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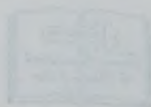
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County Cases Reported in
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CALIFORNIA REPORTER

284 PACIFIC REPORTER

HERON, Director State Department of
Finance, v. RILEY, State Controller.
(S. F. 13658.)★

Supreme Court of California. Jan. 9, 1930.

Rehearing Granted Feb. 6, 1930.

1. States ⇨127—Expenditure for liability insurance premiums on state automobiles held payable from "emergency" fund (Civ. Code, § 1714½, as added by St. 1929, p. 565; St. 1929, pp. 81-96).

Expenditure for liability insurance premiums covering state automobiles under Civ. Code, § 1714½, as added by St. 1929, p. 565, held payable from emergency fund provided in budget bill of 1929 (St. 1929, pp. 81-96), since situation presented "emergency" within intent and definition of Legislature.

[Ed. Note.—For other definitions, see Words and Phrases, First, Second, and Third Series, Emergency.]

2. Statutes ⇨119(1)—Statute respecting state's liability for loss occasioned by negligent driving of automobiles by its officers, agents, or employees held not invalid for insufficient title (Civ. Code, § 1714½, as added by St. 1929, p. 565).

Civ. Code, § 1714½, as added by St. 1929, p. 565, making state and certain designated political subdivisions owning motor vehicles responsible to persons sustaining damage to person or property as result of negligent operation of such motor vehicles, or of any other motor vehicle operated negligently by officer, agent, or employee acting within scope of authority, held not invalid on ground that title was insufficient.

3. States ⇨191(1)—State may be sued only by its express consent.

State cannot be subjected to suits against itself except by its express consent, but it may surrender its sovereignty in that particular.

4. States ⇨119—Statute respecting state's liability for agents' negligence in automobile accidents held not invalid on ground payment of judgments against state constitutes gift of public money (Civ. Code, § 1714½, as added by St. 1929, p. 565).

Civ. Code, § 1714½, as added by St. 1929, p. 565, respecting state's liability for loss occasioned by negligent driving of automobiles by its officers, agents, or employees, held not invalid upon ground that application of funds to pay judgments obtained against state constitutes gift of public money, within prohibition of Constitution.

5. Constitutional law ⇨205(2), 208(16)—Statute respecting state's liability for agents' negligence in automobile accidents held not invalid as class legislation or as granting special privileges (Civ. Code, § 1714½, as added by St. 1929, p. 565; Const. art. 1, § 21).

Civ. Code, § 1714½, as added by St. 1929, p. 565, respecting state's liability for loss occasioned by negligent operation of automobiles by officers, agents, or employees, held not invalid as being class legislation or as violating Const.

art. 1, § 21, providing no citizen or class of citizens shall be granted special privileges.

6. States ⇨112—Right of action to one injured through operation of instrumentality used by state is statutory.

Right of action to one injured through operation of instrumentality used by state did not exist at common law, and is not inherent right, and therefore exists only so far, and in favor of such persons, as may be declared by legislative power of state.

7. Constitutional law ⇨208(1)—Law to be general in scope need not include all classes of individuals in state.

Law to be general in its scope need not include all classes of individuals in state, but it answers constitutional requirements if it relates to and acts uniformly upon the whole of any single class of individuals or objects, and classification is founded upon some natural, intrinsic, or constitutional distinction.

8. Evidence ⇨14—It is common knowledge that operation of automobiles imposes hazard on practically entire population.

It is common knowledge that operation of automobiles upon streets and highways of state imposes hazard upon practically entire population.

9. Statutes ⇨85(4)—Statute respecting state's liability for agents' negligence in automobile accidents held not invalid on ground provision for subrogation to rights of injured person violated provision against special laws regulating practice of courts (Civ. Code, § 1714½, as added by St. 1929, p. 565; Const. art. 4, § 25, subd. 3).

Civ. Code, § 1714½, as added by St. 1929, p. 565, respecting state's liability for loss occasioned by negligence of officers, agents, or employees in operating automobiles, held not invalid as against contention that provision for subrogation to rights of person injured under which state may in turn recover from officer, agent, or employee causing damage, violates inhibition of Const. art. 4, § 25, subd. 3, against special laws regulating practice of courts, since such provision does not relate to practice in courts.

In Bank.

Application by Alexander R. Heron, Director of State Department of Finance, for a writ of mandate, prayed to be directed to Ray L. Riley, State Controller of the State of California, to compel respondent to draw a warrant for the payment of liability insurance premiums. Writ granted.

Webb Shadle, of Sacramento, for petitioner.
Thomas H. Christiansen, of Sacramento, for respondent.

WASTE, C. J. The Legislature, at its last session, added a new section to the Civil Code (section 1714½, St. 1929, p. 565) making the state and certain designated political subdivisions owning any motor vehicles responsi-

ble to persons sustaining damage by reason of death or injury to person or property as the result of the negligent operation of such motor vehicles by any officer, agent, or employee, or as the result of the negligent operation of any other motor vehicle by any officer, agent, or employee when acting within the scope of his office, agency, or employment. Such damaged person may now sue the state or political subdivision in any court of competent jurisdiction in this state in the manner directed by law. In case of a recovery under the provisions of the section, the state or appropriate subdivision is subrogated to the rights of the person injured, and may, in turn, recover from the officer, agent, or employee causing the damage the amount of any judgment recovered against the state or subdivision in the damage suit. The state and the designated political subdivisions are authorized by the provisions of the act to insure their liability in any insurance company permitted to transact the business of such insurance in the state of California, and the premiums for such insurance shall be a proper charge against the respective general funds of the state or subdivision.

After the effective date of the new law, the petitioner, under the authority vested in him as director of the state department of finance, contracted with a qualified insurance company for policies of insurance indemnifying the state, in the event of responsibility arising under the provisions of the section. The policies, duly authorized, were executed, issued, and delivered. The petitioner prepared and presented to the respondent, state controller, a claim against the emergency fund provided in the budget bill of 1929 (St. 1929, pp. 81-96) for the sum of \$23,747.49, that being the amount of the total premiums on the policies so secured. The respondent has refused to allow the claim, and declines to draw his warrant for the amount. Petitioner is here seeking a writ of mandate to compel him to do so. Respondent has demurred to the petition.

[1] The controller does not question the power of the petitioner to direct the payment of the claim for the amount of the premiums, if section 1714½ is constitutional, provided a valid appropriation was made for the purpose, but interposes several objections to its being recognized as a legal demand.

The first of these is that there is no valid express appropriation for the payment of the premiums in the act itself or in the general appropriation bill, his further contention being that the "emergency fund" carried in the general budget cannot be drawn upon for any such purpose.

The act making appropriations for the support of the government of the state of California for the biennial period 1929-31, after setting aside specific amounts for each of the departments of state and its many institutions and for other public purposes (St. 1929, supra), provides as follows:

"Emergencies.

"For emergency fund, one million dollars (\$1,000,000) (exempt from section 4 of this act) to be expended only on written authorization of the state department of finance for emergencies. Emergencies within the meaning of this provision are hereby defined as contingencies for which no appropriation or insufficient appropriation has been made by law."

It has been the practice in this state for many years for the Legislature to include a similar provision in the general appropriations act, thus providing for the payment of emergency claims against the state and its activities, rather than subject the departments of the state and its officers to embarrassment in the administration of the state's business, and put claimants to the annoyance and uncertainty of having to depend upon subsequent Legislatures for reimbursement for services and supplies furnished. The purpose and policy of such an appropriation in the general budget bill has gone unquestioned during the time many Legislatures have met. The plan seems meritorious, and, so far as we are given to understand, it has not been challenged heretofore in its general application. We see no good reason, therefore, for now saying that it is not a proper plan to pursue, provided, of course, the demands against the emergency fund are just and reasonable. The definition in the act of what circumstances shall be sufficient to give rise to an "emergency," subjecting the emergency fund to a valid demand, seems to us to be logical and reasonable. We see no reason why it may not be held that the present situation presents an "emergency" within the intent and definition of the Legislature. The distinction between the situation here presented and the facts in *Ingram v. Colgan*, 106 Cal. 113, 38 P. 315, 39 P. 437, 28 L. R. A. 187, 46 Am. St. Rep. 221, so strongly relied on by respondent, is that in that case the statute (1891, p. 280) not only, like the one in the present instance, made no provision for the payment of the claims there involved (coyote scalps), but, in addition, there was no provision made in the general appropriations bill for the payment of any emergency claims against the state. In the instant case the Legislature has set aside a definite sum, to wit, \$1,000,000, for the payment, among other things, of "contingencies for which no appropriation has been made." We think the use of the word "contingencies" is sufficiently general to include a situation like the one here presented. As to the wisdom of such a course—a question suggested by the respondent—of reposing such a power in the hands of an executive officer of the state, that is a matter resting solely with the Legislature.

[2] The other objections advanced by the respondent may be classed as resting on constitutional grounds. It is urged that the ti-

tle of the act is insufficient. It is as follows: "An act to add a new section to the Civil Code to be numbered 1714½, relating to negligence upon the part of officers, agents and employees of the state, counties, cities and counties, municipal corporations, school districts, irrigation districts, districts established by law and political subdivisions of the state and authorizing the issuance of insurance covering such liability." The provisions of the act are relevant to the liability of the state and its political subdivisions for damages for injuries caused by the negligent operation of automobiles used in public service. In this sense they are expressive of but one general subject, and all parts of the general object to be attained by the statute are sufficiently catalogued in the title. In re Application of Schuler, 167 Cal. 282, 293, 139 P. 685, Ann. Cas. 1915C, 706. See, also, Estate of Wellings, 192 Cal. 506, 519, 221 P. 628.

[3, 4] We are not strongly impressed with the contention of the respondent that the application of funds to pay judgments obtained against the state constitutes a gift of public money, within the prohibition of the Constitution. The state cannot be subjected to suits against itself except by its express consent; but it may surrender its sovereignty in that particular. It has done so in this instance through the act of its duly authorized representative, the Legislature. The judgments which are to be paid bear no semblance to gifts. They must be first obtained in courts of competent jurisdiction, to which the parties have submitted their claims in the manner directed by law. In other words, they are judgments obtained after the requirements of due process of law have been complied with. The Legislature has not attempted to create a liability against the state for any past acts of negligence on the part of its officers, agents or employees—something it could not do, and the doing of which would, in effect, be the making of a gift—but has provided that "hereafter" it shall be liable for certain things done which cause damage to its citizens, its liability to be first determined by an appropriate action at law.

[5-8] It is objected that the section is class legislation, in that it inures to the benefit of a favored class of citizens, that is, only those who are damaged through the negligent operation of automobiles owned by or used in the service of the state, and thereby makes a distinction in their favor as against citizens who may suffer damages through being injured by other state owned and operated instrumentalities, and who are without recourse against the state because it has made no such remedial provision for them. This objection goes only to the policy of such legislation, and the wisdom of the Legislature in enacting it. A right of action to one injured through the operation of an instrumentality used by the state did not exist at common law. It is not an inherent right, and exists

only so far, and in favor of such persons, as may be declared by the legislative power of the state. The provisions of the Constitution were not intended to make it necessary that the Legislature, when conferring new rights of action upon particular classes of citizens for injuries not previously actionable, should, by the same act, declare that all persons who may suffer damages from injuries of that character shall also have such right of action. *Pritchard v. Whitney Estate Co.*, 164 Cal. 564, 568, 129 P. 989. Consequently, a law, to be general in its scope, need not include all classes of individuals in the state. It answers the constitutional requirements if it relates to and acts uniformly upon the whole of any single class of individuals or objects, and the classification is founded upon some natural, intrinsic, or constitutional distinction. *Abeel v. Clark*, 84 Cal. 226, 230, 24 P. 383; *People v. Jordan*, 172 Cal. 391, 397, 156 P. 451. If good ground for the classification exists, such classification is not void because it does not embrace within it every other class which might be included. It is common knowledge that the operation of automobiles upon the streets and highways of the state imposes a hazard upon practically the entire population. It is alleged by the petitioner, and not denied, that the state owns and operates, in connection with its business approximately 2,500 motor vehicles, and operates, under a mileage arrangement with certain of its officers, agents, and employees, approximately 1,000 additional motor vehicles. The operation of such a large number of motor vehicles means that inevitably many claims will arise for injuries caused to persons and property. One of the allegations of the petition is that, since section 1714½, supra, became effective, "many claims have been presented to the state by persons alleging damage to property caused by the negligent operation of state-owned motor vehicles, and that other claims for damage to persons by reason of deaths and injury and damage to property caused by the negligent operation of state-owned motor vehicles and other motor vehicles operated by officers, agents and employees of the state will be presented to the state from time to time." In a very recent case, the Supreme Court of the United States took judicial notice of the "increasing frequency of litigation" arising from the use of the automobile as an instrument of transportation, and held that such use "is peculiarly the subject of regulation," and that "whether there has been a serious increase in the evils of vexatious litigation in this class of cases, * * * is for legislative determination. * * * Its wisdom is not the concern of courts. * * * It is enough," said the court in conclusion, if the "statute strikes at the evil where it is felt and reaches the class of cases where it most frequently occurs." *Silver v. Silver*, 280 U. S. 117, 50 S. Ct. 57, 59, 74 L. Ed. —.

The complaint that the act violates that part of section 21 of article 1 of the state Constitution which provides that no citizen or class of citizens shall be granted privileges which, upon the same terms, shall not be granted to all citizens, is, we believe, sufficiently answered by what we have said on the question of the classification by the act of those permitted to maintain an action under its provisions, and by other decisions of this court. *County of San Luis Obispo v. Murphy*, 162 Cal. 590, 123 P. 808, Ann. Cas. 1913D, 712; *Pritchard v. Whitney Estate Co.*, supra.

[9] We discern little merit in the contention that because the act provides that, in case of a recovery under its provisions by one who has been injured, the state or political subdivision is subrogated to the rights of the person injured, and may, in turn, recover from the officer, agent, or employee causing the damage, it violates the inhibition of subdivision 3 of section 25 of article 4 of the state Constitution against special laws regulating the practice of courts of justice. The provision complained of but serves to give to the employer or principal of the person causing the injury the benefit of the well-settled rules of equity, now recognized in law, upon the subject of subrogation, which are part of the substantive law, and does not relate to practice in the courts.

Let a peremptory writ of mandate issue directing the respondent state controller to audit and allow the claim of petitioner herein, as prayed for.

We concur: CURTIS, J.; PRESTON, J.; SHENK, J.; RICHARDS, J.; SEAWELL, J.; LANGDON, J.

208 Cal. 633

INGRAM et al. v. DEPARTMENT OF INDUSTRIAL RELATIONS, DIVISION OF INDUSTRIAL ACCIDENTS AND SAFETY, et al. (S. F. 13447.)

Supreme Court of California. Jan. 6, 1930.

1. Master and servant $\S$ 417(1) — Where commission treated petition to set aside order denying rehearing as petition for rehearing, petitioner could petition for review, though not filing petition for rehearing following final decision.

Where petitioner filed petition for rehearing on award which was denied January 14, 1927, and on February 7, 1927, he filed a petition to set aside order denying rehearing and for rehearing and Industrial Accident Commission granted petition and treated it as petition for rehearing, referring to it as petition for rehearing and making its final decision of July 27, 1928, as its "decision after rehearing," petitioner, because of circumstances making it inequitable to permit commission to prevail in its

claim that its proceedings therein were not on rehearing, did not forfeit right to petition court for review by failure to file petition for rehearing following final decision and award of July 27.

2. Master and servant $\S$ 416—Commission's powers of additional rehearing on ground of newly discovered evidence should be exercised with caution (Workmen's Compensation Act, $\S$ 20(d).

Power of Industrial Accident Commission of additional and further hearing under Workmen's Compensation Act, $\S$ 20(d), St. 1917, p. 850, invoked on ground of newly discovered evidence, should be exercised with great caution, and when fraud, inadvertence, mistake, or excusable neglect are clearly shown.

3. Master and servant $\S$ 417(7)—When odd jobs may be found by commission to constitute one employment, not casual, court should approve commission's action based on sufficient evidence (Workmen's Compensation Act, $\S$ 8(c).

When work performed by employee doing odd jobs is of such nature as that it may be found by commission that all of odd jobs constituted one employment of duration and value to remove it from definition of "casual," as defined by Workmen's Compensation Act, $\S$ 8(c), St. 1917, p. 835, liberal construction of statute enjoined upon court should impel approval of commission's action in holding employment was not casual when based on sufficient evidence.

4. Master and servant $\S$ 361—Injury, employee sustained while painting roof of lawyer's house, acquired to be rented or sold, was not in course of employer's profession, etc.; "course of trade, business, profession, or occupation of employer" (Workmen's Compensation Act, $\S$ 8(c).

Where employee sustained injury while painting roof of house owned by lawyer, who had no other regular business, and his wife, who had no business or occupation other than housewife, and house was acquired for purpose of repairing and improving it for rental or sale, and parties owned no other similar property, work performed at time of injury was not in "course of trade, business, profession, or occupation of his employer," within meaning of Workmen's Compensation Act, $\S$ 8(c), St. 1917, p. 835.

[Ed. Note.—For other definitions, see Words and Phrases, First and Third Series, Course of Business.]

5. Master and servant $\S$ 361—Where employment was not casual, that employment was not in course of employer's business, etc., did not exclude compensation.

Where Industrial Accident Commission found on sufficient evidence that employment of injured person was not casual, fact that employment did not tend toward preservation, maintenance, or operation of business, business premises, or business property of employer, and was not performed in course of trade, business, profession, or occupation of employer, did not exclude employee from benefits of Workmen's Compensation Act.

6. Master and servant ⇨398—Wife filing affidavit attached to husband's petition for rehearing 8 months after injury held not estopped to claim claim against her 17 months after injury was barred (Workmen's Compensation Act, § 11; Code Civ. Proc. § 1962, subd. 3).

Where injured employee filed claim against husband alone within 6 months from injury, but wife was made party nearly 17 months after injury, wife *held* not estopped to claim that claim was barred by limitation of time under Workmen's Compensation Act, § 11 (St. 1917, p. 841), where nearly 8 months after injury she filed affidavit attached to husband's petition for rehearing stating she was owner of property on which employee performed labor at time of injury, and that, if judgment should be declared in cause, she would be party responsible only, and that she had meritorious defense, since there was no estoppel of record and elements of equitable estoppel, as set forth in Code Civ. Proc. § 1962, subd. 3, were not present.

7. Limitation of actions ⇨124—Suit cannot be considered as having been commenced against parties brought in by amendment until they are made parties.

Suit cannot be considered as having been commenced against parties brought in by amendment until they are made parties, and statute of limitations continues to run in their favor until thus made parties.

8. Master and servant ⇨398—Where employee's claim against husband was timely filed, claim asserted against wife 17 months after injury was not "further claim" within statute "of any person or persons" (Workmen's Compensation Act, § 11).

Where employee injured while working on house held in wife's name, filed claim against husband as employer within 6 months, claim asserted against wife as the other employer 17 months after injury was not a "further claim," as contemplated by Workmen's Compensation Act, § 11 (St. 1917, p. 841), since words "further claims" do not relate to an additional employer but to additional claims against the same employer, and the language "of any person or persons" after the phrase "further claims" includes other claimants for compensation against the same employer arising from the same transaction.

9. Master and servant ⇨398—Where injured employee filed claim against husband within 6 months, claim against wife, brought in by amendment 17 months after injury held barred (Workmen's Compensation Act, § 11).

Where employee filed claim against husband for injuries within 6 months after injury, claim against wife made party by amendment nearly 17 months after injury *held* barred by Workmen's Compensation Act, § 11 (St. 1917, p. 841).

In Bank.

Petition by J. E. Ingram and another against the Department of Industrial Relations, Division of Industrial Accidents and Safety, and another, to annul an award of

the Industrial Accident Commission. Award as to petitioner named affirmed, and award as to the other petitioner annulled.

Superseding opinion in 275 P. 844.

F. Britton McConnell, of Los Angeles (J. W. Carrigan, of Los Angeles, of counsel), for petitioners.

G. C. Faulkner, of San Francisco, for respondents.

SHENK, J. Petition to annul an award of the Industrial Accident Commission.

A procedural question will first be considered. The original award was made on November 24, 1926, against petitioner J. E. Ingram alone. On December 16, 1926, he filed a petition for rehearing which was denied on January 14, 1927. On February 7, 1927, he filed a "Petition to Set Aside Order Denying Rehearing and for Rehearing and for Order under Section 16, Workmen's Compensation Act." The commission on March 1, 1927, granted this petition, referring in its order to said petition as one for a "rehearing." Further hearings were had on August 15 and 24, 1927, wherein the transcript of the proceedings thereon recites that this cause came on regularly for hearing "on rehearing." Following these hearings the commission rendered its decision in writing wherein it denominated the same as its "Decision after Rehearing," and wherein it recited that, "a rehearing of this cause having been duly granted, and said rehearing having been regularly heard * * * and submitted for decision, it is hereby ordered as and for the decision after rehearing that the findings and award heretofore made and filed herein be, and hereby are, rescinded and annulled and new findings and award made and substituted therefor as follows:" (Then follow the findings and award attacked in the present proceeding.) The final decision and award were filed July 27, 1928. The petitioner Minnie H. Ingram, on August 17, 1928, filed a petition for a rehearing of the decision and award of July 27, which petition was denied by the commission on August 20, 1928. The petitioner J. E. Ingram filed no petition for a rehearing of the decision and award of July 27th. Wherefore the respondents contend the petitioner J. E. Ingram has no standing before this court on this application for review. The argument is made that the commission, in acting upon and denying the petition of J. E. Ingram for a rehearing on January 14, 1927, proceeded under section 64(a) of the Workmen's Compensation Act (St. 1917, p. 873); that the remedy of said petitioner as against the award of November 24, 1926, after the denial of his petition for a rehearing, was an application for a review in the courts as provided in section 67(a) of said act, which remedy was not pursued by him; that there is no place in the law for a second petition for a

rehearing of the original decision and award, citing *Crowe Glass Co. v. Ind. Acc. Comm.*, 84 Cal. App. 287, 258 P. 130; that, in granting second petition of J. E. Ingram for a so-called "rehearing" on March 1, 1927, the commission was acting pursuant to its continuing jurisdiction under section 20d of the act, citing *Bartlett-Hayward Co. v. Ind. Acc. Comm.*, 203 Cal. 522, 265 P. 195, and *Brunski v. Ind. Acc. Comm.*, 203 Cal. 761, 265 P. 918; that the remedy of the petitioner J. E. Ingram, as against the decision and award of July 27, 1928, was to file a petition for a rehearing, which remedy was not pursued; and that the failure of said petitioner to file such petition for a rehearing has foreclosed his right to petition the court for review.

[1] The action of the commission, both in its original and its final decision and award, was taken before the decision of the District Court of Appeal in the *Crowe Glass Co. Case* and before the decision of this court in the *Bartlett-Hayward* and the *Brunski Cases*. When such action was taken by the commission, the right of a party to a proceeding before it to apply for a second rehearing under section 65(a) of the act and the powers of the commission under section 20(d) of the act were not clearly understood or defined. The petition of J. E. Ingram, filed February 7, 1927, had a twofold aspect. It was a petition for a rehearing following the original decision and award, and, being a second petition for a rehearing, it was in this respect unauthorized under the construction of the statute as laid down in the *Crowe Glass Co. Case*. However, it was treated by both parties as a petition for a rehearing. The commission especially treated it as such from the beginning, referring to the same as a petition for a rehearing, and making its final decision of July 27, 1928, as its "Decision after Rehearing." If it were properly such, no further petition for a rehearing was necessary or available as a prerequisite to an appeal to the courts for a review under the doctrine of the *Crowe Glass Co. Case*. In view of the uncertainty in the law at the time of the final award of July 27, and further in view of the action of the commission and its attitude throughout its proceedings on the petition for rehearing filed February 7, it would be highly inequitable to permit the commission now to prevail in its claim that its proceedings therein were not on rehearing or that the final award was not a "Decision after Rehearing." Because of the particular circumstances here presented, we conclude that the petitioner J. E. Ingram did not forfeit his right to petition the court for a review by his failure to file a petition for a rehearing following the final decision and award of July 27.

In its second aspect, the petition of J. E. Ingram of February 7 was for an additional and further hearing on the grounds stated in the petition, thus invoking the exercise of the powers of the commission under section 20d

of the act. When treated as such, the proceedings thereunder were in the nature of new proceedings under the statute, and the decision and award made thereon was a final determination of such additional and further proceedings so as to necessitate a petition for rehearing as a prerequisite to the right to petition the courts for a review.

Petitioner Minnie H. Ingram, against whom an award was first rendered on July 27, 1927, filed her petition for a rehearing, and there is no question of her standing as a petitioner in the present proceeding.

[2] It appears to be assumed by both parties that the final award of the commission on July 27 was made pursuant to proceedings had in the exercise of the powers of the commission under section 20(d) of the act. No point is made by either party that the power so invoked was not properly exercised. It should be said, however, that the petition filed February 7, when viewed in its second aspect, invokes the power of the commission under section 20(d) on the ground of newly discovered evidence only, which ground is specifically made one of the bases of a petition for a rehearing under section 65(a) of the act. We are not to be understood as indicating that the power of the commission under section 20(d) may not be invoked on this ground, but we desire to state that such power, invoked on the ground of newly discovered evidence, should be exercised with great caution, and when fraud, inadvertence, mistake, or excusable neglect are clearly shown. Otherwise the process of introducing evidence before the commission would be interminable, and the commission might be held to abuse its discretion in the exercise of its power under section 20(d).

We now pass to the second point urged by petitioners, viz.: That the employment of J. A. Stoolfire, in whose favor the award was made, was both casual and not in the course of the trade, business, profession, or occupation of the employer. If this be true, it is contended that Stoolfire was excluded from compensation under section 8 of the act.

The employee, Stoolfire, as an independent contractor, engaged with the petitioners to perform certain finish carpenter work on the inside of the house belonging to Minnie H. Ingram for the sum of \$40. This work could not be done until the house had been lathed and plastered. Another contractor had agreed to do the lathing and plastering for the contract price of \$110. It was necessary that Stoolfire await the completion of the lathing and plastering before he could commence his inside carpentering work. In the meantime he was engaged by the petitioners herein to do odd jobs outside of the house and about the place at 75 cents per hour. These odd jobs consisted in building a fence, a couple of garages, steps in front of the house, cleaning up the place, and in general doing whatever he was directed to do by the petitioners

from time to time during the period of waiting for the inside work. While Stoolfire was painting the roof of the house at the instance of the petitioners, he fell and received the injury for which compensation was sought. In performing these so-called odd jobs, Stoolfire worked more than 10 days, and the cost of labor exceeded \$100.

[3] It is contended by the petitioner that the evidence shows without conflict that the employment in which Stoolfire was engaged when injured was separate and distinct from every other employment; in other words, that there was no continuous employment as to the odd jobs, but that each was a separate employment from time to time, and that therefore the job of painting the roof and sides of the house was casual, involving in itself about \$16 worth of labor. The petitioners testified in support of this contention, and the evidence so presented was sufficient to support a finding that the job of painting the roof and sides of the house was a separate and distinct employment. On the other hand, the testimony of Stoolfire was sufficient to support the finding of the commission that he was employed in the capacity of "painter-carpenter-laborer," and that the odd jobs which he was called upon to perform in the period of waiting were collectively the work "contemplated" to be completed under a single employment, and that each job, including the painting of the roof, was not a separate and distinct employment. It would require a too narrow construction of the Workmen's Compensation Act to hold that a so-called "jack-of-all-trades," employed continuously to do numerous classes of work each of a casual nature when considered by itself, should in all cases be excluded from compensation. When the work performed by such an employee is of such a nature as that it may be found, as here, that all of the odd jobs constituted one employment of the duration and value to remove it from the definition of "casual" as defined by section 8(c) of the act, the liberal construction of the statute enjoined upon the court should impel an approval of the action of the commission when based upon sufficient evidence. We so construe the record and action of the commission in this regard.

[4] It is also urged by the petitioners that the work performed by Stoolfire was not in the "course of the trade, business, profession or occupation of his employer," as that phrase is defined in the act. The petitioner J. E. Ingram is a lawyer, and has no other regular business or profession. The petitioner Minnie H. Ingram is his wife, and has no business or occupation other than housewife. The property on which Stoolfire performed his work was not the home of the Ingrams. It was acquired by one or both; the title being taken in the name of the wife. It was their purpose to repair and improve the place for rental or sale or for the occupancy of a relative, and

they owned no other similar property. It is upon this state of facts that the present claim is made. The statute provides that "the phrase 'course of the trade, business, profession or occupation of his employer' shall be taken to include all services tending toward the preservation, maintenance or operation of the business, business premises or business property of the employer," and that "the words 'trade, business, profession or occupation of his employer' shall be taken to include any undertaking actually engaged in by him with some degree of regularity. * * *" It was established by the petitioners beyond controversy that the undertaking of repairing and improving the premises in question was not in line with or incidental to the business, profession, or occupation of either, and that it was not engaged in by them or either of them with any degree of regularity. The case of *Archbishop v. Ind. Acc. Comm.*, 194 Cal. 660, 230 P. 16, relied on by the respondent, does not, when carefully considered, support the respondents' cause. That case went off on the question of the burden of proof. The petitioners in the present case have sustained the burden on this point. In the case of *Hedges v. Bedford and the Ind. Acc. Comm.* (S. F. No. 13115), also relied on by the respondents, this court denied an application for a writ of review on August 16, 1929, on the ground that it appeared that, as the petitioner, as a real estate broker, was engaged in repairing and remodeling houses for the purpose of either rental or sales, such undertakings were so closely related and incidental to his regular business as to bring him within the terms of the act. On the other hand, the case of *Rissman v. Industrial Acc. Comm.*, 190 Cal. 619, 213 P. 991, 992, is not authority for the petitioner on this point, for the reason that it was conceded by the petitioners in that case that the renovating of two houses for the purposes of sale was not in the employer's business. The point was therefore not adjudicated. The *Archbishop Case* refers in the discussion to two other cases in the following language: "According to two other decisions (*Lauzier v. Industrial Accident Commission*, 43 Cal. App. 725, 185 P. 870, and *Ford v. Industrial Accident Commission*, 53 Cal. App. 542, 200 P. 667) the making of repairs necessary and incidental to the upkeep of four small frame houses, in the one case, and a flat in the other, which the owners let for hire, is not a business within the contemplation of the Compensation Act." *Pacific Employers' Insurance Co. v. Department of Industrial Relations*, 91 Cal. App. 577, 267 P. 880, is a ruling to the same effect.

[5] But it was settled in the *Rissman Case* that the employment must not only be casual, but also not in the business, etc., of the employer, in order that the employee be excluded from the benefits of the act. It was therein

said, at page 622 of 190 Cal., 213 P. 992: "The defense of casual employment is not available unless the employment was not only casual as defined by the act, but also not in the trade, business, profession, or occupation of the employer. If either of these conditions be present, the employee comes within the provisions of the act." Therefore, when the commission, as here, found on sufficient evidence that the employment of Stoolfire was not casual, the fact that his employment did not tend toward the preservation, maintenance, or operation of the business, business premises, or business property of his employer did not necessarily exclude him from the benefits of the act.

[6] Finally it is contended by the petitioners that the claim is barred as against Minnie H. Ingram. This contention is based on the following undisputed facts: Stoolfire was injured on April 27, 1926. His claim was filed against J. E. Ingram alone within 6 months to wit, on June 9, 1926. After a hearing thereon, findings and award were made which were set aside and additional hearings had. During these additional hearings, it was made to appear that Minnie H. Ingram was a necessary party to the proceeding. The showing as to such necessity was that it appeared that the title to the property on which Stoolfire worked was in Minnie H. Ingram; that during the course of the work Stoolfire dealt with both husband and wife, received instructions from each, and was paid in part by each. Accordingly, an order was entered making Mrs. Ingram a party defendant. This order was made on September 20, 1927, or nearly 17 months after the injury. On October 14, 1927, Minnie H. Ingram filed an answer in which she pleaded, among other things, that the application for compensation as to her was barred by limitation of time under section 11 of the act. The commission found that Minnie H. Ingram was estopped from setting up the bar of the statute. No reason for the estoppel is stated in the findings but in the record it appears that on December 14, 1926, or nearly 8 months after the injury, an affidavit was subscribed and sworn to by Minnie H. Ingram, which affidavit was attached to the petition for rehearing filed by J. E. Ingram on December 16, 1926. In this affidavit Minnie H. Ingram deposed that she was the owner of the real property on which the applicant for compensation performed his labor and claimed to have been injured; that she observed the work done by the applicant, kept a record of the work, and paid him for the same; that she was unavoidably absent from the city, and could not be present at the hearing theretofore had before the commission; that she requested her attorney, J. E. Ingram, to ask the referee to continue said hearing until she could be present, and that she was informed that the referee refused the request;

that "she has a meritorious defense to the above entitled cause and respectfully requests that she be permitted to give her testimony on account of not being present at the hearing; also, that she is actually the defendant in said cause and not the said J. E. Ingram; that he was acting for her on said premises in her absence only, and that if judgment should be declared in this cause she would be the party responsible only;" that she verily believed that, if she had been present and had testified at said hearing, "no judgment would have been entered against her or the said J. E. Ingram." With the foregoing affidavit before it, the commission denied the petition for a rehearing on January 14, 1927. Notwithstanding said order of denial in the face of said affidavit, the commission found that Minnie H. Ingram was estopped from claiming the limitation of time as against the order making her a party defendant in said proceeding on September 20, 1927.

[7] It must be remembered that said affidavit was filed nearly 8 months after the injury, when the 6-months' period of limitation had long since expired, and that, when the order was entered making Minnie H. Ingram a party, she promptly filed her answer setting up the bar of the statute. We find none of the elements of estoppel present in her acts or conduct. The commission and Stoolfire were informed by the testimony of J. E. Ingram on August 12, 1926, within 4 months after the injury, that Minnie H. Ingram owned said property, but no action was taken within the 6-months' period to make her a party. There was no estoppel of record against the claim of the bar of the statute, and the elements of equitable estoppel as set forth in section 1962, subd. 3, of the Code of Civil Procedure, are not present. "The vital principal is that he who by his language or conduct leads another to do what he would not otherwise have done shall not subject such person to loss or injury by disappointing the expectations upon which he acted. Such a change of position is sternly forbidden. It involves fraud and falsehood, and the law abhors both." *Seymour v. Oelrichs*, 156 Cal. 782, 106 P. 88, 94, 134 Am. St. Rep. 154, citing *Carpy v. Dowdell*, 115 Cal. 687, 47 P. 695, quoting from *Dickerson v. Coligrove*, 100 U. S. 580, 25 L. Ed. 618; 10 Cal. Jur. p. 626. The petitioner Minnie H. Ingram was guilty of no act of commission or omission prior to the running of the statute in her favor by which the status or rights of the employee or the authority of the commission were in any wise prejudiced, and at no time has she waived her rights under the statute. When she was ordered into the proceeding as a party, she interposed the bar of the statute, and has at all times relied upon the same. "The general rule is well settled that, when new parties are brought in by amendment, the statute of limitations continues to

run in their favor until thus made parties. The suit cannot be considered as having been commenced against them until they are made parties." 37 Cor. Jur. 1066, and cases therein cited.

[8] Assuming that it might be held that there was no estoppel on the part of Minnie H. Ingram to interpose the bar of the statute, it is further argued by the commission that the claim against her is not barred because of the provision in section 11 of the act, which section specifies the 6-months' period. The proviso is as follows: "Provided, that the filing of an application with the commission for any portion of the benefits prescribed by this act shall render this section inoperative as to all further claims of any person or persons for compensation arising from the same transaction, and the right to present such further claims shall be governed by the provisions of section twenty (d) and section sixty-five (b) of this act." It is argued that, as the claim against J. E. Ingram was timely filed, it must follow that the claim asserted against Minnie E. Ingram about 17 months after the injury was a "further claim" as contemplated by the proviso. The contention is without merit. The words "further claims," as used in the statute, plainly refer to additional claims against the named employer, which additional claims are not mentioned in the original application or to claims for "further disability" as the latter phrase is subsequently used in the section. And the language "of any person or persons" after the phrase "further claims" includes other claimants for compensation against the same employer arising from the same transaction. *Fogarty v. Department of Industrial Relations* (Cal. Sup.) 269 P. 641; *Great W. P. Co. v. Ind. Acc. Comm.*, 196 Cal. 593, 238 P. 662. It is assumed that, on the facts as they developed during the additional hearings before the commission in this matter, the petitioners herein were subject to a joint and several liability on account of the injury. Satisfaction from one would therefore be satisfaction as to both. Consequently this is not a case where the bringing in of an additional party is essential to a recovery against the person already a party. The claim for compensation is against the employer or employers if there be more than one. In a case of this sort, the statute affords the claimant 6 months to proceed against his employer, and the words "further claims" do not relate to an additional employer, but to additional claims against the same employer.

[9] From what has been said it follows that the award as to Minnie H. Ingram must be annulled, and that the award as to J. E. Ingram must be affirmed. It is so ordered.

We concur: WASTE, C. J.; RICHARDS, J.; SEAWELL, J.; PRESTON, J.; LANGDON, J.; CURTIS, J.

CARTER et al. v. STEVENS, State Fire Marshal, et al. (L. A. 11958.)★

Supreme Court of California. Jan. 10, 1930.

1. Statutes $\S$ 166—Where new act revised, amended, and republished title and every section of original act, and re-enacted practically all substantive provisions thereof, omitted provisions of original act only held repealed (St. 1929, p. 288, amending St. 1927, p. 1924; Pol. Code, $\S$ 325).

Where St. 1929, p. 288, amending St. 1927, p. 1924, being an act to reduce fire insurance hazards of clothes cleaning establishments, revised, amended and republished title and every section of original act and re-enacted practically all substantive provisions thereof, provisions of original act omitted from amendment held repealed, and portions of original act which were not altered are considered as law from time they were enacted, and new provisions are considered as having been enacted at time of amendment, in view of Pol. Code, $\S$ 325.

2. Appeal and error $\S$ 1107—Though act involved was amended and substantially re-enacted between time of judgment and appeal, questions involved held not moot, where parts of original were continued in force (St. 1927, p. 1924, as amended by St. 1929, p. 288).

Questions on appeal from judgment in action to enjoin fire marshal and assistants from proceeding to reduce fire insurance hazards of business of clothes cleaning establishments under St. 1927, p. 1924, held not moot, warranting dismissal of appeal, where St. 1929, p. 288, enacted between time of judgment and appeal, though practically amending all substantive provisions of former act, continued in force certain provisions thereof, since invalidity may inhere as well after as before amendment.

In Bank.

Appeal from Superior Court, Los Angeles County; Charles B. MacCoy, Judge.

Action by Jose D. Carter and others, on behalf of themselves and all others similarly situated, against Jay W. Stevens, as State Fire Marshal, and others, in which numerous other parties intervened. From the judgment rendered, plaintiffs and interveners appeal. Motion to dismiss appeal denied.

William Schreider and Lyon, Fleming & Robbins, all of Los Angeles, for appellants.

U. S. Webb, of San Francisco, and James S. Howie and John L. Flynn, both of Los Angeles, for respondents.

PRESTON, J. Motion to dismiss appeal. Plaintiffs, on behalf of themselves and all other parties similarly situated, brought this action against the fire marshal and his assistants to enjoin them from taking action of any kind or character under the provisions of an act of the Legislature, approved June 3, 1927 (St. 1927, c. 880), the basis of their attack being that said statute, as a whole and

as to each provision thereof, and all regulations promulgated by defendant fire marshal thereunder, were illegal and the act void because in contravention of various constitutional provisions, and the regulations unreasonable and oppressive. Numerous other parties were thereafter allowed to intervene in said action as plaintiffs. Issues were joined and the cause brought to trial; findings of fact and conclusions of law were made; and on July 13, 1929, judgment was entered.

The effect of the said judgment was to sustain the validity of said act in toto, but to declare invalid, as being unreasonable and oppressive, certain of the many rules and regulations promulgated by the state fire marshal thereunder. All plaintiffs and interveners appealed. On the 22d day of November, 1929, defendants and respondents, appearing by the attorney general, moved the dismissal of said appeals upon the ground that all questions involved therein had become moot. The basis for this contention is that on August 14, 1929, an amendatory act of the Legislature became effective (St. 1929, c. 155), which, it is urged, superseded all the provisions of said act of 1927; hence the issues involved in this action have been thereby obliterated.

We are not in accord with this contention of defendants. The act of 1927 consisted of a title and four sections. The title read as follows: "An act to reduce the fire insurance hazards of the business of clothes cleaning establishments, providing for the enforcement thereof by the state fire marshal, providing ways and means for enforcement and providing penalties for violations." The several sections were intended to put in operation a system of regulation for clothes cleaning establishments for the purpose of reducing fire hazards attendant thereon. Manifestly an error, by insertion of the word "insurance," crept into the title of the act of 1927. The act of 1929 corrects and recasts the title of that act; it also revises and amends each and every section of it and in addition thereto adds two new sections, having doubtless for its object the correction of mistakes made in the first enactment and a change in the system of administration of said act by the creation in the department of industrial relations of a new division, known as "a division of industrial fire safety," with the state fire marshal as chief thereof. It should be noted, however, that the duties of the fire marshal as an individual are not entirely abrogated by the new act.

[1] We thus have a situation where the new act revises, amends, and republishes the title and every section of the former act. We also have a situation where practically all the substantive provisions of the original act have been re-enacted by the amendatory act. Under this situation, by virtue of the

well-understood rule of statutory interpretation, all provisions of the original act omitted from the new enactment are repealed, while, at the same time, the portions thereof not altered are considered as having been the law from the time they were enacted and the new provisions are considered as having been enacted at the time of the amendment. Pol. Code, § 325; *Riley v. Havens*, 193 Cal. 432, 225 P. 275; *Vallejo, etc., Co. v. Reed Orchard Co.*, 177 Cal. 249, 170 P. 426; *San Joaquin, etc., Co. v. Stevinson*, 164 Cal. 221, 128 P. 924; *Estate of Martin*, 153 Cal. 225, 94 P. 1053; 23 Cal. Jur. p. 699, § 87.

[2] It therefore follows as a necessary conclusion that the attack in the present proceeding upon such provisions as were continued in the amended act must be allowed to proceed, for, as to them, invalidity may inhere as well after as before the amendment. It is true that by virtue of the amendment only a portion of the sections of the amended act will be under review and appellants may meet other difficulties, but this is not ground upon which to declare the questions moot nor to deny appellants such solace as they may receive by an attack upon such provisions as have been continued in the new act.

The motion to dismiss is denied.

We concur: WASTE, C. J.; RICHARDS, J.; SEAWELL, J.; SHENK, J.; CURTIS, J.; LANGDON, J.

208 Cal. 657

MOORE v. THORNBURG et al. (S. F. 13595.)

Supreme Court of California. Jan. 13, 1930.

1. Statutes ⇨ 123(6)—Title to act providing for improvement districts within organized irrigation districts held not invalid (St. 1927, p. 1415; Const. art. 4, § 24).

Title to St. 1927, p. 1415, entitled an act to provide for organization and creation of improvement districts within irrigation districts, to provide for construction of improvements therein, and for levy of assessments on lands of such improvement districts, held not to violate Const. art. 4, § 24, providing that every act shall embrace but one subject, which subject shall be expressed in its title.

2. Statutes ⇨ 123(6)—Act providing for improvement districts within irrigation districts held not unconstitutional because of word "improvement" in title (St. 1927, p. 1415; Const. art. 4, § 24).

St. 1927, p. 1415, entitled an act to provide for organization and creation of improvement districts within organized irrigation districts and to provide for construction of improvements therein, held not violative of Const. art. 4, § 24, requiring every act to embrace but one subject expressed in title, because word "improvement"

used in title is so broad as to define nothing, since improvement district may carry on only such improvements as prior organization might undertake.

3. Waters and water courses ☞227—Contention that statute providing for hearing of objections before formation of improvement district gives board no power to pass on objections held without merit (St. 1927, p. 1415, § 5).

Contention that St. 1927, p. 1415, § 5, providing for hearing of objections before formation of improvement district within irrigation district, gives board of directors of irrigation district no power to pass on objections, held without merit, since power would be implied if it were not expressly given.

4. Waters and water courses ☞224—Improvements in improvement districts within organized irrigation districts held not merely for benefit of private parties (St. 1927, p. 1415).

Improvements made in improvement districts within organized irrigation districts pursuant to St. 1927, p. 1415, held not merely for benefit of private parties, since under Constitution and statutes use of water in manner provided is public one.

In Bank.

Application by W. R. Moore, opposed by D. C. Thornburg and others, constituting the board of directors of the Turlock Irrigation District, and others, for certiorari to review the organization of a subordinate improvement district within an irrigation district. Writ discharged, and petition denied.

Nathan B. McVay and Hu Jones, both of Modesto, for petitioner.

Thomas C. Boone and Griffin & Boone, all of Modesto, for respondents.

Hankins & Hankins, of San Francisco, A. L. Cowell, of Stockton, and Charles L. Childers, of El Centro, for Irrigation District Ass'n of California and Woodbridge Irrigation District.

PRESTON, J. Petitioner, a taxpayer, procured an original writ of review in this court directed to respondents, having for its object a declaration by this court that the organization within the Turlock irrigation district of a subordinate body, under the Statute of 1927 (Stats. 1927, chap. 748, p. 1415), known as "Improvement District No. 1," was an illegal and void proceeding. Admittedly respondents complied with the requirements of the statute in the organization of this subordinate district. The attack upon the proceedings is confined solely to the contention that the above-mentioned statute is invalid and void.

The title of said act is as follows: "An act to provide for the organization and creation of improvement districts within irrigation districts organized under the 'California irrigation district act,' to provide for the construction of improvements therein, and for the

levy of assessments on the lands of such improvement districts." Section 1 permits two-thirds in number of the holders of title to any tract or contiguous tracts situate within the irrigation district and susceptible of irrigation through laterals, ditches, and pipes for irrigation, separate and apart from the main irrigation system of said irrigation district, to petition the board of directors of such district for the organization of an improvement district, and to levy an assessment for the payment thereof. Section 2 of the act defines the nature and contents of the petition. Section 3 provides the plans and specifications, estimate and proposed assessment. Section 4 provides for the giving of notice. Section 5 provides for hearing and determination of objections to said petition and the formation of said district and proposed assessments and confers power upon the board to change the boundaries of said district. It further provides that in the event that more than one-third in number of the owners in said proposed district shall object, the application for the formation of such district shall be denied altogether by the board. Section 6 provides for the final order establishing the district and levying said assessment according to benefits and providing for a lien upon the land for payment thereof. Section 7 provides for the issuance of warrants for the amount of the assessment and for payment thereof out of funds derived from the levy and collection thereof. Section 8 provides for the manner of doing the work, the cost thereof to be paid only out of said assessment on the lands in the improvement district. Section 9 provides for additional assessments in case of insufficiency. Section 10 provides that the directors and officers of the district shall have the same powers concerning the improvement district that they possess respecting the irrigation district, including the right of said district to condemn lands and to acquire, own, and hold property within said improvement districts.

[1] The contention that the title to the act violates article 4, § 24, of the Constitution is without merit and requires no discussion.

[2] The further contention that the word "improvement" found in the title to said act is so broad as to define nothing and so come within the rule announced in *Lewis v. Dunne*, 134 Cal. 291, 66 P. 478, 55 L. R. A. 833, 86 Am. St. Rep. 257, is likewise without merit. It is manifest that the improvement district may carry on only such improvements as the prior organization might undertake.

[3] The claim that the section providing for the hearing of objections before formation of the district gives the board no power to pass on the objections is totally without merit as this power would be implied were it not expressly given.

[4] The contention that the improvement made in such district is purely for the benefit

of private parties is also without merit, as under the Constitution and statutes of this state the use of water in the manner provided is a public one.

Petitioner makes several other objections, but they are, if anything, less meritorious than the ones noted above. He cites little, if any, authority to sustain his contentions, and it is hard to believe that any great number of them are urged with confidence. It may be noted in passing that we have considered all the objections made by him and find no merit in any of them. Moreover, all of said questions have been expressly or inferentially decided adversely to him in such cases as *Tarpey v. McClure*, 190 Cal. 593, 213 P. 983; *Palo Verde Irr. Dist. v. Seeley*, 198 Cal. 477, 245 P. 1092; and *Wheatley v. Superior Court* (Cal. Sup.) 279 P. 989.

Manifestly, this act was passed with the design to create elasticity in the government of irrigation districts so that special improvements independent of the general plan of improvement of the district might be made therein, and the burden thereof rest solely upon the shoulders of those benefited thereby.

The writ is discharged, and the petition denied.

We concur: WASTE, C. J.; CURTIS, J.; RICHARDS, J.; SEAWELL, J.

Justices SHENK and LANGDON, deeming themselves disqualified, do not participate in the foregoing.

208 Cal. 647

MCCARTNEY v. CAMPBELL et al.
(L. A. 11047.)

Supreme Court of California. Jan. 10, 1930.

Appeal and error 780(2)—Plaintiff's appeal in action to quiet title would not be dismissed on ground that plaintiff had conveyed interest in land (Code Civ. Proc. § 385).

Plaintiff's appeal in action to quiet title would not be dismissed on ground that plaintiff had conveyed her interest in land, since under Code Civ. Proc. § 385, the litigation could proceed either in name of plaintiff, or substitution could be had and suit continued in name of grantee.

In Bank.

Appeal from Superior Court, Los Angeles County; Harry A. Holzner, Judge.

Action by Alice G. McCartney against A. P. Campbell and others. From an unsatisfactory judgment, plaintiff appeals. On defendants' motion to dismiss appeal. Motion denied.

Harry L. Cohn, of Long Beach, and William J. Clark, of Los Angeles, for appellant.

Tanner, Odell & Taft, of Los Angeles, for respondent Timm.

C. E. McDowell, of Los Angeles, for respondent E. E. McCalla & Co.

W. C. Shelton and George Burch, Jr., both of Los Angeles, for respondent Bachman.

Leet W. Bissell and F. Walton Brown, both of Los Angeles, for respondent Keena.

PRESTON, J. Motion to dismiss appeal. Plaintiff, as the owner of a certain tract of real property in Los Angeles county, having the same under subdivision, sued the various defendants in an ordinary action to quiet title. Issues upon the complaint and answers thereto and upon cross-complaints by certain defendants and answers thereto were made up, as was also the issue made by one complaint in intervention and answer thereto. The defendants constitute a large body of persons, some of them claiming under an agency contract executed by the plaintiff to defendant A. P. Campbell, and others claiming as purchasers from agents of lots in said tract. The action was tried, findings made, and judgment entered. Plaintiff appealed.

Respondent Timm moves herein the dismissal of plaintiff's appeal upon the ground that plaintiff and respondent McCalla have composed their differences by each executing a conveyance of their respective rights in and to said tract to a third party, in which conveyance plaintiff included the lot in said tract to which respondent Timm has laid claim. The argument is that by this conveyance on the part of plaintiff, a new contract has arisen which supersedes all the issues involved on this appeal.

We can discern no merit whatsoever in the motion. There is no privity between respondent McCalla and respondent Timm. Their rights are in no sense interdependent. The adjustment did not include respondent Timm. The cause of action against her remains as before. Consequently, when plaintiff conveyed all her interest in the tract of land or in the lot therein claimed by respondent Timm, the litigation could proceed either in the name of plaintiff herself or substitution may be had, and it may proceed in the name of the grantee. Section 385, Code Civ. Proc. The case of *Armstrong v. Sacramento Valley R. Co.*, 179 Cal. 648, 650, 178 P. 516, is not at variance with these views. In that action a compromise and settlement of the controversy was made by all the parties, which, of course, superseded the judgment theretofore rendered therein.

The motion is denied.

We concur: WASTE, C. J.; CURTIS, J.; SEAWELL, J.; RICHARDS, J.; SHENK, J.; LANGDON, J.

103 Cal. App. 147

CLAUDIUS et al. v. VILA et al. (Civ. 6783.)

District Court of Appeal, First District, Division 1, California. Jan. 11, 1930.

Landlord and tenant ⇨278—Evidence held to sustain finding that lessor's entry on premises and occupation thereof was lawful and peaceable.

In action for forcible entry and forcible detainer, where it appeared that lease provided no assignment should be made without written consent of lessor, and that husband of lessee entered into possession under oral agreement with lessor, that thereafter lessee surrendered possession of part of premises to another, who on moving from premises relinquished possession to lessor, evidence held to sustain finding that lessor's entry on premises and occupation thereof was lawful and peaceable.

Appeal from Superior Court, Alameda County; John J. Allen, Judge.

Action by H. P. Claudius and others against Catherine G. Vila and others. From a judgment for the defendants and an order denying new trial, plaintiffs appeal. Affirmed.

H. A. Postlethwaite, of San Francisco, for appellants.

J. A. Kennedy and Raymond Salisbury, both of Oakland, for respondents.

TYLER, P. J. Action for forcible entry and forcible detainer. The complaint is in two counts, which allege substantially the following facts: On the 9th day of June, 1928, plaintiffs were in the peaceable and actual possession of certain property located at Twenty-seventh avenue and Foothill boulevard, Alameda county. The property was known as the "Lawrence Service Station." It consisted of a residence, a battery shop, and certain personal property, including equipment and the like. It is charged that, while plaintiffs were absent from the premises, defendants entered upon said property by force and by breaking open a window and locked doors and took possession of the same; that thereafter, on the 10th day of July, 1928, plaintiffs caused to be served upon defendants a demand and notice to surrender the property. It is then alleged in the second count that defendants have forcibly withheld and kept possession of the property at all times since the said 9th day of June, 1928.

After trial judgment went in favor of defendants. Motion for a new trial was made and denied. This is an appeal from the judgment and order.

It is the contention of appellants that all the material allegations of the complaint are supported by ample testimony, and there is a complete absence of contradictory evidence as to all the material facts. There is evidence, however, to show that defendant Catherine G. Vila was the sole owner of the prop-

erty in question, and that she leased the same to certain parties. The lease provided that no assignment of the same should be made without the written consent of the lessor. Thereafter several written assignments were regularly made until finally the possession of the property passed into the hands of appellant, Donald W. Hughes, under some sort of oral arrangement with the lessor. Hughes became ill and he entered into negotiations with one McKinley to purchase the business. After investigating the same, McKinley concluded not to make the purchase. Hughes, who at the time was having marital differences with his wife, thereupon abandoned the premises, leaving his wife to obtain what she could for the business. At this time the gasoline station was not a going concern, as there was no gasoline in the tanks and no oil or other merchandise on the property. There was also evidence to show that plaintiff Velma Hughes surrendered possession to one Savatier who operated a battery shop on other parts of the premises, and that Savatier, who was moving from the premises, relinquished his possession to Mrs. Vila. Thereafter Mrs. Vila took possession of the station in the manner indicated in the complaint.

Under this evidence the trial court found that the entry upon said premises and occupation thereof by defendant Catherine Vila was lawful and peaceable, and that plaintiffs or any of them were not in the peaceable or actual possession or any possession of said property. As above pointed out, there is evidence in the record to sustain this finding. This being so, the judgment and order should be, and each is hereby, affirmed.

We concur: KNIGHT, J.; CASHIN, J.

103 Cal. App. 123

STOLTE v. KEHRLEIN et al. (Civ. 6670.)

District Court of Appeal, First District, Division 1, California. Jan. 9, 1930.

1. Corporations ⇨237—Where sale of corporate assets was void, no title passed, and original stockholders were liable for debts incurred during time purchasers managed corporation (Corporate Securities Act).

Where sale of corporate assets in property violated Corporate Securities Act (St. 1917, p. 673), and was therefore a void transaction, no title passed, and original stockholders were at all times sole stockholders, and were liable for debts incurred by corporation while it was being managed by purchasers.

2. Corporations ⇨243(2)—One who purchases stock through fraudulent inducements is not subject to stockholder's liability.

One who has purchased stock through fraudulent inducements is not subject to stockholder's liability, particularly where no ques-

tion is raised by creditors as to question of estoppel.

Appeal from Superior Court, Alameda County; J. D. Murphey, Judge.

Action by W. V. Stolte against Oliver Kehrlein and others, on a stockholder's liability for corporate debts. From the judgment, defendants appeal. Affirmed.

John G. Robertson, of Oakland, for appellants.

Joseph A. Brown and F. A. Anderson, both of San Francisco, for respondent.

TYLER, P. J. Action upon a stockholder's liability for corporate debts. On November 4, 1916, the Franklin Amusement Corporation was incorporated with an authorized capital stock of \$50,000, divided into 5,000 shares of the par value of \$10 each. On November 15, 1916, a permit was obtained from the commissioner of corporations, authorizing the issuance of 2,800 of these shares. About the year 1919 the shares so issued were purchased by appellants and Emil Kehrlein, Jr. On September 28, 1923, the Kehrleins entered into an agreement with J. M. Maurer, George W. Tatterson, and L. B. Gross to sell all the assets and property of the corporation to them and to transfer the 2,800 shares of issued stock. The unissued stock, consisting of the remaining 2,200 shares, formed part of the consideration of the sale, and they were also transferred to the purchasers. Subsequently, on October 14, 1923, the purchasers took possession of the Franklin Theatre, the property of the corporation, and operated the same for a period of some twenty weeks, after which they surrendered the property to the sellers, the Kehrleins, and served them with a notice of rescission, claiming that they had been defrauded. Demand was made for a return of the consideration paid and certain other sums expended and lost by reason of alleged fraudulent misrepresentations. Thereafter the purchasers brought an action and recovered judgment against the sellers, which judgment was subsequently affirmed by this court. *Tatterson v. Kehrlein*, 88 Cal. App. 34, 263 P. 285.

In the present action plaintiff sued both the sellers and the buyers on a stockholder's liability for obligations incurred during the interim the theater was operated and managed by the purchasers. Judgment was rendered in favor of plaintiff and against the Kehrleins only, and in favor of the codefendants, Gross, Maurer, and Tatterson, the purchasers.

[1] Appellants here claim that they are not liable for bills incurred by the Franklin Amusement Corporation while it was being managed by the purchasers, as they were not stockholders during the period the obligations were incurred, and had no authority or pow-

er, and did not incur the obligations, or bind the corporation for the same. In *Tatterson v. Kehrlein*, supra, this court held the contract of sale between the parties to be absolutely void, for the reason that it violated the Corporate Securities Act (St. 1917, p. 673), in that part of the consideration consisting of 2,200 shares of stock in the corporation were never authorized to be issued by the commissioner of corporations.

It being a void transaction, no title ever passed, and appellants were therefore at all times the sole stockholders. No question of estoppel is herein involved, the creditors being satisfied with the judgment against the Kehrleins alone. Moreover, when an issue of stock is wholly without consideration, the principle of estoppel does not apply. *Knowles v. Sandercock*, 107 Cal. 629, 631, 40 P. 1047; *Honn v. Hamer*, 81 Cal. App. 276, 253 P. 336. It has also been held in this state that one who holds under an invalid issue is not subject to a stockholder's liability. *Boyd v. Heron*, 125 Cal. 453, 58 P. 64.

[2] We are of the opinion that the same principle applies to one, who, as here, has purchased stock through fraudulent inducements, and particularly so where no question is raised by the creditors as to the question of estoppel. *Helliwell on Stockholders*, § 459. The contract being a void transaction from its inception, no title ever passed to the purchasers, and appellants were therefore at all times the sole stockholders of the corporation, and as such they were liable for its debts.

The judgment is affirmed.

We concur: KNIGHT, J.; CASHIN, J.

IN RE SCHLUTER'S ESTATE.★

MOORE v. REYNOLDS.

(Civ. 6511.)

District Court of Appeal, Second District, Division 1, California. Jan. 16, 1930.

Rehearing Denied Feb. 14, 1930. Hearing Granted by Supreme Court March 17, 1930.

1. Executors and administrators ⇨231—Claim against decedent's estate, not filed within time required by notice to creditors, is barred (Code Civ. Proc. § 1493).

Claim against estate of decedent, which is not filed within time required by notice to creditors, is barred under Code Civ. Proc. § 1493.

2. Guardian and ward ⇨68—Guardian is entitled to lien for moneys expended on ward's behalf only against property in guardian's possession.

Guardian is entitled to lien for moneys advanced and expended on behalf of ward only against property either actually or constructively in possession of guardian.

3. Guardian and ward $\hookrightarrow$ 33—Guardian with notice before ward's death that one having joint bank account with ward had stopped payments thereon could proceed to gain possession of money to maintain ward (Code Civ. Proc. § 1800).

Where guardian had notice prior to death of ward that one who had joint bank account with ward had stopped payments on such account, it would have been proper for guardian, under Code Civ. Proc. § 1800, to have proceeded against such person with view to gaining possession of money in order to maintain ward if money was being wrongfully withheld.

Appeal from Superior Court, Los Angeles County; Walter J. Desmond, Judge.

In the matter of the estate of Charlotte Schluter, deceased. Motion by Adelaide Moore against Willetta Reynolds, being the same person as Mrs. James J. Reynolds, executrix, for an order to subject the assets of the estate to a certain charge and lien. From an adverse order, executrix appeals. Reversed.

George Acret, of Los Angeles, for appellant.

Davis & Thorne, of Los Angeles, for respondent.

YORK, J. This is an appeal from an order of the superior court of Los Angeles county, subjecting assets of estate to a charge and lien in favor of guardian.

On July 20, 1926, the decedent made her last will and testament, in which she appointed appellant executrix thereof. At the same time she established a joint bank account with right of survivorship between herself and said appellant, and turned over to appellant certain personal property, all of which was located in Los Angeles county, that being decedent's residence.

Subsequently, under proceedings instituted in Monterey county, to which county decedent had removed temporarily, respondent was appointed guardian of the person and estate of said decedent, and was given possession of a few shares of valueless stock and certain articles of wearing apparel of decedent, but none of the Los Angeles county property.

On December 12, 1926, decedent died in Monterey county, being a resident of Los Angeles county. Thereafter appellant was appointed executrix of the last will, and caused publication of notice to creditors to be published; the date of first publication thereof being February 2, 1927. Meanwhile respondent presented to the superior court of Monterey county her final account as guardian, and said court, under date of April 7, 1927, made an order settling said account and allowing said guardian, as a charge and lien against the property and estate of said decedent, the sum of \$775.08 on account of money expended by her before and after her appointment as guardian for maintenance and

care of the incompetent, without specifying how much was expended before such appointment, together with \$200 for her services as guardian and \$175 on account of attorney's fees.

The record does not show that appellant ever had actual notice of the order settling final account made by the court of Monterey county, or ever had notice that respondent had a claim against the estate until during the month of September, 1927, at which time respondent presented her claim, to which was attached a copy of the order made by the court of Monterey county. This claim was rejected by appellant on September 20, 1927, and under date of January 27, 1928, respondent filed in the probate case pending in Los Angeles county a motion for an order to subject the assets of the estate to the charge and lien allowed by the court of Monterey county. Appellant resisted said motion, alleging that the claim had been filed several months after the time had expired within which claims were required to be filed against the estate, and that the court was without jurisdiction to subject the estate to the said lien claimed or to allow said claim at all.

Upon hearing of the motion, the trial court made its order subjecting the assets of the estate to a first lien in favor of respondent for the sum of \$1,260.07. From this order executrix of said estate prosecutes this appeal.

[1, 2] The respondent's claim, not having been filed within the time required by the notice to creditors, is barred. Section 1493, Code Civ. Proc. Furthermore, it is elementary that a guardian is entitled to a lien for moneys advanced and expended on behalf of the ward only against the property either actually or constructively in the possession of the guardian. Estate of Clanton, 171 Cal. 381, 153 P. 459. In the instant case, the guardian made no claim against the property which she had in her possession, but delivered it to the executrix of the last will and testament of the decedent.

[3] The record shows that the respondent had notice prior to the death of her ward that appellant had stopped payment on the joint bank account in Los Angeles county. It would have been proper for respondent, under the provisions of section 1800, Code of Civil Procedure, to have proceeded against the appellant with a view to gaining possession of this money in order to maintain her ward, if appellant was wrongfully withholding the same. But no such proceeding was instituted.

Having done none of the several things she might have done in order to charge the estate of deceased, respondent is not now entitled to a lien against the estate.

The judgment is therefore reversed.

We concur: CONREY, P. J.; HOUSER, J.

103 Cal. App. 163

PEOPLE v. MILLUM. (Cr. 1872.)

District Court of Appeal, Second District, Division 1, California. Jan. 14, 1930.

1. Criminal law $\Rightarrow$ 569—Evidence, in prosecution for possession of morphine, showing defendant on witness' suggestion went to certain place and was arrested when leaving, held not to show entrapment, where defendant denied having morphine on person at time (State Poison Act).

In prosecution for having in possession preparation of morphine in violation of State Poison Act (St. 1907, p. 124, as amended), evidence showing witness suggested to defendant that woman wanted to see him, that he went to her house and made appointment to call on her later, that he called in company with witness, and on leaving witness was called back, and in a few moments defendant arrested, held not to show entrapment, where defendant testified he had no morphine on his person at time and denied officers' testimony that he dropped it when accosted by them.

2. Criminal law $\Rightarrow$ 1023(9)—Appeal cannot be taken from verdict finding defendant guilty.

Appeal cannot be taken from verdict finding defendant guilty of violation of State Poison Act (St. 1907, p. 124, as amended).

Appeal from Superior Court, Los Angeles County; William C. Doran, Judge.

George E. Millum was convicted of having possession of preparation of morphine, in violation of State Poison Act, and he appeals. Affirmed.

John F. Groene, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Friedlander, Morfoot & Gray, of Los Angeles, for the People.

YORK, J. The defendant was found guilty by a jury of having possession of a preparation of morphine in violation of the State Poison Act (St. 1907, p. 124, as amended), such possession being a felony, as charged in an information filed by the district attorney of Los Angeles county. Defendant filed notice of appeal: "(1) From the verdict of the jury finding defendant guilty of violation of the State Narcotic Act, and (2) from the order of the trial court denying the motion and grounds of defendant for a new trial; and (3) from the judgment made and entered herein, and sentencing this defendant to the State's Prison at San Quentin as required by law."

[1] Defendant was convicted upon sufficient evidence, which, however, was denied in many particulars by the defendant himself as well as by several of his witnesses. There was no direct evidence showing entrapment. From some circumstances introduced in evidence, it is argued that such a conclusion

might possibly be inferred, but it would not be a logical conclusion to be drawn therefrom. The argument is evidently based on the theory that one witness induced the defendant to go to the home of a colored woman and purchase the drug. There is no such evidence; the evidence showing only that a witness did suggest that the woman wanted to see defendant, that he went to her house and made an appointment to call on her later in the day, that he did call in company with such witness, and when the witness and defendant were leaving together, the witness was called back by the woman, and that in a very few moments the defendant was arrested by the officers. The defendant, however, testified in his own behalf and swore he had no morphine on his person at all. He denied the officers' testimony that he dropped it from his hands when accosted by the officers—thus entrapment could not be deduced from any of the facts in evidence.

None of the points raised by appellant are sufficient for the reasons argued or authority cited to justify this court in discussing the questions attempted to be raised. Therefore, the appeal from the verdict of the jury finding defendant guilty, and from the order of the trial court denying the motion of defendant for a new trial and from the judgment made and entered, sentencing defendant to San Quentin, as required by law, is not well taken.

[2] The judgment and order are affirmed; the appeal from the verdict is dismissed as not an appealable order.

I concur: CONREY, P. J.

I concur in the judgment: HOUSER, J.

BUTTRICK v. SEINES et al. (Civ. 6353.) *

District Court of Appeal, Second District, Division 2, California. Jan. 14, 1930.

Rehearing Denied Feb. 13, 1930. Hearing Granted by Supreme Court March 13, 1930.

1. Appeal and error $\Rightarrow$ 757(1)—Brief, failing to present each point separately and to have printed therein any of pleadings, findings, or judgment, was insufficient (Code Civ. Proc. §§ 953a, 953b, 953c; Rule 8 of District Court of Appeals).

Appellant's brief failing to present each point separately under appropriate headings showing nature of questions presented in accordance with requirement of Rule 8 of the District Court of Appeals, and not having printed therein or in supplement any of the pleadings, findings, except for a few brief excerpts, or judgment from which appeal was taken, was insufficient under Code Civ. Proc. § 953c, which requires parties under alternative method of appeal in accordance with section 953a, 953b, 953c, to print in their briefs or in a supplement appended thereto such portions of record as they desire to call to attention of court.

$\Rightarrow$ For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Hearing granted. 289 P. 616.

2. Appeal and error $\S$ 757(1)—Appellate court is not required to search typewritten transcript for errors not specifically pointed out (Code Civ. Proc. $\S$ 953a, 953b, 953c).

Appellate court is not required on appeal by the alternative method in accordance with Code Civ. Proc. $\S$ 953a, 953b, 953c, to search the typewritten transcript for errors claimed by party to exist but not specifically pointed out.

Appeal from Superior Court, Los Angeles County; K. S. Mahon, Judge.

Action by Gussie C. Buttrick against E. Bryon Seines and others. From the judgment, plaintiff appeals. Affirmed.

Duke Stone, of Los Angeles, for appellant.
Hahn & Hahn, of Pasadena, for respondent Hamilton.

BURNELL, Justice pro tem. [1] This appeal is taken under the alternative method. Code Civ. Proc. $\S$ 953a, 953b, 953c. By stipulation filed herein the appeal was submitted on the briefs on file, consisting of appellant's opening brief and respondent Hamilton's reply thereto. The one brief filed by appellant does not, as required by rule VIII of the rules of this court, "present each point separately, under an appropriate heading, showing the nature of the question to be presented," nor has appellant printed therein or in the supplement appended thereto any of the pleadings, the findings (except for a few brief excerpts therefrom) or the judgment from which the appeal is taken, or even sought to lighten the labors of this court by a reference to the pages of the clerk's transcript on which they may be found. He apparently seeks to make the point that the findings are not supported by the evidence, but he has failed to incorporate any of the evidence in his brief or to refer therein to the page of his supplement or of the reporter's transcript where it may be found. This falls far short of the requirements of section 953c of the Code of Civil Procedure, which requires the parties, under the alternative method of appeal, to "print in their briefs, or in a supplement appended thereto, such portions of the record as they desire to call to the attention of the court."

[2] This court is not required, as we have so frequently observed, to search the typewritten transcript—in this case a volume containing 332 pages—for errors claimed by a party to exist but not specifically pointed out. *Scott v. Hollywood Park Co.*, 176 Cal. 680, 169 P. 379; *Marcucci v. Vowinkel*, 164 Cal. 693, 130 P. 430; *Estate of McPhee*, 156 Cal. 335, 104 P. 455, Ann. Cas. 1913E, 899. In the first

of the cases just cited it was said: "Neither in his brief nor in any supplement thereto is there anything to indicate what relief was sought by the action, nor is there anything printed in the brief indicating the nature of the judgment which appellant says was erroneously rendered. All presumptions indulged in are in favor of the regularity of the judgment and proceedings upon which it is based; hence it devolves upon an appellant to affirmatively show the existence of the error upon which he asks for a reversal. Upon the showing made, how can this court say the judgment thus attacked is erroneous? Assuming that appellant's real contention is that the evidence is insufficient to sustain the findings, the answer is that the findings so attacked are not printed in the brief, without which, and the evidence upon which they are based, this court cannot say they are unsustained. The brief does not purport to contain all or other than a meager part of the evidence upon which the trial court made its findings. The direction contained in the statute is clear that, where the record is brought up under the provisions of sections 953a, 953b, and 953c of the Code of Civil Procedure, the appellant shall print enough of such record to show the alleged error of which he complains, and also illustrate the points made in the argument. When not thus exhibited, no duty devolves upon the court to examine a voluminous typewritten transcript of the stenographic report in search of error upon which to base a reversal."

As long ago as 1925, the Supreme Court forcibly called the attention of the bar to the fact that "It has been reiterated approximately 100 times in the decisions of this court and of the District Courts of Appeal that it is incumbent upon an appellant who relies upon a typewritten transcript to print in his brief or in a printed supplement thereto sufficient of the record to justify a reversal of the judgment or order appealed from." *Jeffords v. Young*, 197 Cal. 224, 239 P. 1054, 1056. Since that decision was handed down, the process of reiteration has continued without abatement, but apparently "the seed has fallen upon barren ground." *Withers v. Southern Pacific Co.* (Cal. App.) 281 P. 518; *Kellogg v. Snell* (Cal. App.) 270 P. 232; *Barrett v. Southern Pacific Co.* (Cal. App.) 269 P. 551; *Lanini v. Rosa*, 91 Cal. App. 596, 267 P. 145; *Eddy v. Stowe*, 43 Cal. App. 789, 185 P. 1024; and many other cases.

The judgment is affirmed.

We concur: CRAIG, Acting P. J.; IRA F. THOMPSON, J.

POLLAK v. STAUNTON et al. (Civ. 7060.)★

District Court of Appeal, First District, Division 2, California. Jan. 15, 1930.

Rehearing Denied Feb. 14, 1930. Hearing Granted by Supreme Court March 13, 1930.

1. Money received ⇨8—Action for money had and received held proper remedy to recover proceeds of stock obtained from plaintiff through fraudulent representations.

Where plaintiff, through fraudulent representations, was induced to turn over to defendants corporate stock for sale and application of proceeds to purchase of option shares, plaintiff was entitled to return of stock, and, stock having been converted into money, was entitled to money, for which action for money had and received would lie; plaintiff having received nothing which equity required him to restore as condition of rescission.

2. Appeal and error ⇨728(1)—Sweeping claim that defendant was prevented from showing plaintiff's conduct constituting ratification held insufficient to warrant review of objections to testimony.

On appeal from judgment in action for money had and received, defendant's sweeping claim that he was prevented from showing conduct of plaintiff amounting to ratification of sale of stock and purchase of option stock held insufficient to entitle him to review of objections to testimony.

3. Release ⇨27—Release of several defendants in action for money had and received for proceeds of stock held not release of other defendants.

Where plaintiff through fraudulent representations was induced to part with stock and direct conversion thereof into money, plaintiff's release and dismissal of action for money had and received as to several defendants held not release of other defendants, action not being for tort, or unliquidated damages caused by fraud or deceit, nor for value of property obtained by deceit, and liability of each defendant was several for amount received by him.

4. Money received ⇨1—Action for money had and received is based on fact defendant has money which in equity and good conscience belongs to plaintiff.

Action for money had and received is of an equitable nature, and judgment against defendant is based on fact that he has money which in equity and good conscience belongs to plaintiff.

5. Money received ⇨12—Defendant, sued for money had and received, can urge in defense that codefendants received all money, except specified sum, where evidence showed amount each received.

In action for money had and received for proceeds of stock, which plaintiff was induced to part with through defendants' fraudulent representations, one defendant is entitled to urge in defense that his codefendants and not he have all of money, except specified sum, where evidence showed exact amount each defendant received.

Appeal from Superior Court, City and County of San Francisco; John J. Van Nostrand, Judge.

Action by A. J. Pollak against W. E. Staunton and others. Action was dismissed against defendants other than John Salsberry. From a judgment for plaintiff, defendant Salsberry appeals. Modified, and, as modified, affirmed.

John H. Crabbe, of San Francisco, for appellant.

Arnold C. Lackenbach, of San Francisco, for respondent.

KOFORD, P. J. Respondent recovered judgment against appellant in an action prosecuted in the form of the common count for money had and received. The theory upon which the judgment is defended is that the appellant by fraudulent representations obtained from respondent the possession of a certain 20,000 shares of corporate stock, obtained respondent's consent to the sale thereof, and also obtained respondent's consent to the application of the sale price of said stock to the purchase of 100,000 more shares. The said shares having been sold by appellant before respondent discovered the fraud and commenced this action, the judgment followed the complaint, awarding respondent the proceeds of the sale of the stock, instead of the stock itself. Upon payment of \$5,000 by Berger, Staunton, and Western Lead Mines Company, the action was dismissed as against them before trial. Judgment was for plaintiff in the amount of \$16,532.49 against defendant Salsberry, who is appellant here.

The parties to this appeal are very little in disagreement about the main facts of the case. The respondent's version, which finds adequate support in the record of testimony, is as follows:

In August, 1925, Western Lead Mines Company was organized in Nevada. The three defendants were the incorporators and directors. The major part of the capital stock was issued to appellant in exchange for mining properties. Defendants persuaded plaintiff to buy 20,000 shares of the stock from appellant for \$5,000. A little later the defendants had the company execute to respondent an option for 100,000 shares of treasury stock at 25 cents per share. In December, defendants attempted to persuade respondent to exercise his said option. He refused. About a week later the three defendants called on respondent and represented that their negotiations with C. C. Julian had reached a stage where it appeared that Julian would purchase a large block of stock of Western Lead Mines Company; that they had represented to Julian that respondent Pollak had already exercised his option, and had paid \$25,000 into the treasury of Western Lead Mines Company; that, in order to make good this representation, the three defendants—Salsberry, Staunton, and Berger—had raised \$25,000 (Salsberry selling a ranch, and Berger pawning his wife's jewelry), which they had paid into the treasury of

Western Lead Mines Company for the account of Pollak. They represented to Pollak that Julian would list the stock on the mining exchange, which would cause the stock to greatly enhance in value. They stated that they expected reimbursement from Pollak, and for that purpose proposed to Pollak that he turn over to them the 20,000 shares of Western Lead Mines Company, which he had purchased in August, 1925, to be sold; and that thereupon they would apply the proceeds of the sale of the 20,000 shares to Pollak's indebtedness to them.

Pollak, believing these representations, finally accepted the proposal and turned over the certificate for 20,000 shares to Staunton, receiving a receipt therefor, signed by defendant Staunton, dated December 28, 1925. On the same date defendant Staunton executed to respondent another paper in the form of a letter which read:

"With reference to that certain option given by Western Lead Mines Company to you, dated Reno, Nevada, September 5, 1925, wherein and whereby you are given the exclusive option to purchase all or any part of one hundred thousand (100,000) shares of the capital stock in said corporation; you are advised that with your consent, and without any responsibility attaching to you therefor, the undersigned has exercised the privilege granted in said option, and has paid into the treasury of said company the sum of twenty-five thousand dollars (\$25,000.00) in lawful money of the United States, and has had issued to you certificate No. 183 for one hundred thousand (100,000) shares of the capital stock in said Western Lead Mines Company.

"Your indorsement on said certificate and delivery to me of the same is herewith requested, and upon delivery of said certificate so indorsed, receipt of which is hereby acknowledged, the undersigned shall handle or dispose of said one hundred thousand (100,000) shares of capital stock as he deems for the best interest of yourself and himself; it being understood that in the event of sale of said one hundred thousand (100,000) shares of capital stock, or any part thereof, that from the proceeds thereof the undersigned shall first deduct and repay himself the sum of twenty-five thousand dollars (\$25,000.00), being the purchase price thereof, and the balance remaining shall be forthwith paid to you."

On January 11, 1926, Staunton, acting for himself and the other two defendants, sold the 20,000 shares for the sum of \$21,532.49, and thereupon the defendants Berger, Staunton, and Salsberry divided the money among themselves equally. Thereafter respondent learned that the defendants had not in fact paid \$25,000 into the corporation, and commenced this action. The appellant offered proof that a credit of \$54,800 in favor of defendants appeared on the books of their company for services rendered, and that, when defendants di-

vided and appropriated the amount realized from the sale of respondent's 20,000 shares, they caused bookkeeping entries to be made on the books of the company which charged off against their said credit the amount received and credited a like amount to respondent on the purchase of the 100,000 shares. We do not understand appellant to contend that these entries on the books purged them of the falsehoods they had put forward to respondent, which induced him to consent to the sale of his stock and to exercise the option to buy more stock. Neither did such book entries make such misrepresentations immaterial and nonactionable. The difference between the representations and the true facts was material and important.

[1] Appellant contends that the action for money had and received will not lie in favor of respondent, because he has not rescinded and restored appellant to his original position. Appellant has failed to expressly designate what thing he claims the respondent should have restored. It may be that he has in mind all the transactions of the parties as one unit.

The cause of action is not based upon all the transactions with the defendants. No complaint is made by respondent of his original purchase of shares and the option. He complains only that he was fraudulently induced to give up his stock for sale and to direct the application of the sale price to the purchase of the option shares. The fraud entitled him to have back the stock; but, that having been converted into money, he was entitled to the money. He had received nothing which equity required him to restore as a condition of rescission. Defendants were at all times in possession of the certificate for the 100,000 option shares issued and indorsed under conditions shown by the letter quoted above.

[2] Appellant makes the sweeping claim that he was prevented by the court from showing conduct of respondent amounting to a ratification of the sale of the 20,000 shares and the purchase of the 100,000 shares. The assignment is not sufficient to entitle him to a review of the objections. So far as any reference is made to the printed portion of the testimony, we find no erroneous ruling upon the admission of evidence. Moreover, the acts of respondent which appellant apparently claims to amount to a ratification were acts which occurred before respondent discovered the fraud.

Appellant vigorously asserts that none of the stock transactions, referred to above, were in violation of the Corporate Securities Act (St. 1917, p. 673); but, believing that respondent has or will so claim, appellant contends that respondent is in *pari delicto*, and can, therefore, recover nothing. Respondent does not defend the judgment upon the theory that either of the stock transactions was in violation of the Corporate Securities Act (though he states that the 100,000-share transaction

was such); but, fearing that appellant will so claim and also claim that respondent is in *pari delicto*, respondent is ready with authorities and argument to show that, even if the sale were in violation of the act, he is not in *pari delicto*. Under these circumstances, we do not decide whether any of the stock transactions were in violation of the act.

[3] After this action was commenced against the three defendants for the full amount of the sale price of the stock, \$21,532.49, two of the defendants paid plaintiff \$5,000 and took a release and a dismissal of the action as to themselves. The action proceeded against appellant alone to judgment for the balance, \$16,532.49. Appellant claims that the action is for damages for a joint tort, and for that reason the release of his two codefendants released him also. He relies on *Adams v. Southern Pacific Co.* (Cal. Sup.) 266 P. 541, 57 A. L. R. 1066, and cases cited. The present action is not one for tort, nor for unliquidated damages caused by fraud or deceit, nor for the value of property obtained by deceit. It is like an action for the recovery of specific personal property. The property having been converted into money, the action is for that money. This action is for restitution, and not for damages. *Woodward*, Law of Quasi Contracts, §§ 270, 272, 276; *Minor v. Baldridge*, 123 Cal. 187, 55 A. 783. This action is like an action to recover the fruits of a rescission—a rescission of respondent's agreement to exercise an option to buy 100,000 shares of stock.

The authorities relied upon by appellant by no means can be said to declare that a discharge of one defendant in such an action will discharge the others in full. *Woodward*, Law of Quasi Contracts, §§ 296, 297. "If, however, a wrongdoer is not liable in quasi contract unless he has received some part of the plaintiff's property in the commission of the wrong, the extent of his liability would seem necessarily to be limited to that which he has received. This proposition, which is not disputed where the defendant is a sole tort-feasor, would seem also to determine the extent of the liability where there are joint tort-feasors. For if, in the case of a sole tort-feasor, the defendant is only liable in quasi contract for that which he has received, on what principle can he be made liable in quasi contract in the case of a joint tort for what has been received by another? * * *

Keener on Quasi Contracts, p. 200. "But where that which has in fact been received by another is received only in part for the defendant, and the action is not in tort, the tort, * * * being 'only an item of evidence tending to establish his interest in the proceeds,' it seems that on principle the extent of his interest in the property should be the limit of the recovery against him. If this view is correct, then his liability should be several, and not joint, or joint and several; for each obligation would depend upon questions differing in one particular, namely, the extent of the defendant's enrichment." Keener on Quasi Contracts, p. 201.

The liability of each defendant is several in this action for money had and received, and is limited in amount to the amount received by each. *Minor v. Baldridge*, supra; *Whittier v. Home Savings Bank*, 161 Cal. 311, 318, 119 P. 92; *French v. Robbins*, 172 Cal. 670, 153 P. 188; *Smith v. Bach*, 53 Cal. App. 63, 199 P. 1106; *Smith v. Bach*, 54 Cal. App. 236, 201 P. 611; 2 R. C. L. 761; *Woodward*, Law of Quasi Contracts, p. 439. These authorities operate at once to deny the appellant's contention that the discharge of two of the defendants operated to discharge the appellant, and also to sustain appellant's further contention that the judgment in this case against appellant was excessive, in that it was for more than the amount received by him.

[4, 5] Respondent contends that, inasmuch as all three defendants at first received the entire \$21,532.49, they were thereupon liable in an action for money had and received, both jointly and severally. That might be true, if the evidence had stopped at that point; but it went further, and showed that each received exactly \$7,177.23. The action of money had and received is of an equitable nature, and a judgment against a defendant is based upon the fact that he has money which in equity and good conscience belongs to the plaintiff. The appellant is entitled to urge in defense that his codefendants, and not he, have all the money, except \$7,177.23.

The judgment is modified, by reducing it to the sum of \$7,177.23, principal, with interest from the 11th day of January, 1926, and, as so modified, the judgment is affirmed; appellant to recover his costs.

We concur: STURTEVANT J.; NOURSE, J.

103 Cal. App. 149

PEOPLE v. McGEE. (Cr. 10.)

District Court of Appeal, Fourth District, California. Jan. 11, 1930.

1. Perjury $\S$ 33(8)—Positive testimony of facts contrary to that sworn to by accused, or absolutely incompatible with his evidence, may establish perjury (Code Civ. Proc. $\S$ 1968; Pen. Code $\S$ 1103a).

Under Code Civ. Proc. $\S$ 1968, and Pen. Code, $\S$ 1103a, requiring that perjury must be proved by testimony of two witnesses or one witness and corroborating circumstances, positive testimony of state of facts contrary to that sworn to by accused or absolutely incompatible or physically inconsistent with his evidence may be sufficient.

2. Perjury $\S$ 33(8)—Evidence contrary to defendant's testimony as alibi witness held sufficient to sustain perjury conviction.

In prosecution for perjury, where it appeared accused had testified that defendant in liquor prosecution was digging ditch at accused's home at time he was alleged to have made sale of liquor, evidence that ditch was not dug until some time after liquor sale held sufficient to sustain conviction.

Appeal from Superior Court, Orange County; H. G. Ames, Judge.

William R. McGee was convicted of perjury, and he appeals. Affirmed.

Sidney Sampson, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Frank Richards, Deputy Atty. Gen., for the People.

BARNARD, J. The defendant has appealed from a judgment after conviction on a charge of perjury alleged to have been committed on July 1, 1929, during the trial of one Walter Meeks, who was accused of having sold liquor at his home in Orange county on February 16, 1929, to one E. M. Perry.

At that trial Perry testified that on the morning of February 16, 1929, he went to the home of Meeks in Orange county and purchased some liquor from him at about 10 o'clock a. m. For the purpose of establishing an alibi, defendant testified that on that same forenoon the said Meeks was digging a ditch at defendant's home in Los Angeles, about 30 miles from the Orange county home of Meeks. This testimony is the basis of the perjury charge involved in this action.

The main ground of this appeal is the claim that there is a total absence of any positive testimony to prove the defendant guilty of the crime charged; that it was incumbent upon the prosecution to prove by direct testimony that defendant was not at his residence talking to Meeks at the time referred to; and that the record discloses no witness

who directly testified that the meeting between defendant and Meeks did not take place at the place and hour in question.

[1] It is true that perjury must be proved by the testimony of two witnesses, or one witness and corroborating circumstances. Section 1968, Code Civ. Proc.; section 1103a, Pen. Code. This does not mean that it is necessary to produce some one who was present at the defendant's home on the morning of February 16, 1929, to testify that Meeks was not there at that time. It is, however, necessary to have positive testimony as to facts that are absolutely incompatible with the innocence of the accused. *People v. Porter*, 104 Cal. 415, 38 P. 88; 20 Cal. Jur., p. 1023. Positive testimony of a state of facts contrary to that sworn to by the accused, or absolutely incompatible or physically inconsistent with his evidence, may be sufficient. *People v. Chadwick*, 4 Cal. App. 63, 87 P. 384, 387, 389; *People v. Casanova*, 54 Cal. App. 439, 202 P. 45, 47; *People v. Follette*, 74 Cal. App. 178, 240 P. 502. In *People v. Chadwick*, supra, the court said:

"Direct evidence" is declared in section 1831 of the Code of Civil Procedure to be "that which proves the fact in dispute directly without an inference or presumption, and which in itself, if true, conclusively establishes that fact." Upon a trial for perjury, direct evidence is not limited to a denial in ipsissimis verbis of the testimony given by the defendant, but includes any positive testimony of a contrary state of facts from that sworn to by him at the former trial, or which is absolutely incompatible with his evidence, or physically inconsistent with the facts so testified to by him."

And in *People v. Casanova*, supra:

"The statute respecting the quantum of evidence necessary in perjury cases will be satisfied, if there be the testimony of one witness to facts that are absolutely incompatible with the innocence of the accused, corroborated by circumstances which, of themselves and independently of such directly inculpatory evidence, tend, with a reasonable degree of certitude, to show that the accused is guilty as charged."

In *People v. Wells*, 103 Cal. 631, 37 P. 529, a case relied upon by appellant, the court said:

"As we have already suggested, in order that the evidence may be sufficient, there must be positive testimony to a contrary state of facts from that sworn to by the defendant at the previous trial. For instance, to support the charge of perjury as to the alleged false statement of defendant that he met the cow at the time stated upon this particular public highway, it was necessary to produce the positive testimony of one witness at least that such meeting did not take place, as that the defendant was not at that time at that

place, or that the cow was not there.
* * *

[2] Applying the latter part of this language to the instant case, it would read: "It was necessary to produce the positive testimony of one witness, at least, that such meeting did not take place, that the defendant was not *at that time at that place*, or that *Meeks was not there*." The place in question was defendant's own home, and, while there is no evidence that defendant was not there at the time involved, there is positive evidence that Meeks was not there at that time. The defendant had testified that Meeks and a man named Bland were digging the ditch in question on the morning of February 16, 1929; that they went to work that morning at 8 o'clock, and were still working there when he left at 9:30 or 9:45 a. m.; that he paid Meeks for a full half day's work on that day; that this was the last day of three days it had taken to dig the ditch; and that the entire sewer pipe and connections were all installed later the same day. It was proved, however, that an application for a permit for the installation of this same sewer was signed by appellant, filed with, and approved by, the building department of the city of Los Angeles on April 10, 1929, and a permit issued the same day. E. J. Rutherford, the plumbing contractor who installed the pipes and made the connections, testified that he did not do the work before the permit was issued, but that he did the work on April 10, and that he ordered an inspection of the work by the city on April 11. An assistant plumbing inspector of the city of Los Angeles testified that he inspected the work on April 12, 1929, and that the ditch was not over 24 to 48 hours old at that time. Bland, who helped Meeks dig the ditch in question, testified that he did not know whether the ditch was dug in April, May, or June, but that the sewer was put in right away after the ditch was completed. On cross-examination, the defendant admitted the sewer was connected up by Rutherford in the month of April, and also stated that, while he believed it was not installed at the same time it was connected, he did not know.

There is positive evidence that Meeks was not digging this ditch at defendant's home on February 16, 1929, as there is positive evidence that the ditch was not dug until April. There is positive evidence of a state of facts contrary to that sworn to by appellant, and absolutely inconsistent and incompatible with his testimony that Meeks was digging this ditch at his home on the morning of February 16. There is no dispute that the ditch here referred to is the same ditch appellant referred to in his testimony. He testified that, when he returned home around 12 o'clock on Saturday, February 16, 1929, the digging of the ditch had been completed, and Meeks and Bland had left, and that Rutherford, the contractor, was laying the sewer pipe and completed the job about 2 o'clock. He also testi-

fied he had verified the date, by a receipt Rutherford had given him when he completed the work on February 16. He claimed to have lost his receipt, but Rutherford testified he had not been paid for the work until some time after April 10.

There was ample corroboration of the fact that Meeks was not digging a ditch at defendant's home at 9:30 or 9:45 of February 16, 1929. E. M. Perry testified that on the morning of February 16, 1929, he drove in his automobile to the home of Meeks on Smelzer road near Huntington Beach boulevard in Orange county; that Mr. Mandele and another man followed him in another car; that he observed the premises for ten minutes before he saw Meeks; that Meeks then came from within the house; that Meeks was about half dressed, having on a shirt and trousers, no necktie, and he did not think he had on any shoes or stockings; and that, after a short conversation, he went into the house with Meeks, where he purchased some liquor. Mandele testified that Perry and Meeks went into the house at exactly 10:05 and came out at 10:20. The county surveyor of Orange county testified that the distance between defendant's home in Los Angeles, where Meeks was supposed to be digging a ditch at 9:30 or 9:45, and the Orange county house, where Meeks had been for at least ten minutes before 10:05, is approximately 30 miles. While it might have been humanly possible for Meeks to have been transported between the two points in the 25 minutes between 9:30 and 9:55, the entire circumstances, including the transition from digging a ditch in Los Angeles at 9:30 or 9:45, to being in his own home in Orange county at 9:55, and coming out partially dressed, shortly thereafter, are sufficiently improbable to furnish substantial corroboration of the positive testimony that the ditch digging occurred at a different date. Incidentally, it may be observed that Meeks himself very nearly admitted he was at his own home in Orange county on the occasion in question. While he was being examined by defendant's attorney, the following testimony was given by him: "Q. Now Mr. Perry testified that he saw you at 12:05 or around 10 o'clock on the 16th of February without any clothes on—that you were just half-clad; do you remember how you were dressed when Mr. Perry first saw you? A. Well, I think I was in a— Q. Or did you—I had better not put it that way. At this time when he is supposed to have seen you on the 16th of February, 1929? A. Well, I was working in Los Angeles on that day, and I had my working clothes on." The first question asked is so clear that the spontaneous answer, although not completed, is significant. We think the evidence is sufficient to sustain the finding of the jury that defendant did not see and talk with Meeks at the place and time claimed. See *People v. Hill*, 36 Cal. App. 574, 172 P. 1114.

Appellant also contends that the trial court erred in denying his motion for dismissal before the case went to the jury; in refusing to strike out certain testimony; and that a certain remark of the district attorney, in his argument to the jury, was prejudicial misconduct. All these contentions are based upon the theory held by appellant that it was incumbent upon the prosecution to prove that appellant did not see Meeks at the time and place testified to by him, by some witness who was actually then and there present. Under the view we take of this contention, these other points are without merit.

For the reasons given, the judgment is affirmed.

I concur: SLOANE, P. J.

MARKS, J., deeming himself disqualified, takes no part in the decision of this case.

103 Cal. App. 243

In re CLARKE'S ESTATE. (Civ. 6644.)★

District Court of Appeal, Second District, Division 1, California. Jan. 17, 1930.

Rehearing Denied Feb. 7, 1930. Hearing Denied by Supreme Court March 17, 1930.

Wills ⇨435—Absence of ambiguity in language employed by testator precludes necessity of application of rules of construction.

Where no ambiguity exists in language employed by the testator in his will, and consequently intent is clear and manifest, no occasion is presented which requires the application of any rules of construction.

2. Wills ⇨775—Legatee to take under will providing for lapse of legacy in case of death before date of distribution must have been alive on such date (Civ. Code, §§ 1324, 3538).

Under will expressly providing that, in case of death of legatee before date of distribution of estate, such legacy should be deemed lapsed and accordingly become a part of residuum of estate, intended legatee, in order to take under will, must have been alive at date estate was distributed, in accordance with provisions of Civ. Code, §§ 1324, 3528, to effect that words used in a will are to be taken in their ordinary sense unless something to contrary is clearly apparent.

Appeal from Superior Court, Los Angeles County; Walter J. Desmond, Judge.

In the matter of the estate of Chauncey Dwight Clarke, also known as Chauncey D. Clarke, and sometimes known as C. D. Clarke, deceased, wherein Marie Rankin Clarke and Mary E. Duffield presented separate petitions to the probate court for the purpose of having construed various provisions of the will, as well as to settle final account of executors and to provide for distribution of the estate. From the judgment therein, petitioner first named appeals. Reversed.

Claude I. Parker and Ralph W. Smith, both of Los Angeles, for appellant.

Laughlin & Laughlin, and Frank L. Muhleman, all of Los Angeles, for respondent.

HOUSER, J. By the second paragraph of the will of the testator 11 different legacies were bequeathed to as many different persons "to be distributed in the due course of the settlement" of his estate. The ninth paragraph of the will provided as follows: "Should I pay the amount, or any part thereof, of any of above specified legacies to any of said named legatees, or establish trusts for said amounts, or any part thereof, for the benefit of any of said respective legatees, before my decease, the same shall be taken as satisfaction of said legacies for the amount so paid, to, or established, in favor of, such legatee. Should any of the above-named legatees or devisees die before my decease or before the date of payment or distribution herein specified, it is my will that the legacy or devise to such deceased legatee or devisee shall become a part of my residuary estate, unless otherwise herein specifically provided."

One of the 11 legatees mentioned in the second paragraph of the will died before the legacy left to her could be "distributed in the due course of the settlement" of the estate.

On each of two petitions presented to the probate court for the purpose of having construed the various provisions of the will to which reference has been had, as well as to settle the final account of the executor of the will and to provide for the distribution of the estate, the court made findings and rendered judgment thereon in substance that the effect of the language of the will by which in the second paragraph thereof (as hereinbefore indicated) each of 11 different persons was bequeathed a specified sum of money "to be distributed in the due course of the settlement" of the estate, was to immediately vest in each of such legatees the sum of money so bequeathed to him, and that on the distribution of the estate, of whatever date, he was entitled to have such legacy paid to him. It is from such judgment that the appeal herein is taken.

[1, 2] Although, with reference to the question submitted for the consideration of this court, many different rules of construction are suggested by the respective parties to the appeal, it is a cardinal rule, and one which requires the citation of no authority in its support, that, where no ambiguity exists in the language employed by the testator, and consequently that his intent is clear and manifest, no occasion is presented which requires the application of any rule of construction. To ascertain the intention of the testator in the matter is the sole object of the inquiry. If within the body of the will the intention of the testator is made cer-

tain and unmistakable, it is 'useless and unprofitable to inquire what other meaning might possibly be attributed to the directions which he has given concerning the disposition of his estate. With so much in mind, it may be well to again examine the language of the will, reduced to its simplest form so far as the provision here in question is concerned. By reference to the second and the ninth paragraphs thereof (considered together), it will be noted that in effect the testator gave to a certain person a specified sum of money "to be distributed in the due course of the settlement" of his estate, provided that, if such intended legatee should die before "the date * * * of distribution" of the estate, such legacy should be deemed lapsed and accordingly become a part of the residuum of the estate. Such language, in itself, will admit of no construction other than what it plainly imports, to wit, that in order to take under the will the intended legatee must be alive when the estate is distributed. However, it is contended that the words "date * * * of distribution"—not being or providing for an *exact* date so far as the ordinary calendar is concerned—are not specific, and hence not effectual as against the presumption that vesting of title in the legatee ensues immediately on the death of the testator. It is statutory that, unless something to the contrary is clearly apparent, words used in a will are to be taken in their ordinary sense (section 1324, Civ. Code); and that "that is certain which can be made certain" (section 3533, Civ. Code). Again, in reply to such contention, it need only be said that, where the intention of the testator clearly appears from the instrument itself, rules of construction affecting ambiguity have no place.

It will be observed that, in connection with the assumed vesting of title in the legatee, an extension of the language employed by the testator is that the legatee shall be living at the *date of distribution* "herein specified * * * unless otherwise herein specifically provided." Considering paragraphs of the will other than those to which attention heretofore has been directed, it is noted that by the third paragraph thereof a bequest of \$10,000 was made to a "faithful cook" of the testator "to be paid and distributed to him" at the expiration of 10 years from the decease of the testator; that by the fifth paragraph of the will a bequest of \$100,000 was to be "paid and distributed" to a niece of the testator, provided that she should be living at the expiration of 8 years from the death of the testator; and that by the sixth paragraph of the will it was provided that, on the decease of a certain named legatee, to whom the use of the sum of \$75,000 was bequeathed during her natural life, the children of such legatee should receive said sum. It thus becomes clear that the "date of distribution"

as to the legacies mentioned in the third, the fifth, and the sixth paragraphs of the will are "specifically provided" for otherwise than as appears in the ninth paragraph thereof; and consequently that the words "date of distribution herein specified" can have reference only to the second paragraph of the will, which is the paragraph under which the heirs of the deceased legatee claim title herein.

The conclusion would seem inevitable that, since the legatee, whose claim against the estate forms the basis of this appeal, was not living at the "date of distribution" of the estate, under the terms of the will the title to the legacy did not vest in her, and consequently neither her heirs nor representatives are entitled to participate in the distribution of the estate.

The judgment is reversed.

We concur: CONREY, P. J.; YORK, J.

103 Cal. App. 154

SILLER v. DUNN et al. (Civ. 3854.)★

District Court of Appeal, Third District, California. Jan. 13, 1930.

Rehearing Denied Feb. 11, 1930.

1. Landlord and tenant ⇨194(1)—Upon lessee's surrender of leased premises before expiration of term provided for in lease, lessor has three remedies.

Upon surrender of leased premises by lessee before expiration of term, lessor has three remedies: First, he may do nothing and sue lessee as each installment of rent becomes due, or for whole thereof when it becomes due; second, he may treat lease as terminated and retake possession and use premises for his own purposes as exclusive owner; or, third, he may retake possession for tenant's account and hold tenant in damages for difference between rentals provided for in lease and what in good faith he was able to procure from reletting.

2. Landlord and tenant ⇨194(2)—Acceptance of surrender of lease will be inferred where landlord remodels premises, rendering them unavailable for purposes intended, and preventing collection of rent.

Where landlord takes possession of premises before expiration of term, remodels them rendering them unavailable for purposes leased, untenable during period of remodeling, and preventing collection of rent, acceptance of surrender of lease will be inferred as matter of law, and landlord estopped from asserting contrary.

3. Landlord and tenant ⇨194(2)—Landlord's taking possession of furniture store before expiration of term and remodeling building into hotel held acceptance of surrender of lease, precluding recovery for rent.

Where lessor took possession of building rented as furniture store before expiration of term, and in furtherance of plan to convert premises into hotel remodeled building, render-

ing premises wholly untenable during period between surrender of lease and opening of hotel, lessor held to have accepted surrender of lease, and therefore estopped to maintain action for rent for that period.

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action by L. G. Siller against Minnie M. Dunn and others upon stockholders' liability. Judgment for defendants, and plaintiff appeals. Affirmed.

Robert L. Shinn and Charles J. Hasman, both of Sacramento, for appellants.

Downey, Brand & Seymour and Martin I. Welsh, all of Sacramento, for respondents.

PLUMMER, J. Plaintiff began this action to recover from the defendants certain sums set out in the complaint as the respective liabilities of the defendants as stockholders of Dunn-Brett Furniture Company, a corporation, on account of an alleged indebtedness of said corporation based upon the provisions contained in a lease of real property, entered into between the plaintiff and the Dunn-Brett Furniture Company on or about the 8th day of March, 1926. At the conclusion of the plaintiff's testimony the court granted the defendants' motion for a nonsuit, and from the judgment entered thereon the plaintiff appeals.

The portion of the lease relied upon by the plaintiff for a recovery is in the words following: "In the event of the lessee surrendering the said demised premises prior to the expiration of the term of this lease, responsibility for the payment of the rental herein provided shall continue until such time as the lessor shall have effected a retenant of the said premises satisfactory to him." Notwithstanding this provision in the lease, it is the contention on the part of the defendants that the testimony of the plaintiff established beyond question that by his own acts he had accepted a surrender of the lease, had repossessed himself of the premises in his own right and for his own uses and purposes, and had by operation of law released the defendants from further liability for the payment of rent. The lease in question provided a certain stipulated rental and also specified the purposes for which the premises were to be used, to wit, as a furniture and furnishing goods store, and that no other or different use of the said premises be made by the lessee without the written consent of the lessor first had and obtained. The lease described a building consisting of six stories in height and a basement situated on Ninth street between K and L, in the city of Sacramento, and excepting from the provisions of the lease certain described portions of the premises theretofore leased to a different party. On or about the 8th day of August, 1927, the Dunn-Brett Furniture Company delivered to the plaintiff the key to the premises described in the lease, and at the time of the delivery of

the key the plaintiff handed to the president of the corporation a notice to the effect that he would still hold the corporation liable for rent until the premises were released. It is further shown by the testimony that, prior to the surrender of the premises by the furniture company and the delivery of the key to the premises to the plaintiff, the plaintiff had for about three months made some effort to find another tenant for the premises; the plaintiff having been informed by the officers of the furniture company that the business of the company was in failing circumstances, and that the company would not be able long to continue in business. There does not appear to be any testimony in the transcript to the effect that the plaintiff made any effort to obtain a tenant for the premises after the surrender thereof by the furniture company on the 8th day of August, 1927, or during any of the time for which judgment is asked in this case on account of rentals alleged to be due, nor does the testimony show what the efforts were by the plaintiff to relet the premises, or upon what terms they were offered, but from matters hereinafter referred to we do not deem this material. The testimony shows that, at or about the time the furniture company gave up the key to the premises, the plaintiff put into execution an idea or thought that he had entertained in relation to converting the premises into an hotel. His language was: "To throw it into an hotel so we could rent it." It further appears from the transcript that on or about the 17th day of August, 1927, the plaintiff began the remodeling of the six-story building herein referred to so as to make it available for hotel purposes, and that this remodeling was finished on or about the 15th day of February, 1928; the period of time for which the plaintiff claims rent being from the date when the defendant surrendered the premises up to the 15th day of February, 1928, when the same were ready for occupancy for hotel purposes. It further appears from the transcript that the cost of remodeling the premises was somewhere between \$50,000 and \$60,000; that the work of remodeling required approximately six months. The plaintiff's testimony is to the effect that during the time of remodeling the premises it would have been impossible for any tenant to have taken possession thereof. The questions and answers in this particular are as follows:

"Q. In other words, the property during that period was entirely untenable? A. Absolutely, until we got it finished.

"Q. There can be no doubt about that, can there, Mr. Siller? A. No."

The plaintiff then described in the testimony the manner in which the five upper stories of the building were divided into something like 100 rooms containing baths, etc. The questions and answers of the plaintiff, so far as need be quoted to illustrate this point, are as follows:

"Q. Mr. Siller, what did the work of remodeling in general consist of? A. The work?

"Q. Yes; just describe it generally to the court. A. Just lay it out into rooms, put the light-well into the center of the building, and all that kind of work that—to throw it into hotel rooms.

"Q. I understand then, Mr. Siller, it consisted of practically an entire dismantling of the interior of the building, did it not? A. Of the upper floors, it did, yes."

It does not appear to be questioned that the remodeling of the building does not come within the terms of repairs mentioned in the lease, nor does it appear to be questioned that the character of the remodeling of the building precluded the possibility of its being used as a furniture and furnishing store. Upon the testimony of the plaintiff showing that the remodeling of the building was not in the nature of repairs, was such as to preclude the further use of the premises for the purposes mentioned in the lease, and that the plaintiff intended to and did take possession of the premises for the purposes of converting them to a different use from that mentioned in the lease, and was doing so not for the benefit of the lessee, but for and on his own account, a nonsuit was granted. There is nothing in the testimony indicating that the plaintiff consulted the lessee as to the remodeling of the premises, or that it was understood that the premises were being remodeled for the uses and purposes of the lessee, or for any one except the owner thereof. We think the testimony is conclusive that the plaintiff took possession of the premises solely as owner in his own right and not in furtherance of any of the covenants of the lease, and that it was in execution of a plan to convert the premises into an hotel and change its uses entirely from that limited in the lease.

[1-3] The law seems to be pretty well settled that, upon the surrender of leased premises by a lessee before the expiration of the term provided for in the lease, the owner of the premises has three remedies: First, he may do nothing and sue the lessee as each installment of rent becomes due, or for the whole thereof when its becomes due; second, he may treat the lease as terminated and retake possession of the premises and use the same for his own purposes as the exclusive owner thereof; or, third, he may retake possession of the premises for the tenant's account and hold the tenant in damages for the difference between the rentals provided for in the lease and what, in good faith, he was able to procure from a reletting. Only one question is involved upon this appeal, and that is, notwithstanding the clause in the lease which we have quoted, the plaintiff abandoned the lease and by his actions is now estopped to maintain this action.

In the case of *Welcome v. Hess*, 90 Cal. 507, 27 P. 369, 25 Am. St. Rep. 145, it was held

(quoting from the syllabus) that: "Where tenants leased a building for a term of years as a store, and abandoned the premises after one year's occupation thereof, sending the keys to the landlord, the acts of the landlord in taking possession of the premises, and reletting them for a period longer than the remainder of the term, without notifying the original lessees that he should do so on their account, and without notifying them that he should continue to hold them liable for the rent, show an acceptance by the landlord of the surrender, and he is estopped from denying it." The opinion in that case shows what the landlord may do, as we have hereinbefore stated. It also shows that during the unexpired portion of the term of the lease the lessee has a right to resume possession of the premises unless the landlord has done something which is equivalent to the acceptance of a surrender of the lease. In 35 C. J. 1086 we find the rule thus stated: "A surrender by operation of law occurs where the parties without express surrender do some act or acts from which it is necessarily implied that they have both agreed to consider the surrender as made—acts which are necessarily inconsistent with the continued relation of landlord and tenant. While it has frequently been said that whether a lease has been terminated by operation of law is a question of intention of the parties, it is, nevertheless, held that this mutual agreement may be implied upon the principle of estoppel from the acts of the parties, independently of, and even contrary to, their actual intent." In *Bernard v. Renard*, 175 Cal. 230, 165 P. 694, 3 A. L. R. 1076, it is held (quoting from the syllabus in 3 A. L. R. 1076): "Acceptance of a surrender of a lease will be effective if, after the lessee's refusal to take possession or be bound by the lease, the lessor assumes absolute control of the property and attempts to let it without any notice to the lessee that he is not acting in his own right." In *Voss v. Levi*, 33 Cal. App. 671, 166 P. 359, 361, the court, in its opinion, used the following language: "Such acceptance of surrender was evidenced only at the time the plaintiff, on the 19th day of January, 1915, took possession of the premises and proceeded to have them remodeled. That an acceptance of surrender was then completely had we have no doubt." In *Rehkopf v. Wirz*, 31 Cal. App. 695, 161 P. 285, 286, in considering the question of the acceptance of a surrender of a lease, it is said, referring to the right of the lessor to relet the premises and hold the tenant liable: "But a lessor who chooses to follow that course must in some manner give the lessee information that he is accepting such possession for the benefit of the tenant and not in his own right and for his own benefit. If the lessor takes possession of property delivered to him by his tenant and does so unqualifiedly, he thereby releases the tenant"—citing a number of authorities. And

further: "An unqualified taking of possession by the lessor and reletting of the premises by him as owner to new tenants is inconsistent with the continuing force of the original lease.

* * * If done pursuant to the tenant's attempted abandonment, it is an acceptance of the surrender and likewise releases the tenant." There can be no difference in principle between the acts referred to in this case, which amounts to a release of the tenant, and the circumstances shown by the evidence upon the record in this case. The remodeling of the premises by the owner cannot be held to be anything other than a taking of possession of the premises exclusively by the landlord or owner for his own uses and purposes as such owner. As we have stated, the testimony in this case shows that the premises were rendered wholly untenable during the period for which rent is claimed, and also that the premises have been rendered wholly unusable for the purposes mentioned in the lease to the Furniture Company.

In the case of *Meeker v. Spalsbury et al.*, 66 N. J. Law, 60, 48 A. 1026, 1027, the court, in considering a lease having in it a provision relative to repairs similar to the one under consideration, and where it was claimed that a surrender had been accepted by operation of law, used the following language: "He (referring to the landlord) was to have the right to enter and make such repairs as should be necessary for the preservation of the premises. When the plaintiff did more than that, he conclusively evidenced his intention to hold possession on his own account, thereby accepting the tenants' abandonment as a surrender." The case of *Meeker v. Spalsbury*, supra, is referred to and approved in the case of *Fink v. Browe Co.* (N. J. Ch.) 99 A. 926. To the same effect in principle is the case of *In re Schomacker Piano Forte Mfg. Co.* (D. C.) 163 F. 413. In 15 California Jurisprudence, 797, § 214, the rule is stated that making material alterations in the leased premises amounts to an acceptance of the abandonment of the premises by the lessee. We do not deem it necessary to cite or quote from other authorities, as the foregoing show the rule well settled that when a landlord remodels premises so as to make them unavailable for the purposes for which they were leased, and also renders them untenable during the period of remodeling, that rent for such period cannot be collected, for the reason that acceptance of the surrender of the lease will be inferred as a matter of law, and the landlord estopped from asserting the contrary. The respondents do not question the contention of the appellant that a clause in a lease, such as we have set forth herein, will be upheld where the parties have acted consistently therewith, but only contend that the plaintiff's evidence conclusively establishes that his acts were not consistent therewith,

and that by his taking unqualifiedly possession of the premises, and as he says, practically dismantling five of the floors thereof and remodeling the building so as to fit it for an entirely different use and purpose, establishes beyond controversy in law an acceptance of the abandonment of the lease.

There being no evidence to the contrary, we think the order of the trial court in granting the nonsuit was correct, and the judgment entered thereon should be, and the same is hereby, affirmed.

We concur: FINCH, P. J.; R. L. THOMPSON, J.

103 Cal. App. 220
BAILLY v. LOOCK. (Civ. 23.)

District Court of Appeal, Fourth District, California. Jan. 16, 1930.

1. Sales ⇨475—Seller under title retaining contract could transfer title and right to claim property in bankruptcy proceeding.

One selling out restaurant business under contract, whereby seller retained title and right to repossess property upon buyer's default, could transfer to third party title which he had, together with right to claim property in bankruptcy proceeding.

2. Sales ⇨459—Intention of parties determines whether sales contract reserves title in seller.

Whether contract is one of conditional sale reserving title in seller, or one transferring title to the buyer, is primarily a question of intention of the parties.

3. Sales ⇨459—Contract to transfer fixtures and stock in restaurant, providing for possession by buyers while contract was complied with and for bill of sale when price was paid, held conditional sales contract (Civ. Code, § 1140).

Where contract, for sale of restaurant business together with equipment, fixtures, stock in trade and supplies, and good will, provided that "the seller has agreed" to transfer the property and that upon payment in full of purchase price seller would deliver bill of sale transferring property referred to, and providing further that buyers should take possession and retain possession of premises "so long as they comply with the terms of this agreement," held that the contract was one for conditional sale under which title was not to pass to buyers until full payment of stipulated consideration; Civ. Code, § 1140, providing that title to personal property passes whenever parties agree upon present transfer and thing is identified.

4. Bankruptcy ⇨140(1½)—Trustee does not acquire title to goods in possession of bankrupt under conditional sales contract but not paid for.

Where bankrupt has possession of goods under conditional sales contract, reservation of title in seller until payment for goods is made

will prevent title from passing to the trustee in bankruptcy where goods are not paid for, since trustee has no higher right in this regard than the bankrupt himself.

5. Bankruptcy $\Rightarrow$ 165(1)—Where buyer defaulted under conditional sales contract and seller had assigned his interest, assignee acquired nothing by buyer's subsequent release, and there was no preference as to buyer's trustee in bankruptcy.

Where agreement for sale of restaurant business reserved title in seller until payment in full of purchase price and seller thereafter assigned all his right, title, and interest, and buyer defaulted, title to the fixtures and stock in the seller's restaurant business passed by seller's assignment and bill of sale made out to assignee, and subsequent instrument executed by buyer releasing and abandoning his rights under the sales contract did not invest seller or seller's assignee with any new interest or ownership, and there was therefore no transfer by bankrupt which could be set aside as preference, in suit by buyer's trustee in bankruptcy against assignee.

Appeal from Superior Court, San Bernardino County; V. N. Thompson, Judge.

Action by E. W. Bailly, trustee in bankruptcy of the estate of George Nick Georgelas, bankrupt, against Henning Loock. Judgment for plaintiff, and defendant appeals. Reversed.

Martin J. Coughlin and W. E. Byrne, both of San Bernardino, for appellants.

N. C. Peters, of San Bernardino, for respondent.

SLOANE, P. J. This is an action by a trustee in bankruptcy to recover the value of a restaurant business and equipment alleged to have been acquired by the defendant as a preferred creditor from the bankrupt George Nick Georgelas. The defendant was adjudged a bankrupt on the 16th day of March, 1928, and the complaint alleges: "That prior to said adjudication in bankruptcy, to-wit, on or about the 31st day of January, 1928, while said George Nick Georgelas was insolvent, the said defendant herein was a creditor of said bankrupt, claiming to have claims against him in the sum of \$2,575.00 and in order to obtain a preference over other creditors of the same class, said defendant took possession of the restaurant equipment, stock and fixtures of said George Nick Georgelas known as the 'Star Grill' at No. 695 Third Street, San Bernardino, California, the reasonable value of which was the sum of \$3,000.00."

The allegations of the complaint and the findings of the trial court are to the effect that the defendant acquired possession of said property by a preferential assignment and transfer from the bankrupt. It further appears from the record on this appeal that

prior to the adjudication in bankruptcy Georgelas, the bankrupt, acquired the property in controversy under various sales contracts, and the real controversy on this appeal is as to who was the owner of the property at the time the defendant here obtained possession thereof.

Judgment was given for the plaintiff on findings sustaining the claim that prior to the said adjudication of bankruptcy, while the said George Nick Georgelas was insolvent, and while the defendant herein was a creditor of the said bankrupt, he obtained the possession of the restaurant equipment, stock of goods, and fixtures, as a preferred creditor under a transfer by the bankrupt, and that the value thereof was the sum of \$3,000, and it was by the judgment appealed from, decreed that the plaintiff have and recover from the defendant the sum of \$3,000 and costs taxed at \$30.70.

The defendant contends on this appeal that the findings are not supported by the evidence, but that, on the contrary, it conclusively appears from the evidence in the case that the bankrupt was at no time the owner of this property, but that he held the same under conditional contracts of purchase, wherein title was reserved to the seller, in which title a right of possession on breach of the contracts was reserved to the sellers and that defendant obtained title and possession from the original vendors, after conditions broken.

The original restaurant plant was acquired by Georgelas from one Petropoulos, and at the time of the transfer to defendant was held by him under the following contract:

"Agreement of Sale.

"This Agreement, made and entered into this 9th day of December, 1923, by and between George Petropoulos, party of the first part, sometimes hereinafter referred to as the seller, and G. N. Georgelas and George G. Simon, both of the same place, parties of the second part, sometimes hereinafter referred to as the buyers,

"Witneseth: That for and in consideration of the purchase price hereinafter named, the covenants and agreements herein contained, and for other good and valuable consideration, the seller has agreed and does hereby agree to sell, transfer, assign, convey and set over unto said buyers all that certain personal property situate in the City of San Bernardino, County of San Bernardino, State of California, more particularly described as follows, to-wit:

"That certain restaurant and cafe business now owned, conducted and carried on in said City of San Bernardino at 695 Third Street, named and known as the 'Star Grill,' together with all equipment, fixtures, trade fixtures, including tables, chairs, stools, counters, partitions, dishes, cooking, kitchen, table and

restaurant equipment therein, all stock in trade and supplies on hand of every kind, and the lease under which said seller occupies said premises, and also the good will of said business; for and at the agreed purchase price of Two Thousand (\$2,000.00) Dollars, lawful money of the United States, said purchase price to be paid as follows, to-wit, Five Hundred (\$500.00) Dollars, cash, upon the execution of this agreement, receipt of which is hereby acknowledged by said seller, and the balance of the said purchase price to be paid as follows: all present existing indebtedness of said business, including the mortgage now thereon and outstanding bills, shall first be paid and satisfied by said buyers, and said buyers hereby agree to and do assume and agree to pay all such indebtedness as soon as it is possible for them to do so; and when said indebtedness is paid said buyers shall pay the said seller the sum of One Hundred (\$100.00) Dollars per month on the first day of each and every month until said balance of said purchase price herein named is fully paid and discharged, it being agreed that no interest shall be paid thereon.

"It Is Further Agreed that upon the payment to said seller in full of the purchase price herein named, said seller will execute and deliver to said buyers, or their successors, a good and sufficient bill of sale transferring to said buyers all the property herein agreed to be sold.

"It Is Further Agreed that said buyers shall take immediate possession upon the execution of this agreement and shall retain possession of said premises and business and conduct and carry on the same as and for their own business from date hereof, so long as they comply with the terms of this agreement. Said seller is hereby released by said buyers from all indebtedness on said business herein mentioned and said buyers hereby agree to hold him harmless from any further liability thereon. An itemized list of the indebtedness herein referred to and which said buyers have assumed and agreed to pay has been this day agreed on and approved, attached hereto and made a part hereof.

"In Witness Whereof the parties hereto have hereunto set their hands.

"G. Petropoulos.

"Party of the first part,

"Seller.

"G. N. Georgelas.

"Parties of the second part,

"Buyers."

Prior to the transfer to defendant, Georgelas had defaulted in deferred payments due on the contract purchase price, and on the 1st of February, 1928, and shortly prior to the adjudication in bankruptcy, the defendant procured from Petropoulos the following instrument of assignment of agreement of sale of December 9, 1925:

"Assignment of Agreement.

"For valuable and sufficient consideration to me in hand paid, I, George Petropoulos of the City of San Bernardino, County of San Bernardino, State of California, hereby sell, assign and transfer to Henning Loock of said city, all my right, title and interest in and to the annexed agreement of sale dated the 9th day of December, 1925, by and between George Petropoulos as party of the first part and G. N. Georgelas and George G. Simon as parties of the second part.

"In Witness Whereof, I have hereunto set my hand this first day of February, 1928.

"G. Petropoulos."

To which above assignment was attached the agreement of purchase and sale between Petropoulos and Georgelas, hereinbefore set out.

On the same date Petropoulos also executed to the defendant a bill of sale in words and figures as follows:

"Bill of Sale.

"For a valuable and sufficient consideration to me in hand paid, I, George Petropoulos of the city of San Bernardino, County of San Bernardino, State of California, hereinafter designated the Seller, do hereby sell, assign, transfer and set over to Henning Loock, of said City, hereinafter designated the Buyer, and to his heirs and assigns, all that certain personal property situate in said city more particularly described as follows, to-wit:

"That certain restaurant and cafe business now owned, conducted and carried on in said city of San Bernardino, at No. 695 Third Street, in said city, named and known as the 'Star Grill,' together with all equipment, fixtures, trade fixtures, including tables, chairs, stools, counters, partitions, dishes, cooking, kitchen, table and restaurant equipment therein, all stock in trade and supplies on hand of every kind, and the lease under which seller occupies said premises, and also the good will of said business.

"In Witness Whereof, the seller has hereunto set his hand this 1st day of February, 1928.

G. Petropoulos."

On February 3, 1928, the defendant obtained from Georgelas the following instrument, releasing and abandoning any right he might have under and by virtue of the sales agreement with Petropoulos of December 9, 1925:

"Be It Known, that I, G. N. Georgelas have abandoned and do hereby abandon all my right or rights under and by virtue of that certain agreement of sale dated December 9th, 1925, by and between George Petropoulos as seller and G. N. Georgelas and George G. Simon as buyers; that I have acquired all the right, title and interest of the said George G. Simon in and to said agreement and arising out of the same by virtue of an assignment duly executed and delivered

by the said George G. Simon to me, and that I have surrendered up and do hereby surrender up to said George Petropoulos and his assigns the right to the possession to all that certain personal property described in said agreement of sale; and I hereby release said George Petropoulos and his assigns from any and all obligations whatsoever, arising out of said agreement of sale.

"Dated this 3rd day of February, 1928.

"G. N. Georgelas."

It is under the foregoing assignment and bill of sale from Petropoulos and release and quitclaim of Georgelas that appellant bases his claim of title unaffected by the bankruptcy proceedings on said restaurant and equipment, or at least to such part thereof as was covered by the original sales contract between Petropoulos and Georgelas.

[1] It seems clear, if Petropoulos, under the agreement of December 9, 1925, retained title to the property and premises therein described, subject to the right to repossess himself of the same upon default of Georgelas in complying with the conditions of the agreement and meeting the stipulated payments, that he had a vendable title to the property, which at the time of the transactions in question with defendant, he had a right to transfer to the latter, and which the defendant had a right to acquire.

If Petropoulos would have had a right to claim this property in the bankruptcy proceedings as against the bankrupt's creditors, it was a right which he could immediately transfer to a third party, and which a third party could properly acquire.

[2, 3] The trial court in effect finds from its construction of the sales agreement of December 9, 1925, and the finding rests wholly on the interpretation of this agreement, that the transaction was a sale, and that Georgelas became the owner of this property.

We do not think that this finding can be sustained. It appears, on the contrary, from the terms of the instrument itself, that it was the intention of the parties that title was not to pass to the purchaser until full payment had been made of the stipulated consideration, and a bill of sale executed to the purchaser.

The instrument is not in terms denominated an instrument of sale. It expressly stipulates that "the seller has *agreed*, and does hereby *agree* to sell, transfer, assign, convey and set over" the property in question.

It is further agreed "that upon the payment to said seller in full of the purchase price herein named, said seller will execute and deliver to said buyers or their successors, a good and sufficient bill of sale, transferring to said buyers all the property herein agreed to be sold."

And further, the provision with reference to vendee's possession is inconsistent with an intention to make a present transfer of title. The agreement recites "that said buyers shall

take immediate possession upon the execution of this agreement, and shall retain possession of said premises and business and conduct and carry on the same as and for their own business, from date hereof, so long as they comply with the terms of this agreement."

It is true that the sales agreement contains no express retention of title, or words of surrender or cancellation in event of default in payments, but it has been repeatedly held in this state that whether or not a contract of this character is one of conditional sale, reserving the title in the seller, or one transferring title to the buyer, is primarily a question of intention. The well-settled rule is stated in 22 California Jurisprudence, p. 942, as follows: "A question as to the passing of title is to be determined by reference to the showing as to the intention of the parties."

And again at page 948: "Words of transfer or conveyance in the present or past tense, i. e., 'sells' or 'sold' not 'agrees to sell,' while not conclusive of the question as to whether the parties contemplated a consummated sale will, it seems, be held to be determinative, unless their force and effect is overcome by other provisions of the instrument."

In *Kohler v. Hays*, 41 Cal. 455, 458, the court uses this language with reference to the significance of providing for a subsequent bill of sale: "The provision for the giving of a bill of sale, upon the payment of the price of the piano, indicated that it was not the intention of the parties that the title should pass upon the making of the agreement."

To the same effect, in *McArthur, etc., v. Hagihara*, 22 Ariz. 100, 194 P. 336, 337, 13 A. L. R. 1038, it is said: "The provision in the contract that when the purchase price is paid in full, a bill of sale will be given is utterly inconsistent with the claim that the title was to pass when the agreement was made or that there was an absolute sale. * * *" (With citations.)

In *Potts Drug Co. v. Benedict*, 156 Cal. 322, 104 P. 432, 435, 25 L. R. A. (N. S.) 609, where the question was as to whether the parties agreed upon a present unconditional transfer, the court says: "Their intention in this regard is to be here ascertained from the written instruments duly executed and delivered. 'The agreement is just what the parties intended to make it. If that intention is clearly and unequivocally manifested, *cadit questio*.' Benjamin on Sales, § 309. In *Elgee Cotton Cases*, 22 Wall, 180, 187, 22 L. Ed. 863, it was said by the United States Supreme Court: 'It must be admitted there is often great difficulty in determining whether a contract is itself a sale of personal property so as to pass the ownership to the vendee, or whether it is a sale on condition, to take effect or be consummated only when the condition shall be performed, or whether it is a mere agreement to sell. It is doubtless true that whether the property passes or not is depend-

ent upon the intention of the parties to the contract, and that intention must be gathered from the language of the instrument.' "

Section 1140 of the Civil Code provides that "the title to personal property sold or exchanged, passes to the buyer whenever the parties agree upon a present transfer, and the thing itself is identified, whether it is separated from other things or not."

[4, 5] The evidence shows that Georgelas was in default in his payments, and that nothing had been paid under this contract since December, 1927, and that upwards of \$575 was due and unpaid.

The trustee succeeded to no greater rights in the bankrupt's property than the bankrupt himself had, and even if either the bankrupt or the trustee had the right to be relieved from default in payment by a tender of the amounts due, there is nothing to indicate that either at any time tendered any balance due under the contract, to either Petropoulos or the defendant here, his assignee.

The defendant Loock did not acquire his claim of title to this property from Georgelas. He acquired it, if at all, under the assignment and bill of sale from Petropoulos. The instrument executed by Georgelas is not, and does not purport to be, a transfer or assignment either to Petropoulos or the defendant. It is in express terms, merely a release or quitclaim of any claim of right under the sales agreement which he might have despite his default.

The rule is stated in 7 Corpus Juris, p. 123, as follows:

"In case of property sold to the bankrupt and not paid for, the trustee takes no title, if the conditions or circumstances of the sale were such that title did not pass to the bankrupt, but if title actually passed, the fact that the property was not paid for does not prevent the trustee from taking title.

"Where the contract was one of conditional sale the reservation of title in the seller until payment for the property is made, will prevent the title from passing to the trustee, although the goods were in the possession of the bankrupt."

The text, as thus stated in Corpus Juris, is sustained by the authorities cited.

In *Bryant v. Swofford Bros.*, 214 U. S. 279, 291, 29 S. Ct. 614, 618, 53 L. Ed. 997, where the bankrupts prior to adjudication returned to the seller goods which they were purchasing under conditional sales contract, the court found that "the trustee has no higher rights in this regard than the bankrupt. * * * It follows that, so far as the identified goods * * * are concerned, * * * the dry goods company, must prevail."

It is held in *Zartman v. First National Bank*, 216 U. S. 134, 30 S. Ct. 368, 369, 54 L. Ed. 418, that, "The trustee takes the property of the bankrupt, not as an innocent purchaser, but as the debtor had it at the time of the petition, subject to all valid claims, liens, and equities."

In the case of *In re Rosenbloom* (D. C.) 280 F. 139, 141, certain goods had been sent to a dealer on consignment to be resold. Within four months prior to the dealer's adjudication in bankruptcy, the parties to the transaction had a settlement, and it was agreed that the dealer should hold the goods on hand in storage for the seller. The court held that the trustee in bankruptcy had no right to these goods, and in the opinion says:

"In view of the considerations hereinafter pointed out, it becomes unnecessary to determine whether the agreement involved was one of absolute sale with an attempted retention of title, operating as a chattel mortgage lien, in the petitioner, a contract of conditional sale, with title remaining in the petitioner until resale by the bankrupt, or an arrangement of pure agency. As this agreement, valid between the parties thereto and based upon a present consideration, was mutually settled and rescinded by such parties before the filing of the petition in bankruptcy, that settlement, by which the petitioner received and accepted his own property, was also for a present consideration. * * *

"It cannot be successfully contended that the result of this settlement was to effect a voidable preference in favor of the petitioner. The contract under which the goods were delivered to the bankrupt having been made prior to the statutory four months period before bankruptcy, for a present consideration, and the rights of the parties with respect thereto being valid and enforceable as between them, the surrender of possession of this property was merely a delivery thereof to its owner, to which the latter was entitled, and was not a transfer by the bankrupt of his property to one of his creditors, and hence such transfer did not constitute a preference." (With numerous citations.)

In *Illinois, etc., Co. v. Goldman* (C. C. A.) 257 F. 300, 301, where the buyer obtained goods on credit through fraudulent representations, and later voluntarily transferred his accounts to the seller in payment thereof, the court said: "But on June 9th appellant concededly had a right to rescind the fraudulent sales and to recover back such of the goods as were then in the bankrupt's possession. Clearly a return of these goods would not be a preference; to the extent of their value, payment could no more effectuate a preference; neither transaction would diminish the estate to which bankrupt was then entitled. That appellant did not expressly assert a right of rescission is immaterial; it relinquished that right in confirming the sale; it then gave up a property interest equal to the value of the goods then on hand. To that extent the transfer was for a present consideration, and not preferential."

Under the transaction involved here, Petropoulos was entitled to possession of the property of the Star Grill covered by his sales contract because of the default of Georgelas in

payment of the instalments due. This interest in the premises he had a right to transfer and did transfer to the defendant who was placed in his shoes in the matter of taking and holding possession.

In *Liver v. Mills*, 155 Cal. 459, 101 P. 299, 300, where the owners of an automobile had made a contract of conditional sale thereof, it is held that when a contract for the sale of personal property expressly reserves title in the vendors until the purchase money is paid, the title carries with it the right of possession in case of default, though such contract does not contain the usual provision to that effect. "The purchasers had no right of possession, except that given them by the contract, which must be construed as authorizing them to retain possession only so long as they should comply with the conditions required to be performed by them."

The same rule is expressed in *Los Angeles, etc., Co. v. Hansen*, 46 Cal. App. 5, 8, 188 P. 292.

In *Hart v. Emmerson, etc., Co.* (D. C.) 203 F. 60, 62, the trustee brought suit to recover property or its value upon the ground that it had been transferred to the seller by the bankrupt as a preference under the bankrupt law. The court says: "In the case here presented the conditional vendor reclaimed its goods under a title which was superior to that of its conditional vendee, and as, at the time of the transaction, the return of the property was a lawful and valid act as between the parties, and as the rights of no creditor had then attached, it would seem clear upon principle that the transaction cannot be successfully assailed by one who is subsequently vested with the rights of a judgment creditor. (Citing authorities.) The same considerations lead me to the conclusion that the return of the goods cannot properly be treated as a preferential transfer, for the defendant took back the property under the assertion of a paramount title, and did not take it as a creditor for application upon a debt."

In *Jennings v. Swartz*, 86 Wash. 202, 149 P. 947, 949, a conditional seller repossessed property sold prior to the buyer's adjudication as a bankrupt, and the court says: "The vendee never complied with the contract of purchase, and therefore did not acquire title. The trustee in bankruptcy obtained no more interest in the boiler than the vendee had at the time of the adjudication in bankruptcy."

We are satisfied that the weight of authority sustains the proposition that title to the original restaurant plant, as covered by the Petropoulos sales contract, remained in Petropoulos, and that the relinquishment by the bankrupt of any claim to said property did not constitute a transfer direct to Petropoulos or his successor in interest, the defendant. Even though Georgelas might have relieved himself of his default in failing to make the deferred payments, as required by his contract, by tendering the amounts due thereon,

he did not elect to do so. On the contrary, by his declaration of release and abandonment, he notified Petropoulos and his assigns that he relinquished all right to consummate his contract of purchase. This cannot be construed as a transfer. It did not invest either Petropoulos or the defendant Look with any new interest or ownership. It was merely a surrender, or letting go, a waiver of any personal claim under the contract, to the property in question. Had Georgelas had title to this property at the time of this release, it doubtless by way of quitclaim, would have divested him of such right. Not having title, and right of possession having become subject to forfeiture by his default in meeting the conditions of his contract, he had nothing to transfer, and no interest that could pass to the trustee in bankruptcy.

Our conclusion is that, to the extent at least of the restaurant property covered by the original sales agreement of December 9, 1925, the defendant did not acquire the same from the bankrupt, and the plaintiff as trustee for the bankrupt estate was not entitled to recover its value from defendant. The goods thus affected are described in the sales contract as follows: "That certain restaurant and cafe business now owned, conducted and carried on in said city of San Bernardino, at 659 Third Street, named and known as the Star Grill, together with all equipment, fixtures, trade fixtures, including tables, chairs, stools, counters, partitions, dishes, cooking, kitchen, table and restaurant equipment therein; all stock in trade and supplies on hand of every kind, and the lease under which the seller occupies said premises, and also the good-will of said business, for an agreed purchase price of \$2,000.00."

Respondent, however, calls attention to the fact that not all of the restaurant property involved in this action, and of which defendant came into the possession, was covered by the Petropoulos sales contract, and contends that the valuation of \$3,000, found by the trial court against defendant, was upon portions of the restaurant equipment belonging to Georgelas, exclusive of the Petropoulos agreement.

This additional equipment of the restaurant concededly was to some extent acquired by Georgelas from other vendors, under conditional sales contracts, in which title was reserved to the sellers and had never vested in the bankrupt. The evidence in the record indicates that the defendant Look acquired this additional property by assignment from the original vendors after they had repossessed themselves of the property upon default of the vendees.

The finding upon which the recovery of \$3,000 from defendant rests is "that said restaurant equipment, stock fixtures and other articles, including dishes, silverware and supplies which at the time belonged to George Nick Georgelas at said Star Grill, was of

the reasonable value of the sum of \$3,000.00, over and above contract interests of other parties, covering a portion of the property of said Star Grill."

This finding leaves in extreme uncertainty, just what portion of the restaurant and equipment was by the court included in this \$3,000 valuation, and as to what portion was considered as covered by contract interests of other parties. If the amount of the judgment was based upon a valuation of the property included in the Petropoulos contract, it was erroneous; and that the valuation did include this portion of the restaurant equipment is indicated by the further words of the finding "that upon said third day of February, 1928, at which time said defendant obtained possession of said property, he also obtained a purported transfer or waiver from George Nick Georgelas, transferring the property to him as payment upon, or in cancellation of the claim of said defendant against said George Nick Georgelas, and without any further consideration therefor, and that, at the time, said defendant well knew and had reasonable cause to know, that said defendant (bankrupt) was insolvent, and that enforcement of said transfer would effect a preference."

Since the complaint in this action alleges this purported transfer or waiver as the gist of plaintiff's cause of action, and in view of the fact that such purported transfer or waiver related solely to the original Petropoulos agreement of December 9, 1925, the conclusion cannot be avoided that the trial court included the property acquired under that agreement, in fixing the amount to be recovered from defendant.

The evidence doubtless shows that there was property included in this restaurant equipment and belonging to the bankrupt, and which came into the hands of defendant, which was not covered by the various contract agreements referred to; but the extent or value of the same is not sufficiently shown to justify the finding of a valuation of \$3,000 thereon.

Appellant claims that this possession of this last-described property was rightfully obtained by him under the terms of a chattel mortgage assigned to him by the mortgagee; but we think it sufficiently appears that this mortgage was invalid as to creditors of the bankrupt, by reason of failure at the time of its execution, to comply with the provisions of section 3440 of the Civil Code in giving notice of intention to execute the same.

Without ruling on this point, we are disposed to disregard defendant's claim of right of possession under this mortgage, but for other reasons hereinbefore stated the judgment is reversed.

We concur: BARNARD, J.; MARKS, J.

103 Cal. App. 140

COLEY v. WOLCOTT. (Civ. 7057.)

District Court of Appeal, First District, Division 2, California. Jan. 10, 1930.

1. Appeal and error $\S$ 907(3)—On appeal on judgment roll, findings are presumed supported by evidence.

Where appeal is on judgment roll and evidence is not before reviewing court, presumption must be indulged that there was evidence before trial court sufficient to support all findings.

2. Pleading $\S$ 409(3)—Findings for defendant held not in conflict with admissions of answer, where answer was uncertain or ambiguous and no demurrer was filed (Usury Law).

As against contention that findings for defendant were in conflict with admissions of answer in action to recover under Usury Law (St. 1919, p. lxxxiii), defendant's answer that agreement was in certain words and figures "and not otherwise," but also pleading facts to supplement and explain writing, *held* uncertain or ambiguous, and any objection on that ground was waived by failure to demur.

3. Appeal and error $\S$ 907(3)—Claim that certain findings were outside issues held foreclosed by appealing on judgment roll alone.

Claim that certain findings were outside issues *held* foreclosed by appealing on judgment roll alone, since, in absence of evidence, reviewing court must presume findings, even though outside issues, were supported by evidence, and hence that issue, though not made by pleadings, was tendered at trial.

4. Usury $\S$ 115—In action under Usury Law, written agreement by parties held not so unambiguous as to preclude evidence showing transaction joint venture and not loan (Civ. Code, $\S$ 1647; Code Civ. Proc. $\S$ 1856, 1860).

In action to recover treble amount of interest paid for use of money alleged to be in violation of Usury Law (St. 1919, p. lxxxiii), written agreement between parties *held* not so unambiguous as to preclude introduction of evidence, under Civ. Code, $\S$ 1647, and Code Civ. Proc. $\S$ 1856, 1860, to show that transaction was not loan but joint venture, and did not violate Usury Law.

5. Usury $\S$ 72—Contract subject to two constructions, one of which will render it usurious, will be construed lawful, in absence of evidence showing it usurious.

While court will tolerate no subterfuge to evade Usury Law and will admit evidence showing contract fair on face is nevertheless disguise for usurious transaction, it is equally true that contract subject to two constructions, one of which will render it usurious and one of which will render it lawful, will be construed lawful, in absence of other evidence requiring it to be construed as usurious.

Appeal from Superior Court, Alameda County; J. J. Trabucco, Judge.

$\S$ For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

Action by J. A. Coley against H. E. Wolcott to recover treble the amount of interest paid for use of money alleged to be in violation of the Usury Law. Judgment for defendant, and plaintiff appeals. Affirmed.

J. L. Smith, of San Francisco, for appellant.

David D. Oliphant, Jr., of Oakland, for respondent.

DOOLING, Justice pro tem. Appellant sued to recover treble the amount alleged to have been paid to respondent as interest for the use of money in violation of the statute against usury. St. 1919, p. lxxxiii.

The parties entered into a contract in writing in the following language:

"Oakland, California, May 4, 1925.

"This memorandum of agreement made and entered into this day by and between H. E. Wolcott and J. A. Coley, witnesseth:

"That whereas H. E. Wolcott has this day entered into an agreement with the Bank of Alameda to redeem from foreclosure sale at an expense of \$8425.75 that certain land described as follows: Located in the County of Contra Costa, State of California, and being

"The Northeast one-quarter ($\frac{1}{4}$) of Section Thirty-four (34), township one (1); Range Two (2) East; M. D. B. & M.'

"Therefore said H. E. Wolcott is to have for security for the money so paid to the Bank of Alameda and for security for interest on the same at seven per cent. (7%) per annum, compounding semi-annually, a Deed to the following described land:

"Lot 1 and 2 of the Northwest Quarter (N W $\frac{1}{4}$) the East (E) half ($\frac{1}{2}$) of the Northwest (NW) quarter ($\frac{1}{4}$) the East (E) half ($\frac{1}{2}$) of the Southwest (SW) quarter ($\frac{1}{4}$) and all of the Southeast (SE) quarter ($\frac{1}{4}$) of Section 7, all in Township 16 North (N), Range 8 East (E), M. D. B. & M. excepting from this conveyance, however, all of the lands heretofore conveyed by D. F. Norton to J. E. Taylor, in deed dated August 9th, 1909, and recorded in Book '109' of Deeds, Page '478,' records of the County of Nevada, State of California, to which records special reference is made for a full and particular description, with a Certificate of Title showing a good title in said H. E. Wolcott, subject only to an encumbrance of \$2,250.00 which can remain for at least one year. J. A. Coley to keep the interest and taxes on both properties paid, and the mortgage on said second piece satisfied.

"It is further agreed that all expense that said H. E. Wolcott may be put to in connection with said properties, shall be added to the principal investment and bear a like rate of interest.

"H. E. Wolcott to convey both properties herein described upon receipt by him, first, of the entire amount invested in same together with all expenses and interest as above stated; Second, of one-half of the differences between the net receipts and the gross costs to

him of the said Contra Costa property; or to convey the Nevada County property, upon the receipt of \$4,000.00.

"It is especially agreed and understood that the conveyance of the above property to H. E. Wolcott is intended to convey title absolutely in fee simple and that no foreclosure or suit in Court shall be necessary to complete ownership, and that unless said H. E. Wolcott shall within two years from date hereof be reimbursed as herein above provided, both of said properties shall be considered his without restrictions or claims whatsoever by J. A. Coley who hereby specifically waives any and all claim to same.

"H. E. Wolcott,
"J. A. Coley."

The Contra Costa county property was later sold for \$16,000, and, if the transaction between the parties was a loan and the profits realized by the respondent were received as interest thereon, the Usury Law (St. 1919, p. lxxxiii) was violated.

The trial court found "that the transaction between the plaintiff and said defendant Wolcott, referred to in the pleadings on file herein, did not originate in a negotiation for a loan; that the plaintiff did not on or prior to May 4, 1925, apply to the defendant for a loan; that the transaction between the parties was in the nature of a joint adventure with respect to said Contra Costa County property in which the plaintiff furnished the information and some time, thought and services to the sale of said property and in which the defendant Wolcott was to furnish the money and was to give some of his time, thought and services to the venture, and the parties were to divide any profits made and the defendant Wolcott as and for an additional share in the profits was to receive seven per cent. per annum on the money invested in said venture. That it is true that in addition to investing the necessary funds in said venture the defendant Wolcott did expend time, labor and services upon said Contra Costa County property, and upon said venture of the parties, and in an effort to effect a sale of said property."

The court also found the allegations of certain designated paragraphs of the answer to be true, including paragraph IX, reading as follows:

"This defendant alleges that on and prior to May 4, 1925, the Contra Costa County property described in the complaint on file herein was owned in fee simple absolute by The Bank of Alameda, a California corporation, and that on and prior to said May 4, 1925, the plaintiff J. A. Coley stated and represented to this defendant H. E. Wolcott that said Contra Costa County real property could be purchased and acquired from said The Bank of Alameda for about \$8,000.00 and that in the opinion of J. A. Coley it could be resold for a price in excess of \$8,000.00, and

that a substantial profit could be made, and said J. A. Coley further stated and represented to this defendant that he, said plaintiff did not have the money with which to buy said property from The Bank of Alameda, but that if the defendant H. E. Wolcott should buy said property from said The Bank of Alameda a resale could be effected and a profit could be made and that after H. E. Wolcott had deducted the amount of money paid by said H. E. Wolcott for said property, and any and all expenses or costs of the transaction and one-half of the net balance remaining and interest at seven per cent. on the amount invested, then the balance remaining should be paid to J. A. Coley as compensation for the information.

"That thereupon and on May 4, 1925, the plaintiff and this defendant pursuant to said representations of the plaintiff entered into that certain agreement in writing between the parties hereinabove in paragraph II set out, to which said agreement reference is hereby made and same is to be deemed incorporated herein by reference. That after the execution of said agreement this defendant H. E. Wolcott did buy said Contra Costa County property from said The Bank of Alameda, and said The Bank of Alameda did convey to and did grant, bargain and sell said Contra Costa property to this defendant H. E. Wolcott for the sum of \$8,454.40, and that upon such sale by said The Bank of Alameda to said H. E. Wolcott, he, the said H. E. Wolcott, became the owner in fee simple absolute of all right, title and interest in and to said Contra Costa County property subject, however, to the rights of the plaintiff J. A. Coley to receive from the defendant H. E. Wolcott one-half of the profit made on the sale of said property by said H. E. Wolcott, less seven per cent. interest on said money invested as hereinabove alleged."

[1] As conclusions of law, the court found that the transaction was not a loan, but a joint venture, and that it did not violate the Usury Law, and accordingly ordered judgment for the defendant. The appeal is on the judgment roll, and, since the evidence is not before us, the presumption must be indulged that there was evidence before the trial court sufficient to support all the findings.

Appellant, however, contends: (1) That the findings above quoted are in conflict with the admissions of the answer; (2) that the contract is plain and unambiguous and on its face shows that it was a contract for the lending or forbearance of moneys, and (3) that the finding that respondent, Wolcott, gave time, labor, and services to the care and sale of the property is outside the issues.

[2] The first contention is based upon an allegation of the answer "that said agreement and each and every part thereof was in writing * * * and * * * was in the words and figures following, to wit, and not

otherwise," which allegation was followed in *hac verba* by the writing quoted in this opinion. From this appellant argues that respondent is bound by these allegations, and that, since their effect is that the entire contract is fully expressed in the writing, it was error to admit any evidence to supplement or explain it. In this appellant too narrowly construes the effect of the pleading. In the same answer, in paragraph IX, above quoted, respondent pleaded facts to supplement and explain the writing. No demurrer was interposed by appellant to this answer. If it be conceded that the effect of these allegations with regard to the written instrument, standing alone, would be, as contended by appellant, to foreclose any evidence outside the contract to supplement or interpret its language, those allegations did not stand alone. They were accompanied in the same pleading by other allegations which were intended to explain the writing. This, at most, rendered the pleading uncertain or ambiguous, and any objection to it on that ground was waived by appellant's failure to demur.

[3] Appellant's claim that certain findings are outside the issues is foreclosed by his appealing on the judgment roll alone. In the absence of the evidence, this court must presume that the findings, even though outside the issues, are supported by evidence introduced without objection, and hence that the issue, although not made by the pleadings, was tendered at the trial. *Turner v. Stock*, 79 Cal. App. 662, 666, 251 P. 814; *Fighiera v. Radis*, 180 Cal. 660, 663, 182 P. 418; *Peck v. Noee*, 154 Cal. 351, 354, 97 P. 865; *Illinois T. & S. Bank v. Pac. Ry. Co.*, 115 Cal. 285, 296, 47 P. 60; *Swallow v. Francisco*, 73 Cal. App. 692, 239 P. 95.

[4] This leaves as the sole remaining point to be determined whether the written agreement of the parties is complete upon its face and unambiguous so as to preclude the introduction of any evidence to supplement it or explain its meaning.

No place in the written agreement is there any express language designating the transaction as a lending of money nor any promise on the part of appellant to pay the principal sum to respondent. But appellant argues that the language of the agreement is inconsistent with any other construction. Without analyzing the writing in detail, we are satisfied that its language is not such as to compel this interpretation. In its last paragraph it squarely negatives the idea that it is intended as a mortgage. That language is apparently a deliberate attempt to express the idea that Wolcott is to have title absolutely with a right in appellant to one-half of any profits realized from a sale of the property if made within two years from the date of the agreement. Certainly the writing leaves in doubt the true intention of the parties, and the court was justified in taking other evidence to aid it in arriving at its meaning.

Civ. Code, § 1647; Code Civ. Proc. §§ 1856, 1860; *Heslin v. Lapham*, 77 Cal. App. 137, 246 P. 150; *Shelley v. Byers*, 73 Cal. App. 44, 55, 238 P. 177; *Los Angeles City High School Dist. v. Quinn*, 195 Cal. 377, 383, 384, 234 P. 313; *Petroleum Midway Co., Ltd., v. Moynier* (Cal. Sup.) 272 P. 740.

[5] While courts will tolerate no subterfuge designed to evade the Usury Law, and will always admit evidence to show that a contract fair on its face is nevertheless a disguise for a usurious transaction, it is equally true that, if a contract is subject to two constructions, one of which will render it usurious and therefore unlawful and one which will render it lawful, the courts, in the absence of other evidence requiring the contract to be construed as usurious, will give it such a construction as will render it lawful. *Shelley v. Byers*, 73 Cal. App. 44, 57, 238 P. 177; *Cobb v. Hartenstein*, 47 Utah, 174, 152 P. 424, 427; *Ohio Inv. Co. v. Brown*, 89 Kan. 66, 130 P. 665; *Lusk v. Smith*, 71 Kan. 550, 81 P. 173; *German Sav. Bldg. & Loan Ass'n v. Leavens*, 89 Wash. 78, 153 P. 1092; *Martin v. Oklahoma State Bank*, 86 Okl. 113, 206 P. 824; *Foreman v. Needles*, 78 Okl. 105, 188 P. 1087.

In this case, the written agreement not being clear on its face as to the true nature of the transaction between the parties, the trial court was justified in resorting to extrinsic evidence to arrive at its proper construction.

Judgment affirmed.

We concur: **NOURSE, Acting P. J.**
STURTEVANT, J.

103 Cal. App. 195

**B. F. SCHLESINGER & SONS v. KOHLER
& CHASE.** (Civ. 7064.) ★

District Court of Appeal, First District, Division 2, California. Jan. 16, 1930.

Rehearing Denied Feb. 14, 1930. Hearing Denied by Supreme Court March 17, 1930.

1. Contracts ⇨221(3)—Clause in contract to operate department in store, requiring store to give notice of delinquent accounts, held not condition precedent to lessee's obligation to repurchase delinquent accounts.

Clause in contract, renting space in department store to conduct music department and requiring store to carry installment and charge accounts of that department, providing that department store shall give lessee notice of any delinquencies within 30 days following date thereof, held not condition precedent, but merely covenant, failure to perform which did not excuse performance by lessee of contract obligation to repurchase delinquent accounts.

2. Contracts ⇨221(1)—Condition precedent distinguished from covenant.

Distinctive feature of covenant in contract which distinguishes it from condition precedent is that, when it goes only to part of consideration, nonperformance is not a defense if breach of covenant may be paid for in damages.

3. Appeal and error ⇨931(4)—Absent proof of damage resulting from breach of covenant pleaded, appellate court must assume trial court impliedly found no damage was sustained.

In action to recover balance due under written contract to operate concession in department store, where defendant pleaded breach of covenant but did not make any proof regarding damages sustained by reason thereof, appellate court must assume on defendant's appeal from judgment that trial court impliedly found no damage was sustained by breach.

4. Accord and satisfaction ⇨11(1)—Compromise and settlement ⇨5(2)—Department store's acceptance of specified sum in full for disputed rental claims under contract held to constitute "accord and satisfaction" (Civ. Code, §§ 1521-1523).

Where controversy existed over amount of rental due under contract to operate music concession in department store, department store's agreement in writing to accept in full for all claims for rent specified amount, which was paid and received by it, held to constitute "accord and satisfaction" under contract within meaning of Civ. Code, §§ 1521-1523.

[Ed. Note.—For other definitions, see Words and Phrases, First, Second, and Third Series, Accord and Satisfaction.]

5. Corporations ⇨426(10)—Corporation accepting benefits of accord and satisfaction entered into by manager, and not repudiating acts, held estopped to subsequently contend manager was unauthorized (Code Civ. Proc. § 1963, subd. 20).

Where corporation accepted benefits of accord and satisfaction entered into by its active head and manager in ordinary course and conduct of corporate business, and did not at any time repudiate his acts, corporation held estopped to subsequently contend manager had no authority to enter into accord and satisfaction, in view of Code Civ. Proc. § 1963, subd. 20, raising disputable presumption that ordinary course of business has been followed.

Appeal from Superior Court, City and County of San Francisco; **Edmund P. Mogan**, Judge.

Action by **B. F. Schlesinger & Sons** against **Kohler & Chase**. Judgment for plaintiff, and defendant appeals. Reversed, with direction to modify judgment.

A. E. Shaw, of San Francisco, for appellant.

Dunne, Dunne & Cook, of San Francisco, for respondent.

NOURSE, J. Plaintiff sued to recover the balance claimed to be due under a written contract. The cause was tried before the court sitting without a jury and resulted in a judgment for plaintiff in the sum of \$8,160.77. Defendant has appealed upon type-written transcripts.

The plaintiff corporation operated a depart-

ment store in the city of Oakland under the name of "Kahn's"; the defendant corporation operated a music store in San Francisco. In the contract hereafter referred to the plaintiff was mentioned as "Kahn's," "Kahn Bros.," and "Schlesinger's"; and the defendant is referred to as the "Music Company."

The contract was duly executed by the two corporations on May 1, 1925. At that time a music department was being operated in Kahn's by one Jessen. This concession was sold by Jessen to defendant, and the latter retained Jessen as salesman in charge, or manager of sales. At the instance of plaintiff the contract of May 1, 1925, was executed providing that the Music Company should operate its department "wholly under the supervision of Kahn's, and, so far as the public is concerned, as an integral department of Kahn's." Space in the store was leased to the Music Company for a period of five years, the lease being subject to termination by either party on January 1, 1926. The Music Company agreed to pay as rental for the space, and in consideration of Kahn's carrying the installment and charge accounts, a sum equal to 12½ per cent. of the total net sales of the department. If the rental as so computed shall not have amounted to \$12,500 for the six months' period commencing July 1, 1925, the Music Company was to make up the difference so that the rental for the six months' period should equal that amount. The Music Company was required to pay all its employees in the department and to expend at least 5 per cent. of its net sales in newspaper publicity. The Music Company agreed to hire all its employees through Kahn's subject to the latter's control and supervision. These employees were to be paid by Kahn's and the payments charged to the Music Company's account.

The arrangement by which Kahn's purchased and carried the installment and charge accounts of the department is found in the following language of the contract: "Kahn's shall purchase and carry the instalment contract accounts and charge accounts of the department. If any instrument covered by an instalment contract shall be taken in exchange or revert, or for any reason an account fails to meet four (4) consecutive monthly payments and becomes uncollectible in the opinion of Kahn's, the unpaid balance of the principal shall be charged against The Music Company and deducted from the gross sales before figuring net sales. Following the termination of this agreement Kohler & Chase agrees to repurchase, for cash, any contract or account which fails to meet four (4) consecutive monthly payments and which Kahn's may deem uncollectible, paying therefor the unpaid balance of the principal less twelve and one-half per cent. (12½%). All of such contracts or accounts are to be assigned by Kahn's to The Music Company without recourse."

Payments and collections on open charge accounts of Kahn's were to be applied pro rata against the music department items and the other items of the account, all of which were to be handled in the same manner and form as Kahn's handled its own installment and charge accounts.

The contract was prepared in the usual form used by Kahn's in leasing space in its store; but, before its execution, there was inserted at the special request of defendant and for the purpose of enabling the defendant to investigate and assist in making collections of unpaid accounts, a clause which reads: "Kahn's shall give The Music Company notice of any delinquencies within thirty (30) days following the date thereof."

The issues as tried are simple. The contract and lease were terminated by mutual consent as of December 31, 1925. Soon thereafter representatives of the parties endeavored to adjust the accounts between them covering instruments which had been sold in the store and returned to defendant. On May 13, 1926, plaintiff billed defendant for \$1,044, being the amount then claimed to be due. On July 26, 1926, plaintiff's attorneys made demand on defendant for \$11,264.51 claimed to be due on the open accounts, and on October 6, 1926, this action was commenced by the filing of a complaint in which the sum of \$8,291.02 was claimed to be due upon the same accounts. After the complaint was filed, but before trial, defendant paid to plaintiff \$2,813.23, and prior to the date of judgment plaintiff had collected on outstanding accounts over \$1,300 of the amount sued for. Credit for some of these payments was given, and judgment on this issue went for plaintiff in the sum of \$4,006.95. The dispute between the parties on this issue relates to the liability of the defendant to reimburse plaintiff on the overdue accounts of sales which plaintiff had assumed to collect for defendant. It is the contention of the defendant that it is not liable for any overdue account, notice of the delinquency of which was not given defendant as stipulated by the contract.

The other issue involved relates to the claim for unpaid rental of the store space. The net sales in the defendant's department having fallen far below the amount anticipated, the 12½ per cent. deduction failed to reach the minimum of \$12,500 fixed as the rental for the first six months' period. It is the claim of defendant that it obtained oral consent of plaintiff to modify these terms of the contract, and that this change was executed for some time prior to the termination of the lease; that thereafter differences having arisen between the parties, a written accord and satisfaction was made and the amount then agreed on was paid by defendant and received by plaintiff. The plaintiff disputes the claim on the ground that the accord was unauthorized by the proper corporate officers and that the payment made thereunder

was not a satisfaction because other conditions were not complied with.

[1-3] On the first issue the parties split on the interpretation of the clause of the contract whereby plaintiff undertook to give defendant notice of each delinquency within 30 days after it occurred. The plaintiff insists that it is merely a covenant, and the defendant argues that it is a condition precedent to its obligation to repurchase the delinquent accounts.

We take the view that the clause is merely a covenant the failure to perform which did not excuse performance by defendant. The evidence is clear that plaintiff did not give notice of these delinquencies to defendant as required by the contract, but there is no evidence of any character tending to prove what, if any, damage the defendant suffered by reason of such failure of performance. One of the distinctive features of a covenant which distinguishes it from a condition precedent is that, when it goes only to a part of the consideration, nonperformance is not a defense if the breach of the covenant may be paid for in damages. *Ernst v. Cummings*, 55 Cal. 179, 183. Here the defendant pleaded that the clause was inserted in the contract in order that it might investigate the delinquencies and assist in making collections and that plaintiff's failure to give the required notice caused defendant damage. But the defendant did not make any proof of damage, and we must assume that the trial court impliedly found that no damage was suffered by plaintiff's breach.

Accordingly, defendant has had its day in court on the issue raised in the pleadings, and the judgment on this phase of the case must stand, with these exceptions: The judgment on the uncollected accounts is manifestly \$413.78 in excess of that shown by the evidence to be due, and the defendant is entitled to an assignment of all accounts which remain uncollected, or a credit on the judgment of all payments which have been collected by plaintiff subsequent to the trial. This portion of the judgment should therefore be modified so as to provide that the plaintiff shall recover the sum of \$3,593.17 upon these uncollected accounts instead of the sum of \$4,006.95, and that the plaintiff shall forthwith assign to the defendant the uncollected accounts to the amount of the judgment as modified, or, if any of said accounts have been collected in the meantime, then the judgment should be further reduced to that extent, taking into account in each instance the 12½% deduction provided for in the contract.

[4] The issue of unpaid rent was raised by plaintiff by amendment to its complaint some time after the litigation was started. It is merely an afterthought which has no foundation in equity or good conscience. On January 25, 1926, there existed between the parties a bona fide controversy as to their rights and obligations under the contract of May,

1925. This controversy related to the amounts due on uncollected accounts as well as to the amount due for rental of store space. It arose through plaintiff's failure to comply with the terms of the contract and through the oral modification of the terms relating to rental made in September, 1925. In the conference held in January, 1926, between the representatives of these parties, Mr. Schlesinger, acting for plaintiff, agreed in writing to accept in full for all claims for rental the sum of \$3,054.48, and this sum was paid and received by the corporation in full satisfaction of that claim. There was therefore a complete accord and satisfaction of the claim for rent under the contract within the meaning of sections 1521-1523 of the Civil Code.

In support of this portion of the judgment plaintiff argues that there was no satisfaction because the accord was made conditional upon the settlement of other claims which were not paid. The language of the agreement of January, 1926, upon which this argument is based, reads: "This settlement does not release you (defendant) from your obligation under the contract for outstanding accounts *any of which prove to be in arrears* or in which there is a loss we expect you to reimburse us as per contract." There are two answers to the argument: First, the settlement of these outstanding accounts is not a condition to the accord and satisfaction, but the clear meaning of this portion of the January agreement is that the parties *excepted* the outstanding accounts controversy from the settlement and intended the latter to be a complete settlement and adjustment of the rent issue alone. Second, the time for reimbursement of the outstanding accounts was not fixed in the January agreement and the stipulation in the January agreement that the settlement of these accounts "*which prove to be in arrears*" should be made "as per contract" could mean nothing more than that such payments should be made by the defendant when found due. This contingency has not yet arisen as has been shown heretofore. Even during the course of the trial it appeared that plaintiff had been and still was engaged in collecting these outstanding accounts—that in some cases actions had been brought by the plaintiff against the purchasers, that attachments had been levied, and that these cases were pending and unsettled, while from the date of the January agreement to the time of the trial on November 9, 1927, the plaintiff itself was unable to fix any definite amount which it should claim to be due on these accounts.

[5] We are not impressed with plaintiff's argument that the accord was ineffective because not specially authorized by its board of directors. All transactions, from the execution of the original contract in May, 1925, to the settlement in January, 1926, were conducted by Mr. Schlesinger, who was the active head and manager of the plaintiff corporation, and his acts of January, 1926, were

in the ordinary course and conduct of the business of the corporation. The corporation has not at any time repudiated any of these acts on the part of its manager, but, on the contrary, has accepted and retained all the benefits from these acts. It should not, therefore, be heard at this time to dispute the authority of Mr. Schlesinger to make the settlement. *Grummet v. Fresno, etc., Co.*, 181 Cal. 509, 513, 185 P. 388; *Code Civ. Proc.* § 1963, subd. 20; *Reardon v. Richmond Land Co.*, 21 Cal. App. 357, 131 P. 894; *Meister & Sons Co. v. Wood & Tatum Co.*, 26 Cal. App. 584, 587, 588, 147 P. 981.

For the reasons given the portion of the judgment which awarded plaintiff the sum of \$3,054.58 by way of rental is error and that amount is accordingly stricken therefrom.

The judgment is reversed, with directions to enter a modified judgment in favor of plaintiff in accordance with the views expressed herein, with costs of this appeal to appellant.

We concur: KOFORD, P. J.; STURTEVANT, J.

103 Cal. App. 117

TYLER et al. v. PARK RIDGE COUNTRY CLUB. (Civ. 52.)

District Court of Appeal, Fourth District, California. Jan. 8, 1930.

1. Corporations ⇨559(1, 4)—**Injunction** ⇨70 —Courts cannot either through receivership or by injunction prevent stockholders and directors from exercising powers conferred by them under by-laws.

Courts cannot either through a receivership or by injunction prevent stockholders and legally constituted directors of corporation from exercising powers expressly conferred on them under by-laws adopted by corporation for its government.

2. Receivers ⇨35(1)—**Order appointing receiver for country club on ex parte application and without notice held erroneous.**

Order appointing receiver for country club on an ex parte application and without notice held erroneous, particularly in view of fact that petition was verified as to many of essential allegations only on information and belief, and particularly in absence of allegation that any great or irreparable injury would result before application for receivership could be heard on notice.

3. Receivers ⇨35(3)—**Subsequent denial of motion to vacate order appointing receiver did not make unauthorized appointment less erroneous.**

Fact that trial court, after appointment of receiver for country club, on ex parte application without notice, subsequently entertained and denied a motion to vacate order appointing receiver, did not make the unauthorized appointment any less erroneous.

4. Perpetuities ⇨7(1)—**Attempt to prevent sale or transfer of stock of country club to negroes was violation of rules regulating restraints on alienation (Civ. Code, § 715 et seq.).**

An attempt either by appointment of a receiver or by injunction to prevent sale or transfer of capital stock of country club to members of negro race constituted a violation of rules regulating restraints on alienation, as provided by Civ. Code, § 715 et seq.

5. Contracts ⇨108(2)—**Contracts limiting transfer and ownership of property to members of Caucasian race are void.**

Contracts limiting transfer and ownership of property to members of Caucasian race are void, although contracts governing use and occupancy of property may be enforced.

Appeal from Superior Court, Riverside County; William H. Ellis, Judge.

Action by V. A. Tyler and another against the Park Ridge Country Club. From a judgment for plaintiffs and an order appointing a receiver, defendant appeals. Reversed.

Edward T. Sherer and Welburn Mayock, both of Los Angeles, for appellant.

Sarau & Thompson, of Riverside, Henry G. Bodkin and A. G. Ritter, both of Los Angeles, for respondents.

SLOANE, P. J. The plaintiffs are holders of membership privileges in the defendant Park Ridge Country Club, a corporation organized for and engaged in the business of promoting and furnishing to such membership participants facilities for outdoor sports and the enjoyment of social intercourse and good fellowship.

Plaintiffs brought this action for themselves and other membership participants to prevent the corporation and its directors from diverting the service of the club from the exclusive use of the members of the Caucasian race, and from selling its stock and extending its privileges to members of the negro race.

The action is brought and maintained under a complaint in equity, asking the appointment of a receiver to conduct and administer the affairs of the corporation in the protection of the exclusive rights of the Caucasians to its privileges. The court made the order appointing a receiver on an ex parte application upon the complaint filed herein, and without notice to the defendants.

The complaint alleges in part as follows:

"IV.

"That the membership in said club is by the by-laws limited to members of the Caucasian race and that no other person than a member of the Caucasian race is entitled to become a member of said club under the terms of the by-laws in existence at the time that the plaintiffs herein were induced to and did become members of said club, and at the present time.

"V.

"That at the present time there are approximately 500 members in good standing and unsuspended from said club and all of said members are entitled to all of the privileges of said club and each and every of the members are of the Caucasian race.

"VI.

"That by and according to the by-laws of said club the persons holding membership privileges therein are not entitled to voting power in the conduct of said club or of said corporation, nor in amending or changing in any manner the by-laws of said club.

"VII.

"That by and according to the articles of incorporation of said club and the by-laws now in full force and effect, the directors of said club and the owners of the stock therein have the sole right to amend the by-laws and to provide for the making of rules and regulations for the conduct of such club and the members thereof.

"VIII.

"That such directors and stockholders have the sole and exclusive right to amend said by-laws so as to provide that membership in said club shall not be limited to members of the Caucasian race and said directors and stockholders have it within their power to amend said by-laws so as to provide that members of the negro race may be entitled to full membership in said club and to enjoy all the privileges and rights now enjoyed by the plaintiffs herein.

"IX.

"That the by-laws of said corporation further provide that the board of directors may by majority vote extend the privileges and courtesies of the club, without charge, to any person or persons for a period not exceeding three months.

"X.

"That the by-laws of said club further provide that the board of directors shall elect new members and that two negative votes of the board of directors shall be sufficient to reject any candidate and the membership of said club has no right whatsoever to pass upon said proposed membership."

The complaint contains further allegations indicating that the present membership acquired its rights in reliance upon the existing race restrictions, and that an extension of membership rights or vesting the control of the corporation to negroes would destroy the value and availability of the club to its present membership, and render its further operation impracticable.

This result may readily be conceded. We have not reached a point in race assimilation where a social club of this character could function with a participating membership half

white and half black, or where the two races are brought into contact on a basis of social equality. This would be true whether the organization was originally wholly white or wholly black.

The question on this appeal is as to whether or not the situation affords the plaintiffs any relief, and particularly the relief they are seeking to maintain.

In the first place, the charter and by-laws of the corporation, as pleaded by the plaintiffs, are not consistent with their demands. As set forth in the portions of the complaint above quoted, the by-laws provide that persons holding membership privileges "are not entitled to voting power in the conduct of said club or of said corporation, nor in amending or changing in any manner the by-laws of said club"; that "by and according to the articles of incorporation of said club, and the by-laws now in full force and effect, the directors of said club, and the owners of the stock therein, have the sole right to amend the by-laws and to provide for the making of rules and regulations for the conduct of said club and the members thereof"; that such directors and stockholders "have the exclusive right to amend said by-laws so as to provide that memberships in said club shall not be limited to members of the Caucasian race, and said directors and stockholders have it within their power to amend said by-laws so as to provide that members of the negro race may be entitled to full membership in said club, and to enjoy all the privileges and rights now enjoyed by the plaintiffs herein"; that "the by-laws of said corporation further provide that the board of directors may by a majority vote, extend the privileges and courtesies of the club without charge to any person or persons for a period not exceeding three months."

[1] When the fundamental laws adopted by the corporation for its government, and subject to which the plaintiffs and others whom they represent, presumptively accepted membership privileges, thus vests the exclusive right to remove all race restrictions, how can the courts either through a receivership, or even by injunction, prevent the stockholders and legally constituted directors of the corporation from exercising the powers thus expressly conferred upon them—powers of which the present membership had notice when they entered into this partnership relation? However disastrous to the interests of the present membership the adoption of such a course may be, there is nothing illegal about it where the organic laws of the corporation have authorized such procedure.

[2] Appellants further dispute the power of the court to create this receivership, taking from the corporate directors the management and control of all the corporate affairs, and vesting the entire management in a receiver, upon an ex parte application, and without notice, and particularly upon a petition which is verified as to many of the essential allegations

only on information and belief. The allegation that the owners of the capital stock of the corporation intend to sell their stock to negroes is made on information and belief. The allegation that Dan Gilkey, the principal stockholder, is insolvent, is made upon information and belief. The allegation that the purpose of the transfer of stock to negroes is to enable the negroes to force the present members to sacrifice their membership rather than to maintain a membership in a club owned and operated by negroes is made on information and belief. The allegation that the present owners and directors are about to amend the by-laws of the corporation so as to enable members of the negro race to become participating members is made on information and belief.

There is a direct allegation that the clubhouse and grounds have been neglected, and that, if the neglect is continued, great and irreparable injury will result, but there is no allegation that such neglect will continue or is threatened, or that any great or irreparable injury would result to plaintiffs before the application for a receivership could be heard on notice.

There is no direct statutory limitation as to the showing of irreparable injury required in such a case, but the rule contended for by appellant is sustained by the decisions in this state. As is said in *Fischer v. Superior Court*, 110 Cal. 129, 138, 42 P. 561, 562:

"The general rule, no doubt, is that so harsh a measure as the appointment of a receiver to take property out of one's possession without trial will not be indulged in by a court without previous notice to the defendant. It would be unjustifiable, except where it clearly appeared that irreparable injury would be done during the few days necessary for a hearing on notice, and even in such an extreme case a temporary injunction would usually be sufficient. 'A motion to appoint a receiver will not be entertained unless notice has been given to the defendant, if practicable, and the appointment will not be made without notice, save in case of irreparable pending injury.' Beach, Rec. § 141, and notes."

In *Ryan v. Murphy*, 39 Cal. App. 640, 179 P. 517, 518, the court says:

"It is obvious that the receiver in this case was appointed without formal notice. Such an appointment, under the established law of this state, cannot be legally made except upon a showing of great emergency. *Fischer v. Superior Court*, 110 Cal. 129, 42 P. 561."

Again the rule is invoked that a receiver should not be appointed where a less drastic remedy would insure petitioner adequate protection. This is indicated in the decision last above quoted, where the court says:

"Moreover, it may be said that the plaintiffs could (if they had not done so) have adequately protected their interest in the property against future alienation thereof by filing a *lis pendens*. Thus in *National Union Bank*

[of Reading] v. Riger, 38 App. Div. 123, 50 N. Y. S. 545, which was an action by a judgment creditor to subject certain land to his claim, it was held erroneous to appoint a receiver where there was sufficient equity in the property to satisfy the judgment. The court remarked that in such a case the creditor was adequately protected by the filing of a *lis pendens*."

The citation of *Fischer v. Superior Court*, supra, recognizes the same limitation where an injunction or restraining order would give adequate protection pending hearing on notice.

In *A. G. Col Co. v. Superior Court*, 196 Cal. 604, 613, 238 P. 926, 930, it is said:

"By numerous authorities, the principle is unequivocally announced that, from the standpoint of the business welfare of a defendant corporation, the appointment of a receiver on an ex parte application is so dangerous an expedient that it should be done only in cases of the greatest emergency and where, without such appointment, irreparable injury will unquestionably result. *Fischer v. Superior Court*, 110 Cal. 129, 42 P. 561; *Hobson v. Pacific States M. Co.*, 5 Cal. App. 94, 89 P. 866; *Ryan v. Murphy*, 39 Cal. App. 640, 179 P. 517.

"It is also a well-established rule that a receiver should not be appointed where a remedy less drastic in its nature and scope is available, and which will insure to the litigants adequate protection. * * *

"Where an injunction will protect all the rights to which the applicant for the appointment of a receiver appears to be entitled, a receiver will not be appointed.' 34 Cyc., p. 25; *Hickey v. Parrot Silver, etc., Co.*, 25 Mont. 164, 64 P. 330 [and other citations]."

[3] In the case before us a restraining order or temporary injunction would have held up any of the proceedings by the corporation or its officers, of which plaintiffs were apprehensive, until such time as a hearing on proper notice could have been had. The fact that the trial court subsequently entertained and denied a motion to vacate the order appointing a receiver makes the unauthorized appointment no less erroneous.

[4] Moreover, an attempt either by appointment of a receiver or by injunction to prevent the sale or transfer of the capital stock of this corporation to members of the negro race would be in violation of the rules regulating restraints on alienation, as provided by the provisions of the Civil Code, § 715 et seq., and as maintained by the decisions of our appellate courts. In *re Walkerly*, 108 Cal. 627, 658, 41 P. 772, 49 Am. St. Rep. 97; 9 Cal. Jur. pp. 352-357; *Strong v. Shatto*, 45 Cal. App. 29, 187 P. 159.

[5] While, under the authorities in this state, contracts governing the use and occupancy of the property may be enforced, contracts limiting transfer and ownership to members of the Caucasian race are void.

For the various reasons stated, we are sat-

ified that the ex parte order appointing a receiver in this case is erroneous.

The order and judgment is reversed.

We concur: BARNARD, J.; MARKS, J.

103 Cal. App. 183

GIBBS v. MENDOZA et al. (Civ. 3977.)

District Court of Appeal, Third District, California. Jan. 15, 1930.

1. Vendor and purchaser ⚡3(4)—Contract for sale of land with delivery of deed on payment of part of purchase price, and providing for final payment within one year, was not mere option; "contract for sale of real property" (Civ. Code, §§ 1726, 1729, 1741).

Contract for sale of land for specified amount, with delivery of deed for portion of land on payment of part of purchase price, and providing for final payment on or before one year from date of delivery of deed, constituted a "contract for sale of real property," within Civ. Code, §§ 1726, 1729, 1741, and not a mere option.

[Ed. Note.—For other definitions, see Words and Phrases, Third Series, Contract for Sale of Real Estate.]

2. Vendor and purchaser ⚡23—Contract for sale of land was binding without being signed by purchaser.

Contract for sale of real estate was binding on party without necessity of purchaser signing it.

3. Vendor and purchaser ⚡86—Assignee's failure to tender balance of purchase price until ten days after demand on original purchaser was not abandonment of contract.

Failure of assignee of contract for purchase of real estate to tender balance of purchase price until ten days after demand therefor on original purchaser did not operate as abandonment of the contract wherein time was not made the essence.

4. Interest ⚡23—Interest, without agreement to contrary, is payable only when principal becomes due.

In the absence of an agreement to the contrary, interest is payable only when principal becomes due.

5. Vendor and purchaser ⚡93—Delay of ten days in paying final installment on contract without time of the essence does not authorize repudiation by vendor.

Where provisions of contract to sell real estate do not declare forfeiture for nonperformance, and time is not made essence, delay of ten days in payment of final installment will not authorize vendor to repudiate agreement or declare abandonment, when he may be fully compensated for such delay.

Appeal from Superior Court, San Luis Obispo County; T. A. Norton, Judge.

Action by Jessie M. Gibbs against Jose Ygnacio Mendoza and another. Judgment for plaintiff, and defendants appeal. Affirmed.

Preisker, Goble & Twitchell, of Santa Maria, for appellants.

Webster & Lyon, of Paso Robles, for respondent.

R. L. THOMPSON, J. This is an appeal from a judgment decreeing specific performance of a contract to sell and convey real property.

The defendants were the owners of 320 acres of land in San Luis Obispo county, being lots 28 and a portion of lot 29, according to the subdivision map of the Morro y Cayucas Rancho on file in the office of the recorder of said county. July 22, 1925, the defendants executed and delivered to plaintiff's assignor, J. Rohrberg, a written contract to sell said land for \$100 an acre. The sum of \$500 was paid by the purchaser upon the execution and delivery of the contract, and the further sum of \$11,500 was subsequently paid. Upon the payment of the last-mentioned sum, a deed of conveyance to 50 acres of the land was executed and delivered to the purchaser, as required by the terms of the contract, and he was thereupon given possession of the premises. The time for the delivery of no other deed was specifically designated. It was provided that the final payment of \$20,300 should be made "on or before one year from the date of delivery of deed." The contract provided for 6 per cent. interest per annum on deferred payments. Time was not made the essence of the contract. Subsequent to the payment of the said sum of \$12,000 on the purchase price of the property, the contract was duly assigned to plaintiff for a valuable consideration. On or about July 23, 1926, the defendants notified the original purchaser that prompt payment of the interest would be required. The assignee had no notice of this demand. On August 2, 1926, the plaintiff tendered to the defendants \$20,300, the entire balance of the purchase price, together with the accrued interest, and demanded a deed of conveyance to the balance of the property, which was refused. This suit for specific performance of the contract was then commenced. The complaint recited the foregoing facts, and the contract was made an exhibit thereof. It was alleged that the purchase price of the land was fair and reasonable. The answer denied the allegations of the complaint seriatim, and declared that the instrument in question was a mere option, and not a contract to sell real property, and that it was breached by the purchaser by his failure to pay the interest as required. Upon trial the court rendered judgment for the plaintiff decreeing specific performance, which was to be accomplished within a pre-

scribed time, and was conditioned upon the payment of the balance of the purchase price together with the accrued interest.

[1] The appellants contend that the document in question, which was signed by the vendors only, was a mere option, and not an agreement to sell real property, and that the instrument was breached, abandoned, and canceled by the failure of the purchaser to promptly pay the interest amounting to \$1,218, which was due July 22, 1926.

From a construction of the terms of the instrument itself, together with the acceptance of \$12,000 of the purchase price of the land and the conveying of 50 acres thereof and delivery of possession to the purchaser, it appears clear that this agreement was intended to be, and was in fact, a valid contract to sell the 320-acre tract of land, and not a mere option. The contract was not severable. The contract provided in part:

"This agreement, made this 22nd day of July, 1925, by and between Jose Ygnacio Mendoza and Maria Mendoza, parties of the first part, and J. Rohrberg, the party of the second part,

"Witnesseth: That said first parties agree to sell to said second party the following described premises * * * (here follows a description of the 320-acre tract of land).

"Terms of sale: One hundred dollars (\$100.00) per acre, payable as follows, to-wit: Five hundred dollars (\$500.00) cash, paid this day, receipt whereof is hereby acknowledged. Eleven thousand five hundred dollars (\$11,500.00) as soon as title is examined, and deeds are signed. Twenty thousand three hundred dollars (\$20,300.00) to be paid on or before one year from date of delivery of deed. Time shall be given for examination of title. * * *

"Upon said \$11,500 being paid, said first parties agree to convey to said second party fifty (50) acres of said land by grant, bargain and sale deed * * * (describing the fifty-acre tract). Deferred payments to bear interest at the rate of six (6) per cent. per annum from date. Possession of said premises to be delivered when said \$11,500 is paid.

"Witness the hands of the said parties of the first part.

"[Signed and witnessed]

"Jose Ygnacio X Mendoza
"Maria X Mendoza"

[2] It was not necessary that the contract should be signed by the purchaser to make it binding. The payment of a substantial part of the purchase price of the land was ample evidence of acceptance of the terms of the agreement on the part of the purchaser. These payments, together with conveyance of a part of the land and possession of the entire tract, constitute ample evidence that the respective parties deemed the instrument to be, and we are of the opinion that it is, a valid contract to sell real property, and not a mere option. Sections 1726, 1729, and 1741, Civ. Code; *Benson v. Shotwell*, 87 Cal. 49, 25 P.

249; *Easton v. Montgomery*, 90 Cal. 307, 27 P. 280, 25 Am. St. Rep. 123; *Smith v. Post*, 167 Cal. 69, 74, 138 P. 705; *Copple v. Aigeltinger*, 167 Cal. 706, 140 P. 1073; *Sparks v. Mauk*, 170 Cal. 122, 148 P. 926; *Karahadian v. Lockett*, 33 Cal. App. 411, 165 P. 552.

[3-5] In addition to part performance of the contract in the present case, the plaintiff proved, and the court found, that an adequate tender of the entire balance of the purchase price, together with the accrued interest, was duly made on August 2, 1926. It is contended that this tender was too late, in view of the demand which was made upon the original purchaser on July 23, 1926, to promptly pay the interest, and that this default constituted a breach and abandonment of the contract. We cannot agree with this assertion. Time was not made the essence of the contract. The assignee and owner of the contract had no notice of this demand on the part of the defendants. The contract does not specify a date upon which the interest shall become payable. It merely provides that deferred payments shall "bear interest at the rate of six per cent. per annum from date." In the absence of an agreement to the contrary, interest is payable only when the principal becomes due. *Owens v. Graetzel*, 146 Md. 361, 126 A. 224, 39 A. L. R. 943, and note; *In re Payne*, 171 Wis. 608, 177 N. W. 858, 10 A. L. R. 993, and note; 6 Permanent Supp. R. C. L. 3868, § 8. The contract in the present case provided that the balance of the deferred principal sum of \$20,300 was "to be paid on or before one year from the date of delivery of deed." Assuming that this clause referred to the deed of conveyance to the remainder of the property not included in the description of the first 50 acres of land which had already been executed, neither this principal sum of \$20,300 nor the interest thereon was due, for the reason that the defendants failed and refused to execute or deliver deeds of conveyance to the balance of the land. If the foregoing clause of the contract be construed to mean that the final payment of \$20,300 was due one year from the date of the delivery of the deed which was executed to the 50-acre tract, then the tender was actually made within the time prescribed, for the record is undisputed that this deed was not delivered until August 3, 1925. Accepting appellants' construction of the contract, the plaintiff, at most, was in default of this final payment and interest for a period of only ten days. Since time was not made the essence of the contract, under the circumstances of this case this brief delay will not be construed to constitute an abandonment of the contract. The defendants were not injured by the delay, and a subsequent oral notice demanding prompt payment of the interest could not change the express terms of the contract. Where the provisions of the contract to sell real estate do not declare a forfeiture for nonperformance, and time is

not made the essence of the contract, a mere delay of ten days in the payment of the final installment and interest will not authorize the seller to repudiate the agreement or declare an abandonment thereof when he may be fully compensated for such delay. *Norris v. Hay*, 149 Cal. 695, 698, 87 P. 380; 25 R. C. L. 321, § 136.

It appears that the purchase price of the land was fair and reasonable. The finding that the value of the land did not increase subsequent to the execution of the contract is sufficiently supported by the evidence.

The judgment is affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

103 Cal. App. 161

PEOPLE v. HOMAN et al. (Cr. 1867.)

District Court of Appeal, Second District, Division 1, California. Jan. 14, 1930.

Criminal law §1170½(1)—Refusing to permit defendant police officers charged with bribery to show motive which actuated prosecuting witness held prejudicial error (Code Civ. Proc. § 1847).

Where evidence of guilt of defendant police officers charged with bribery consisted almost entirely in testimony of truck driver alleged to have given defendants money to avoid prosecution for traffic violation, and defense consisted of complete denial and well-supported alibi and considerable testimony by which good reputation for honesty and integrity of each of defendants was sought to be established, refusal to permit defendants to show motive which actuated prosecuting witness in premises held prejudicial error under Code Civ. Proc. § 1847, providing that, although witness is presumed to speak truth, presumption may be repelled by evidence affecting his motives.

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

William Homan and another were convicted of bribery, and they appeal. Reversed.

R. E. Parsons, of Los Angeles, and J. L. Granttham, of Riverside, for appellant Homan.

Joseph W. Ryan and Frank J. Ryan, both of Los Angeles, for appellant Davis.

U. S. Webb, Atty. Gen., and John D. Richer, Deputy Atty. Gen., for the People.

HOUSER, J. Defendants appeal from a judgment rendered against each of them pursuant to their conviction on each of four counts in an information wherein they were charged with the crime of bribery. They also appeal from an order denying their motion for a new trial.

Briefly, the facts relating to each of the

four counts of bribery appear to be that the two defendants, who were traffic officers of the city of Los Angeles and who operated together at night in a large outlying district, stopped a Japanese (who at that time was driving an auto truck), for assumed violation of the traffic ordinance. What followed thereafter, as claimed by the prosecution, is illustrated by the testimony given by one of the prosecuting witnesses as follows: "He say stop. I stop. He say how many miles. I say 30 miles. He say 45 miles. He say too much speed. He say, 'Got any chauffeur license.' I say, Yes. He say no signs license. He say no chauffeur license. 40 miles speed. He say, go 10 days go to jail. * * * He say, want go there? I say, no dont. You have money? Yes, I give you. He say, thank you."

One of the alleged errors which occurred at the trial related to the refusal of the trial court to permit defendant to show the motive which actuated each of the prosecuting witnesses in giving the testimony upon which the prosecution and conviction of defendants depended.

On cross-examination of one of the prosecuting witnesses, counsel for defendants asked certain preliminary questions for the asserted purpose of laying a foundation to show "interest and bias." Objections by the people to each of such questions, as well as to a statement as to what facts were expected to be proved, and which statement was accepted as an "offer of proof," were sustained by the trial court. Thereafter, in the case in chief for defendants, both by attempted preliminary questions of the prosecuting witness, as well as by formal "offer of proof," defendants sought (but by order of the trial court were prevented from so doing) to introduce evidence affecting the "motives" of the prosecuting witness.

Among other things, section 1847 of the Code of Civil Procedure provides that although a witness is presumed to speak the truth, such presumption may be repelled by evidence affecting his motives; and that the provisions of such statute are applicable to the facts of the instant case is attested by a long line of authorities appearing in 27 California Jurisprudence, p. 124 et seq.

The evidence of the guilt of defendants consisted almost entirely in the testimony of the Japanese truck driver to the effect as hereinbefore set forth. The defense consisted not only of a complete denial of the facts to which the prosecuting witness had testified, but also a well-supported alibi and considerable testimony by which the good reputation for honesty and integrity of each of the defendants was sought to be established. In such circumstances, the refusal of the trial court to permit defendants to show the motive which actuated the prosecuting witness in the prem-

ises may have been most prejudicial to the substantial rights of defendants.

The judgment and the order denying the motion for a new trial are reversed.

We concur: CONREY, P. J.; YORK, J.

103 Cal. App. 105

LOS ANGELES SODA WORKS v. SOUTHERN CALIFORNIA AQUAZONE CO.
et al. (Civ. 6249.)

District Court of Appeal, Second District, Division 2, California. Jan. 8, 1930.

Landlord and tenant Ⓒ200(2)—Agreement providing that after certain date rentals should be fixed, based on business which has been done, did not authorize court to fix rentals for unexpired term of lease (Civ. Code, § 3390, subd. 3).

Agreement providing that after certain date rentals under lease should be fixed by a revised agreement, based on the business which has been done, held insufficient to authorize court to appraise and fix the value of the leased premises for the unexpired term, in view of Civ. Code, § 3390, subd. 3, making unenforceable agreement to submit a controversy to arbitration, and that other considerations than payment of a monthly sum of rentals were to be performed by a lessee.

Appeal from Superior Court, Los Angeles County; Ira F. Thompson, Judge.

Action by the Los Angeles Soda Works, a corporation, against the Southern California Aquazone Company and another. Judgment for defendants, and plaintiff appeals. Affirmed.

Louis P. Boardman, of Los Angeles, for appellant.

Keeler, Fickert & French, of Los Angeles, for respondents.

CRAIG, J. Final judgment having been entered pursuant to an order sustaining a demurrer to the complaint filed in this action without leave to amend, the plaintiff appealed.

Appellant alleged that on June 2, 1925, it became the sublessee of respondent Southern California Aquazone Company, a corporation, of premises belonging to the respondent F. G. Philipps, for a term extending until March 1, 1927, "and any renewal of the same," at the rental "specified in said lease"; that it entered and still had possession of the premises, and had performed all of the terms and conditions thereof; that the sublessor had declined to accept the monthly rental for June, 1926, demanding a larger amount than that tendered, or possession of the property. The plaintiff prayed that the court "appraise

and fix as of June 2, 1926, the monthly rental of said leased premises and property for said unexpired term between June 2, 1926, and March 1, 1927, in fulfillment of the provisions of said lease." The facts pleaded are embodied in correspondence which, including the purported lease, is set forth in the complaint. The instrument in controversy consists of a letter, the material portions of which are as follows:

"Los Angeles, California, June 2, 1925.

"Mr. Frank R. Bray, Los Angeles Soda Works, 509 Commercial Street, Los Angeles, California. Dear Sir: This is to confirm the verbal understanding had between your company and the Southern California Aquazone Company in regard to your leasing this company's plant and equipment. * * * The understanding is that for the first year of our agreement, commencing June 1, 1925, you are to pay the rentals and perform the services hereinafter recited, with the understanding that at the end of this period a revised agreement will be made, based on the business which has been done, and which will cover the life of the lease & any renewal of same.

"For the first year you are to pay to F. G. Philipps, the lessee of the premises at 3408-10 South Main street, on the first of each and every month, one hundred and no/100 dollars (\$100.00)."

On May 27, 1926, the respondent corporation, contending that since their contract had not been fulfilled in particulars immaterial to this decision, and "that at the end of such period a revised agreement was to be made," demanded a rental of \$200 per month from and after June 1, 1926. Appellant replied that there was no foundation for the assumption that his lessor might arbitrarily fix the rent after the date last mentioned. It is contended by appellant that the contract constituted an agreement to arbitrate at the end of the first period as to the rental value of the premises, for the purposes of an extension, in aid of the main contract, which was a continuing one. His theory is best illustrated by quotation from *Kaufmann v. Liggett*, 209 Pa. 87, 58 A. 129, 134, 67 L. R. A. 353, 103 Am. St. Rep. 988, one of several authorities cited to the same rule in other jurisdictions:

"After a careful consideration of all the cases bearing upon the subject which have been brought to our attention, or which we have found, we are satisfied that the authorities well agree that equity will not compel an arbitration, and this upon the very good ground that the courts remain open to the parties, with better provisions for securing justice than are possessed by arbitrators, but that in cases of renewal leases the weight of authority clearly favors the view that the tenant in such a case has a quasi proprietorship—a right, lacking merely a valuation—

and that the grossest inequity would be worked, should he lose his right through a failure upon the part of the arbitrators to fix a valuation."

It is argued therefrom that the same duty to appraise and fix the value of leased premises for a future or unexpired term lies with the courts of this state where the appraisement and fixing of rental is reserved by the contract. However, we think it unnecessary to further pursue this course of discussion, both for the reason that the contract contained no reference to an arbitration as to the rental value of the premises, which in any event would have been ineffective, and that it is too indefinite to enable a court of equity to specifically enforce it. Not only does the contract merely provide that after June 1, 1926, the rentals shall be fixed by a revised agreement, "based on the business which has been done," but subdivision 3 of section 3390 of our Civil Code denounces as unenforceable specifically "an agreement to submit a controversy to arbitration." Other considerations than the payment of a monthly sum of rental were to be performed by the lessee in the instant case. He agreed to manufacture all of certain specified waters for his lessor for which he would receive twenty cents per case, and to pay the running expenses of both parties to the lease, except that of keeping accounts of the lessor. What the parties might deem equitable as cash compensation for the use of the premises in addition to these concessions, cannot be conjectured, much less decided, judicially. We think the case falls within the rule expressed in *Howard v. Burrow*, 77 Cal. App. 4, 245 P. 808, 810, quoting with approval from 1 Williston on Contracts, § 45:

"Although a promise may be sufficiently definite when it contains an option given to the promisor or promisee, yet if something is reserved for the future agreement of both parties, the promise can give rise to no legal obligation until such future agreement. Since either party by the very terms of the promise may refuse to agree to anything to which the other party will agree, it is impossible for the law to affix any obligation to such a promise."

It is manifest that the complaint in this regard failed to state a cause of action, and that the demurrer was properly sustained.

The next point advanced by appellant is that, having remained in possession and performed the services specified after the expiration of the initial term, the relationship of landlord and tenant was continued, and that respondents were estopped to demand possession or to terminate the tenancy. It is sufficient answer to this contention that the complaint does not allege the facts relied upon but in fact avers that appellant elected to stand upon the original contract requiring an agreement between the parties as to future

tenancy, the conditions of which had not been determined.

The judgment is affirmed.

We concur: WORKS, P. J.; BURNELL, Justice pro tem.

103 Cal. App. 113

BROWN v. CITY COUNCIL OF CITY OF HAWTHORNE et al. (Civ. 6732.) ★

District Court of Appeal, Second District, Division 2, California. Jan. 8, 1930.

Rehearing Denied Feb. 6, 1930. Hearing Denied by Supreme Court March 3, 1930.

1. Municipal corporations ⇨159(4)—Clerk's certificate, in absence of evidence, was conclusive on question whether person circulating petition for recall saw written signatures appended thereto (Code Civ. Proc. § 1963; St. 1911, Ex. Sess., p. 128, as amended).

Under Code Civ. Proc. § 1963, clerk's certificate was conclusive on question whether person circulating petition for recall of city councilmen "saw written signatures appended thereto," as required by St. 1911, Ex. Sess., p. 128, as amended, where no evidence was offered on question, since uncontroverted presumption that city clerk regularly performed his duty and that law was obeyed would prevail.

2. Municipal corporations ⇨159(1)—Oath that signatures to petition for recall of councilmen "were signed in my presence" was tantamount to requirement that affiant state he saw them signed; "presence" (St. 1911, Ex. Sess., p. 128, as amended).

Oath that signatures to petition for recall of city councilmen "were signed in my presence" was tantamount to statutory requirement, under St. 1911, Ex. Sess., p. 128, as amended, that affiant shall state that he saw them signed, since word "presence" means in a situation face to face with some person or persons; in view.

[Ed. Note.—For other definitions, see Words and Phrases, First, Second, and Third Series, Presence.]

3. Officers ⇨70½—Statutes in aid of people's rights to determine removal should be liberally construed, and courts cannot interfere except on clear showing of violation of law (St. 1911, Ex. Sess., p. 128, as amended).

Statutes enacted in aid of rights reserved to people to determine whether or not their public servants shall be removed from office, such as St. 1911, Ex. Sess., p. 128, as amended, should be liberally construed, and courts cannot interfere except upon clear showing that law has been violated.

Appeal from Superior Court, Los Angeles County; Wm. S. Baird, Judge pro tem.

Action by Benjamin F. Brown against the City Council of the City of Hawthorne and others, for a writ of mandate requiring the calling of a special recall election. From the judgment, defendants appeal. Affirmed.

Louis Greenbaum, of Los Angeles, for appellants.

Bonelli, Hughes & Miller, of Los Angeles, for respondent.

CRAIG, Acting P. J. A petition for the recall of appellants, who were three of the councilmen of the defendant city of Hawthorne, a city of the sixth class, was filed with the clerk of said council, who certified the same, and it was submitted to the council on March 11, 1929. No action having been taken thereon, the respondent petitioned the superior court of Los Angeles county for a writ of mandate requiring that a special election be called, which was granted, and this is an appeal from the judgment entered accordingly.

It is contended that the genuineness of the signatures upon the petition for a special election was not sufficiently established to require or justify action by the city council, and was not shown in accordance with the provisions of the statutes in the trial court. The findings are not questioned, except in this respect: The person who circulated the petition for a recall election appended his affidavit, reciting that "the signatures upon this sheet were signed in my presence and are genuine and that to the best of my knowledge and belief the persons signing were at the time of so signing qualified electors of said city and that their respective residences are correctly stated as set forth." By the Statutes of 1911, Ex. Sess. page 128, as amended, it is provided as follows: " * * * Each such separate paper shall have attached thereto an affidavit made by a qualified elector of the city or town (or particular subdivision thereof as the case may be) and sworn to before an officer competent to administer oaths, stating that the affiant circulated that particular paper and saw written the signatures appended thereto; and that according to the best information and belief of the affiant, each is the genuine signature of the person whose name purports to be thereunto subscribed, and of a qualified elector of the city or town (or particular subdivision thereof)."

Respondent alleged in his petition for a writ of mandate, and the court found, that the city clerk examined the petition for election, and that from an inspection of the records of registration he ascertained that the same was signed by the requisite number of qualified voters, that it was sufficient, and that he attached his certificate thereto, showing the result of said examination. The clerk testified that the petition which he identified in open court was the document in controversy, that it bore his certificate and signature,

and that he presented the same to the city council.

[1-3] Appellants insist that there is no evidence tending to show that the person circulating the petition "saw written the signatures appended thereto," as required by statute or as alleged by petitioner herein. No evidence having been offered by appellants, the uncontroverted presumption that the city clerk regularly performed his duty, and that the law was obeyed in this regard, will prevail. Code Civ. Proc. § 1963. His certificate is conclusive. *Watts v. Superior Court*, 36 Cal. App. 692, 173 P. 183. Hence the only remaining question of consequence is as to whether or not an oath that the signatures "were signed in my presence" is tantamount to the statutory requirement that the affiant shall state that he saw them signed. In *Tucker v. Oxner*, 12 Rich. (S. C.) 141, it was held upon the contest of a will that, while it did not sufficiently appear that the testatrix signed in the presence of the witness, the latter's attestation was legal if made while the testatrix stood in the doorway of a room wherein he signed his name. In the language of the court: "If she then stood at the door post she might have seen because she was 'within view,' which words have been held synonymous to 'in the presence.'" *Funk and Wagnalls Dictionary* defines "presence" as in a "situation face to face with some person or persons," "in view." Statutes enacted in aid of rights reserved to the people to determine whether or not their public servants shall be removed from office should be liberally construed, and the courts are not authorized to interfere except upon a clear showing that the law has been violated. *Laam v. McLaren*, 28 Cal. App. 632, 153 P. 985; *Worth v. Downey*, 74 Cal. App. 436, 241 P. 96.

The only other point attempted to be advanced by appellants is that the affidavit appended to the petition does not constitute legal evidence as prescribed by the Code of Civil Procedure. However, since this affidavit is held to be sufficient in form within the meaning of the statute, and stands uncontradicted by any evidence whatever, it fulfills the purposes of the enactment. As to its admissibility in evidence, no objection was interposed below, and it was expressly stipulated that the question here principally discussed was appellants' only point.

The judgment is affirmed, and it is ordered that a peremptory writ of mandate issue forthwith, as prayed.

We concur: IRA F. THOMPSON, J.; BURNELL, Justice pro tem.

103 Cal. App. 247

PEOPLE v. BRAHM. (Cr. 1858.)★

District Court of Appeal, Second District,
Division 1, California. Jan. 17, 1930.

Rehearing Denied Jan. 30, 1930. Hearing De-
nied by Supreme Court Feb. 13, 1930.

1. Criminal law ⇨274—After denial of motion to withdraw plea of guilty, leave may be granted on same facts more fully stated.

After denial of motion to withdraw plea of guilty and vacate judgment entered thereon, although leave to renew will rarely be granted unless it appears new state of facts has arisen since former hearing, leave may be granted in discretion of court on the same facts more fully stated.

2. Criminal law ⇨274—Denying permission to renew motion for withdrawal of plea of guilty rested in court's discretion.

Discretion rested with trial court to decide whether or not it would permit renewal of motion to withdraw plea of guilty and to vacate judgment.

3. Criminal law ⇨274—Denying second motion to withdraw plea of guilty to arson charge held not abuse of discretion, where only new facts were that defendant was in daze on night of fire.

Where motion to withdraw plea of guilty to charge of arson had been denied, trial court held not to have abused its discretion in denying second motion, where no new facts were presented other than two affidavits that on night of fire defendant was in daze and appeared to be out of her mind.

Appeal from Superior Court, Los Angeles County; Hartley Shaw, Judge.

Alice Brahm pleaded guilty to a charge of the crime of arson. On appeal from an order denying a motion de novo for leave to withdraw a plea of guilty and to vacate the judgment entered pursuant to such plea. Affirmed.

Arthur Brigham Rose, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., John L. Flynn, Deputy Atty. Gen., and Warner I. Praul, of Los Angeles, for the People.

YORK, J. The defendant and appellant was charged by information filed by the district attorney of Los Angeles county with the crime of arson. She pleaded guilty to the charge, and at her request was granted leave to make application for probation. After several continuances had been had of the hearing on the matter of probation, an order was

finally made by which probation was denied and judgment was pronounced against her. Thereafter the defendant moved the trial court for leave to withdraw her plea of "guilty" and substitute therefor a plea of "not guilty," and at the same time moved the court to vacate the judgment. An order was made denying both of these motions, and an appeal was prosecuted in which the appellate court upheld the action of the trial court. *People v. Brahm* (Cal. App.) 277 P. 896. Subsequently, to wit, June 13, 1929, request was made upon the presiding judge of the superior court for further stay of proceedings and leave to present facts and evidence in support of a motion "de novo" for leave to withdraw the plea of guilty and to vacate the judgment. Said motion was argued, denied by the court, and this appeal is taken from the order denying said motion. A stay of execution was granted pending determination of this appeal.

Appellant in her brief maintains that the trial court refused to entertain the motion, for the reason that the matter was res adjudicata by virtue of the decision upon appeal from the order denying the first motion. An examination of the record discloses the fact that the trial court heard the motion upon its merits, but stated in denying it that no new matter had been presented which would justify a withdrawal of appellant's plea of guilty.

[1, 2] After a denial of such motion, "while leave to renew will rarely be granted unless it appears that a new state of facts has arisen since the former hearing * * * leave may, in the discretion of the court, be granted upon the same facts more fully stated." 18 Cal. Jur. p. 660. While appellant denominated the proceeding a motion "de novo," it was in effect a renewal of motion, and discretion rested with the court to decide whether or not it would permit such renewal.

[3] In support of the second motion, no new facts were presented other than two affidavits of officers of the Culver City police department to the effect that on the night of the alleged fire appellant was in a daze and appeared to be out of her mind. We are of the opinion that there was no abuse of discretion on the part of the trial court in denying the motion here involved.

The order denying motion to vacate the judgment and withdraw plea of guilty is affirmed.

We concur: CONREY, P. J.; HOUSER, J.

★Rehearing denied. Hearing denied by Supreme Court.

208 Cal. 694

LAYNE v. KIRBY. (S. F. 13065.)

Supreme Court of California. Jan. 22, 1930.

1. Libel and slander ⇨89(1)—Complaint alleging defendant wrote employer charging plaintiff with neglect of duty and inefficiency, if actionable, was actionable per se, making it unnecessary to allege special damage (Civ. Code, § 45).

Complaint alleging defendant wrote to Secretary of War a letter stating that plaintiff, chief clerk in district engineer's office, had outside business interests to which he devoted considerable of his time during office hours, in violation of government regulations, and generally charging him with neglect of duty and inefficiency, alleged matter having tendency to injure plaintiff in his occupation, and, if actionable under Civ. Code, § 45, was actionable per se, making it unnecessary for plaintiff to allege special damage.

2. Libel and slander ⇨45(1)—Complaint alleging defendant wrote letter to Secretary of War charging chief clerk in district engineer's office with inefficiency showed only qualified privilege (Civ. Code, § 47, subd. 3).

Complaint alleging that defendant wrote letter to Secretary of War stating that plaintiff, chief clerk in district engineer's office, devoted considerable of his time during office hours to outside business interests and generally charging him with neglect of duty and inefficiency, if it showed privilege at all, showed only that publication was qualifiedly privileged, under Civ. Code, § 47, subd. 3, relating to communication made to person interested therein.

3. Libel and slander ⇨93—Where complaint did not show communication was absolutely privileged, such privilege must be specially pleaded (Civ. Code, § 47, subd. 2).

Where it was not ascertainable from complaint that communication addressed by defendant to Secretary of War regarding plaintiff, chief clerk in district engineer's office, was intended to or did initiate an authorized proceeding for any purpose, so that communication would be absolutely privileged under Civ. Code, § 47, subd. 2, absolute privilege could not be successfully asserted by demurrer, but in such case privilege must be specially pleaded.

4. Libel and slander ⇨83—Where complaint shows only that libelous publication was made in communication to person interested, and malice is pleaded, plaintiff states cause of action (Civ. Code, § 47, subd. 3).

Where complaint shows on its face no more than that libelous publication was made in communication to person interested, and malice is pleaded, plaintiff states cause of action, under Civ. Code, § 47, subd. 3.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by Charles H. Layne against Edmund Kirby for damages for libel. From a

judgment entered on an order sustaining a demurrer to the complaint, plaintiff appeals. Reversed.

Superseding opinion in 278 P. 1046.

John Ralph Wilson and Everette C. McKeage, both of San Francisco, for appellant.

George R. Andersen, of San Francisco, for respondent

SHENK, J. Appeal from a judgment entered on an order sustaining a demurrer to a complaint for libel. The plaintiff declined to amend, and the sole question is whether the complaint states a cause of action.

The complaint charges that on January 30, 1928, the defendant wrote and published of and concerning the plaintiff a certain letter, set out in full in the complaint, addressed to the Secretary of War at Washington, D. C. At that time the plaintiff was chief clerk in the office of the United States district engineer, First district, San Francisco, in which the defendant was and had been since about 1916 a subordinate clerk. Both the plaintiff and the defendant received their appointments from the Secretary of War. The letter shows that on December 21, 1927, the defendant was notified by the district engineer that, on account of a reduction in the force, he would be furloughed without pay effective January 31, 1928. From the correspondence which ensued between the defendant and his superior officers at San Francisco and at Washington, D. C., and which is included as a part of the publication, it is apparent that there had been friction between the plaintiff and the defendant in the district engineer's office since about 1921, and that the defendant believed that the plaintiff had been instrumental in effecting the defendant's furlough without pay in preference to more recently employed clerks. The letter to the Secretary of War in brief charged, among other matters, that "the chief clerk has outside business interests to which he devotes considerable of his time during office hours * * * in violation of government regulations"; that he took advantage of his immediate superior officer and used government property and time for his own private enterprises; that he "faked" or "fudged" statistical reports to the district engineer; that he knowingly allowed incorrect reports to be submitted; that he had been given a low rating on habits; and generally charged him with neglect of duty and inefficiency. The complaint also alleged that the designated portions of the letter claimed to be libelous "were and are false, defamatory and untrue and were known by said defendant to be false and untrue, and were wilfully and maliciously written and published of and concerning the plaintiff by said defendant for the purpose of injuring the reputation of said plaintiff in the eyes of his

employer." The plaintiff did not allege special damages, but prayed for general damages only. The demurrer of the defendant was interposed principally on the grounds that the portions of the letter claimed to be defamatory, etc., were privileged under and by virtue of section 47 of the Civil Code, and that the statements were not actionable without allegations of special damage.

The appellant contends that the order sustaining the demurrer was erroneous, for the reasons that the alleged defamatory writing is actionable per se, and, if privileged at all, is only qualifiedly privileged under the provisions of subdivision 3 of section 47 of the Civil Code.

[1] We are of the opinion that both contentions must be sustained. Civil Code, § 45, defines libel as a "false and unprivileged publication by writing * * * which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation." That the defamatory matter alleged in the complaint had a tendency to injure the plaintiff in his occupation and if actionable at all is actionable per se is supported by *Stevens v. Snow*, 191 Cal. 58, 214 P. 968, and *Schomberg v. Walker*, 132 Cal. 224, 64 P. 290. It was not necessary, therefore, for the plaintiff to have alleged special damage.

[2-4] The complaint, if it shows privilege at all, shows only that the publication was qualifiedly privileged under the provisions of subdivision 3 of section 47 of the Civil Code. That subdivision provides that a publication is privileged when it is made "in a communication, without malice, to a person interested therein, by one who is also interested, or by one who stands in such relation to the person interested as to afford a reasonable ground for supposing the motive for the communication innocent, or who is requested by the person interested to give the information." Section 47, subd. 2, provides that a privileged publication is one made "in any legislative or judicial proceeding, or in any other official proceeding authorized by law." But it is not ascertainable from the complaint that the communication addressed by the defendant to the Secretary of War was intended to or did in fact initiate an authorized proceeding for any purpose. If such indeed is the case—i. e., that the letter properly initiated a proceeding before the Secretary of War and the communication is claimed to be absolutely privileged by virtue of the provisions of subdivision 2 of section 47 of the Civil Code—that claim cannot be made nor the privilege be successfully asserted by demurrer when the complaint itself does not show such privilege. In such a case privilege must be specially pleaded. *Stevens v. Snow*, supra. Where,

as here, the complaint shows on its face no more than that the libelous publication was made in a communication to a person interested, etc., and malice is pleaded, the plaintiff states a cause of action. The demurrer was improperly sustained.

The judgment is reversed.

We concur: WASTE, C. J.; RICHARDS, J.; SEAWELL, J.; PRESTON, J.; CURTIS, J.; LANGDON, J.

208 Cal. 676

DAVIS v. DAVIS. (S. F. 13681.)

Supreme Court of California. Jan. 17, 1930.

Divorce ⇐ 182—Defendant appealing from order in divorce suit denying change of venue could not have supersedeas to prevent enforcement of orders for alimony (Code Civ. Proc. § 942).

Defendant, on appeal from order denying change of venue in divorce suit brought against him by wife, *held* not entitled to writ of supersedeas to prevent enforcement pending determination of his appeal, of orders for payment to wife of alimony and counsel fees, since defendant had adequate remedy in superior court by appealing from judgment allowing alimony and filing bond in accordance with Code Civ. Proc. § 942.

In Bank.

Action by Myrtle Davis against John Charles Davis for divorce. Defendant appeals from an order denying change of venue, and applies for writ of supersedeas to prevent enforcement of orders for payment of alimony and counsel fees. Writ of supersedeas denied.

Leland J. Allen, of Los Angeles, and Maurice E. Gibson, of San Francisco, for petitioner.

Robert E. Hatch, of San Francisco, for respondent.

LANGDON, J. This is an application for a writ of supersedeas. It is alleged that the plaintiff herein brought an action for divorce against the defendant in the superior court for the state of California, in and for the city and county of San Francisco, and that, in aid thereof, an order was issued temporarily restraining the defendant from disposing of his property; that defendant demanded a change of the place of trial to Los Angeles county, which motion was denied, and from which order defendant appealed. Later, it is alleged, the case proceeded to judgment, orders being made for the support by the defendant of his minor child and for the payment of alimony, costs, counsel fees,

etc. It does not appear that any appeal was taken from the interlocutory judgment of divorce nor from any orders other than the order refusing to change the place of trial. It is also alleged that plaintiff is attempting to enforce the orders of the trial court for the payment of alimony, counsel fees, etc., by attachment and other means open to her, and defendant seeks this writ of supersedeas to prevent her from enforcing these orders in her favor until a determination of the appeal from the order denying his motion for change of place of trial.

Petitioner might have appealed from the judgment allowing plaintiff alimony, costs, etc., rendered in the divorce action, and might have filed a bond in accordance with the provisions of section 942, Code of Civil Procedure, and thus effected a stay of proceedings pending appeal. He is not entitled to relief in this court while he had an adequate remedy in the superior court by complying with the statutory requirements.

The writ prayed for is denied.

We concur: WASTE, C. J.; CURTIS, J.; SEAWELL, J.; RICHARDS, J.; SHENK, J.

208 Cal. 652

BOWMAN v. MOTOR TRANSIT CO.
(L. A. 9764.)

Supreme Court of California. Jan. 13, 1930.

1. Negligence ⚡136(30)—Contributory negligence of plaintiff's husband, while driving automobile colliding with defendant's stage at intersection, held for jury.

In action for damages for personal injuries sustained by plaintiff as result of collision of automobile in which she was riding with defendant's stage at street intersection, contributory negligence of plaintiff's husband, imputable to wife, held for jury, where there was credible testimony that he was an experienced and cautious driver and was at time in question proceeding with his usual due care.

2. Damages ⚡132(3)—\$18,750 for injuries causing concussion of brain, nervous shock, impairment of mental powers, and permanent injury to eyesight, held not excessive.

Verdict assessing damages at \$18,750, plus \$326.90 expenses, for injuries to woman causing concussion of brain, severe bruising and laceration of head, nervous shock throughout her whole body, together with impairment of her mental powers and senses, and a serious and probably permanent injury to her eyesight, causing a change in her from an active, healthy, able, and mentally alert woman to one weakened, depressed, suffering mentally and physically, altered in disposition and mental power, and apparently permanently injured in health, held not excessive.

3. Evidence ⚡492—Permitting plaintiff's husband, driver of automobile colliding with stage, to testify regarding speed of stage, when 15 feet away, held not error.

In action for injuries sustained by plaintiff in collision between automobile in which she was riding and defendant's stage, permitting plaintiff's husband, who was driving automobile, and who was not qualified as an expert on speed, to testify as to speed of stage, when it was 15 feet away from him held not error, since testimony was descriptive and did not purport to be expert opinion.

4. Evidence ⚡493—Plaintiff could testify regarding her changed mental condition, paralytic condition, and how her nervous system, eyesight, and other senses were affected by injury.

In action for damages for personal injuries, the court properly allowed plaintiff, who was unqualified as a medical expert, to testify as to her changed mental condition, and to state that she had paralytic condition on one side of her face, and to describe how her nervous system, eyesight, and other senses were affected, since such testimony was merely descriptive, and did not purport to be expert opinion.

5. Trial ⚡296(8)—Instruction that preponderance of evidence meant that evidence which produces conviction in unprejudiced mind of juror held not reversible error, in view of other instructions.

In instruction in effect that in civil cases affirmative of issue must be proved, and when evidence is contradictory decision must be made according to preponderance of evidence, and that by preponderance of evidence was meant weight of evidence, preponderance of probability, "or that evidence which produces conviction in the unprejudiced mind of the juror," quoted clause, added by court, held not reversible error, where other instructions bearing on same matter made it improbable that jurors could have been misled.

In Bank.

Appeal from Superior Court, Orange County; H. G. Ames, Judge.

Action by Verna M. Bowman against the Motor Transit Company to recover damages for personal injuries sustained by plaintiff as the result of an automobile accident. From a judgment for plaintiff, defendant appeals. Affirmed.

Superseding opinion in 279 P. 1014.

Kidd, Schell & Delamer, of Los Angeles, for appellant.

William L. Waters, of Fullerton, and Francis B. Cobb, of Los Angeles, for respondent.

PRESTON, J. In this action to recover damages for personal injuries sustained by plaintiff as the result of an automobile accident, the judgment is affirmed. We find that the record in this cause contains evidence amply sufficient to uphold the verdict and

judgment, and that it is free from prejudicial error, both in the admission and rejection of testimony and in the giving and refusing of certain instructions. A résumé of the case follows:

At the time of the accident, plaintiff, in an Overland car driven by her husband, was proceeding in a southerly direction on Fullerton road, Orange county, towards its intersection with Central avenue. Defendant's stage was traveling west on Central avenue. At the northeast corner of the crossing a lemon orchard was so situated as to somewhat obscure the view at the intersection for drivers approaching it from the directions stated. As he entered the crossing, plaintiff's husband reduced the speed of his car to permit the passing of an automobile traveling east on Central avenue, but, proceeding slowly, he failed to see the approaching stage at his left until it was almost upon him; he then swung hard to the right in an effort to avoid it. The stage, however, continued swiftly toward him, catching his car by the front left fender. This caused the rear end to swing with great force against the side of the stage. The car then rebounded, and finally crashed to a standstill at the curb, with the back ripped from the front seat and husband and wife thrown unconscious in the rear. The stage stopped a short distance beyond.

Plaintiff did not regain consciousness for some days, due to severe bruising and laceration of the head, and concussion of the brain. She also suffered a nervous shock throughout her whole body, together with impairment of her mental powers and senses and a serious and probably permanent injury to her eyesight. The jury returned a verdict in her favor, assessing damages at \$18,750, plus \$326.90 expenses. They also returned two special verdicts, one to the effect that at said time defendant stage was being operated at a negligent rate of speed in excess of 15 miles per hour, and the other to the effect that defendant failed to keep a proper or careful outlook for the approach of plaintiff's auto and failed to yield it the right of way. The judgment for plaintiff followed, from which defendant prosecutes this appeal.

Appellant complains of denial of its motion for a nonsuit, refusal of the trial court to direct a verdict in its favor, and denial of its motion for new trial. These several claims may be summed up and considered with its main contention of insufficiency of the evidence to support the verdict and judgment. The record contains an exhaustive survey, by both parties, of the somewhat conflicting evidence as to speed of the respective vehicles; condition of the intersection, conduct, and acts of the two drivers, together with their care or lack of care, and all other factors contributing to the collision. A detailed statement of these matters would not clarify the situation.

[1] As above stated, our review of the cause impels us to agree with the conclusion reached by the jury upon all the issues, including those of negligence and contributory negligence, and to state that both verdict and judgment are amply supported by competent and persuasive evidence. Neither is there necessity for a detailed discussion of the contention that plaintiff's husband was guilty of negligence, imputed to her, so indisputable as to constitute contributory negligence as a matter of law. The record affords no basis for this claim, especially in the light of credible testimony that he was an experienced and cautious driver and was at the time in question proceeding with his usual due care.

[2] The above remarks may also be applied to appellant's claim that the verdict was so grossly excessive as to amount to a miscarriage of justice and to necessitate reversal or substantial modification thereof. The record offers proof of an utter change in plaintiff as a result of her injuries from an active, healthy, able, and mentally alert woman to one weakened, depressed, suffering mentally and physically, altered in disposition and mental power, and apparently permanently injured in health by the shock to her nervous system, injuries to her brain, impairment of her vision, and at least temporary impairment of some of the other senses. The showing made, to our mind, clearly justifies an award of damages in the sum here named.

[3, 4] Appellant charges the court with errors in the admission of evidence in that it permitted plaintiff's husband, who was not qualified as an expert on speed, to testify as to the speed of the stage when it was 15 feet away from him, and allowed plaintiff, who was not qualified as a medical expert, to testify as to her changed mental condition, to state that she had a paralytic condition in one side of her face, and to describe how her nervous system, eyesight and other senses were affected. Two hypothetical questions propounded to plaintiff's expert medical witness are also criticized by appellant. We have examined carefully all assignments of error in this connection and find them to be without merit. The testimony offered by plaintiff and her husband was merely descriptive, and did not purport to be expert opinion. The hypothetical questions were included among other similar questions along the same line, and, even were their wording subject to the criticism made, such error would not be prejudicial under the circumstances shown by the record.

Lastly, we are asked to consider errors in the giving and refusing of certain instructions. The first concerns an instruction given at plaintiff's request, based on section 131, subdivision (a), of the Motor Vehicle Act

(Act 5128, Deering's Cons. Supp. 1925-1927, p. 1537), which provides that, "when two vehicles approach an intersection of public highways at approximately the same time, the vehicle approaching from the right shall have the right of way, provided such vehicle is traveling at a lawful speed." We find no fault with the instruction, which was so worded as to place the instant situation before the jury in the terms of said statute, and charge them that, if they found from a preponderance of the evidence that the vehicles here involved approached said intersection in the manner therein stated, plaintiff had the right of way for the purpose of traversing it, and it was the duty of defendant's driver to yield it to her. Reading the entire charge to the jury, we do not find that said instruction is inconsistent or in conflict with later ones, nor do we find the existence of any reversible error whatsoever in any of the instructions given.

[5] Appellant requested the court to give the following instruction: "In civil cases the affirmative of the issue must be proved, and when the evidence is contradictory the decision must be made according to the preponderance of evidence. By preponderance of the evidence is meant the weight of the evidence, the preponderance of probability." The court gave the instruction, with the following clause added to it: "or that evidence which produces conviction in the unprejudiced mind of the juror."

Appellant, of course, does not challenge the accuracy of the instruction as requested by it, but severely criticizes said portion which was added by the court. That said clause was inaccurate and academically incorrect is beyond doubt. Instructions containing phrases similarly worded have been condemned in *Estate of Ross*, 179 Cal. 629, 178 P. 510; *People v. Miller*, 171 Cal. 649, 154 P. 468, and other cases. The phrase, however, was evidently intended to be used here in a sense synonymous with the word "preponderance," and in fact placed as great a burden upon plaintiff in proving negligence as it did upon appellant in proving contributory negligence. Furthermore, other instructions were given by the trial court bearing upon this very matter, and it seems improbable, if not impossible, that the jurors, in the light of the entire charge, could have been misled by said inaccuracy. In the recent case of *East Bay Municipal Utility Dist. v. Kieffer* (Cal. App.) 278 P. 476, this identical phrase was under consideration and, while deemed inaccurate academically, it was held not to constitute reversible error. Said holding is directly in point here, and to it reference is made for a fuller discussion of the issue, distinguishing the cases above mentioned and citing many other cases touching

upon the subject. See, also, the following as authority for the ruling made: *Estate of Guilbert*, 46 Cal. App. 55, 57, 188 P. 807; *Lawrence v. Goodwill*, 44 Cal. App. 440, 450-454, 186 P. 781; *Boa v. San Francisco-Oakland Transit Rys.*, 182 Cal. 93, 103, 104, 187 P. 2; *De La Torre v. Johnson*, 203 Cal. 374, 378, 264 P. 485.

We find the record free from reversible error; hence our conclusion first announced.

We concur: WASTE, C. J.; SHENK, J.; RICHARDS, J.; SEAWELL, J.; CURTIS, J.; LANGDON, J.

208 Cal. 667

AMBASSADOR PETROLEUM CO. et al. v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al. (L. A. 11962.)

Supreme Court of California. Jan. 17, 1930.

As Modified Feb. 10, 1930.

1. Parties $\S$ 51 (4)—Parties without whom complete determination of controversy cannot be had become necessary parties, and they must be brought in (Code Civ. Proc. $\S$ 389).

Where trial court finds, or record indisputably shows, that complete determination of controversy cannot be had without presence of other parties, such parties become necessary and indispensable parties, making Code Civ. Proc. $\S$ 389, requiring court to bring them in, mandatory, and question becomes one of jurisdiction.

2. Prohibition $\S$ 32—If court proceeds without necessary parties prohibitory writ, "quousque" will issue (Code Civ. Proc. $\S$ 389).

If trial court assumes to proceed to determination of controversy without bringing in indispensable and necessary parties, as it is required to do under Code Civ. Proc. $\S$ 389, it may be subjected to prohibitory writ quousque; that is, until performance of certain act or happening of certain event.

3. Parties $\S$ 51 (4)—Generally, new parties defendant will not be brought in against will of plaintiff, unless presence is necessary to determination of action.

Generally, new parties defendant will not be brought in against will of plaintiff, unless presence of such new parties is necessary to determination of action.

4. Mines and minerals $\S$ 52—Lessors under oil and gas lease and trustee under lessee's trust deed held not necessary and indispensable parties to action to enjoin lessees from wasting natural gas (St. 1915, p. 1404, $\S\S$ 8b, 14b, as added by St. 1929, pp. 927, 930, $\S\S$ 9, 14; Code Civ. Proc. $\S$ 389).

Lessors of oil and gas wells and trustee under trust deed securing bond issue of one of

lessees *held* not necessary and indispensable parties to action to enjoin unreasonable waste of natural gas by lessees operating oil and gas wells under St. 1915, p. 1404, §§ 8b, 14b, as added by St. 1929, pp. 927, 930, §§ 9, 14, required to be brought in under Code Civ. Proc. § 389, since, if parties violating statute are compelled to remedy abuses, complete determination of controversy is had as between parties before court.

5. Mines and minerals ☞52—Lessors' interest in increased production resulting in unreasonable waste of natural gas held not to make them necessary parties to action to enjoin waste (St. 1915, p. 1404, §§ 8b, 14b, as added by St. 1929, pp. 927, 930, §§ 9, 14; Code Civ. Proc. § 389).

Interests of lessors under oil and gas leases to continuance of increased production, resulting in unreasonable waste of natural gas, *held* not such interest as to make them necessary and indispensable parties to action against lessees to enjoin waste under St. 1915, p. 1404, §§ 8b, 14b, as added by St. 1929, pp. 927, 930, §§ 9, 14, requiring them to be brought in under Code Civ. Proc. § 389.

6. Mines and minerals ☞52—Lessees under oil and gas lease defending suit to restrain waste of natural gas held in effect representatives of lessors, precluding bringing lessors in as necessary parties (St. 1915, p. 1404, §§ 8b, 14b, as added by St. 1929, pp. 927, 930, §§ 9, 14; Code Civ. Proc. § 389).

Lessees under oil and gas leases against whom action was brought to restrain unreasonable waste of natural gas under St. 1915, p. 1404, §§ 8b, 14b, as added by St. 1929, pp. 927, 930, §§ 9, 14, *held* in effect representatives of lessors in defending action, and therefore lessors are not necessary and indispensable parties requiring them to be brought in under Code Civ. Proc. § 389.

In Bank.

Original application by the Ambassador Petroleum Company and others for writ of prohibition directed to the Superior Court in and for Los Angeles County and Hon. William Hazlett, Judge thereof. Alternative writ discharged, and preemptory writ denied.

Hunsaker, Britt & Cosgrove, Robert B. Murphey, and Wm. L. Murphey, all of Los Angeles, for petitioners.

U. S. Webb, Atty Gen., and James S. Bennett, of Los Angeles, for respondents.

Walter F. Haas, of Los Angeles, *amici curiæ* for Bell View Oil Syndicate.

Niel S. McCarthy, of Los Angeles, *amici curiæ* for Twin Bell Oil Syndicate and others.

PER CURIAM. Prohibition. On September 11, 1929, an action was commenced in the superior court in and for the county of Los Angeles, entitled People of the State of California, on relation of Fred G. Stevenot,

Director of Natural Resources of the State of California, v. Associated Oil Company et al., including among the defendants the petitioners herein. The purpose of the action was and is to enjoin the defendants therein, numbering 42 and more of the persons, firms, associations, and corporations operating oil and gas wells in the Santa Fé Springs area in said county, from the unreasonable waste of natural gas from the wells so operated by said defendants. It is alleged that 70,000,000 feet of natural gas is wasted daily in said area. Upon the filing of the complaint, the court issued an order directing the defendants to show cause at a specified time why a temporary injunction should not issue. The order to show cause came on regularly for hearing on October 14, 1929. In the meantime, on October 10th, the petitioners herein filed a demurrer to the complaint, and on October 14th they moved the court for an order requiring that some 165 of their lessors and a bank, trustee under a bond issue of one of the petitioners, be made parties defendant in the pending action. This motion was made on the ground that the lessors and the bank were necessary and indispensable parties; that a complete determination of the controversy could not be had without their presence in said action, and that, under section 389 of the Code of Civil Procedure, it was the duty of the court to order them in. After argument on this motion, the respondent court denied the same on October 18. On October 21 the present petition for a writ of prohibition was filed. An alternative writ was issued commanding the respondents herein to desist and refrain from taking any further proceedings based upon the allegations of the complaint in said action then pending in the respondent court, except to make an order bringing in some 33 parties specifically named in the alternative writ and making them parties in the pending action, and that the respondent court do not hear, determine, or conduct any proceedings therein until said named parties are brought in.

The pending action was commenced under the authority of a statute of this state enacted for the protection of the natural resources of petroleum and gas from waste and destruction through improper operations in production. St. 1915, p. 1404, as finally amended in 1929, St. 1929, p. 923. Section 8b of the act (as added by St. 1929 p. 927, § 9) declares that the "unreasonable waste of natural gas * * * is hereby declared to be opposed to the public interest and is hereby prohibited and declared to be unlawful." Section 14b (as added by St. 1929 p. 930, § 14) provides: "Whenever it appears to the director of the department of natural resources that the owners, lessors, lessees or operators of any well or wells producing oil and gas or oil

or gas are causing or permitting an unreasonable waste of gas, he may institute, or have proceedings instituted, in the name of the people of the State of California, to enjoin such unreasonable waste of gas. * * * The owners, lessors, lessees or operators causing or permitting an unreasonable waste of gas in the same oil or gas field, although their properties and interests may be separately owned and their unreasonable waste separate and distinct, may be made parties to said action. * * * This statute was adopted as an emergency measure, effective immediately upon its approval by the governor on May 28, 1929, and recited as the reason for its urgency the fact that, at the time of the enactment of the statute, there were, in the oil and gas producing fields within the state, approximately 500,000,000 feet of gas daily blown into the air and wasted, and that new fields being opened up would increase the amount. The statute purports to provide reasonable regulations in the production and conservation of natural gas, to prevent the unreasonable waste thereof, and includes a plan for the assessment against oil and gas well operators of a sufficient amount annually to pay for such regulation and for inspection. The validity of the statute was questioned by certain of the defendants in the trial court, but its validity is not brought into question in the present proceeding. For the purposes of this proceeding, it will therefore be assumed that the statute is constitutional in all respects, and that it constitutes a valid enactment under the police power of the state. The only point now presented for determination is the contention of the petitioners that the court exceeded its jurisdiction in assuming to proceed with the hearing on the order to show cause why a temporary injunction should not issue without bringing in the alleged indispensable parties.

[1-3] It cannot be disputed that the respondent court has jurisdiction of the subject-matter of the cause pending before it and of the parties thereto, and to that end has the power to decide in the first instance all questions of law and fact properly involved in the case (*United Security Bank & Trust Company v. Superior Court* (Cal. Sup.) 270 P. 184), subject, however, to the operation of section 389 of the Code of Civil Procedure upon the proceedings during the course of the hearing or trial. In so far as pertinent herein, that section provides: "The court may determine any controversy * * * before it, when it can be done without prejudice to the rights of others, or by saving their rights; but when a complete determination of the controversy cannot be had without the presence of other parties, the court must then order them to be brought in." The meaning, scope, and effect of this section has been involved and declared in numerous cases in this state. Its applica-

tion has, to some extent, resulted in an apparent but not real contradiction in terms. In *Syverson v. Butler*, 3 Cal. App. 345, 85 P. 164, 165, it was said that under this section "the power to order others brought into * * * is a discretionary one." In *Solomon v. Redona*, 52 Cal. App. 300, 198 P. 643, it was said that the requirements of the section are "mandatory." Both declarations are proper when applied to appropriate facts. Whether "a complete determination of the controversy cannot be had without the presence of other parties" may readily involve questions of fact as to which the discretion of the court might be exercised. But, when the trial court finds, or the record indisputably shows, that a "complete determination of the controversy cannot be had without the presence of other parties," such parties become necessary and indispensable parties, and the section is mandatory, and the question then becomes one of jurisdiction in that the court may not proceed without bringing them in. If, nevertheless, it assumes to do so it may be subjected to the prohibitory writ *quousque*, that is to say, until the performance of a certain act, or the happening of a certain event. *Carter v. Superior Court*, 176 Cal. 752, 169 P. 667; *Ash v. Superior Court*, 33 Cal. App. 800, 166 P. 841. On the other hand, "the general rule is that the court will not order new parties defendant to be brought in against the will of the plaintiff, unless the presence of such new parties is necessary to the determination of the action." *East Riverside, etc., Dist. v. Holcomb*, 126 Cal. 315, 320, 58 P. 817, 818. Another statement of the rule is found in *Mitau v. Roddan*, 149 Cal. 1, 84 P. 145, 147, 6 L. R. A. (N. S.) 275, as follows: "It is the general rule in equity, continued in force by the provisions of the Code of Civil Procedure, § 389, that all who are interested in the subject-matter of a litigation should be made parties thereto, in order that complete justice may be done, and that there may be a final determination of the rights of all parties interested in the subject-matter of the controversy." "The 'other parties' who may be brought in must be persons whose presence is essential to the complete determination of a controversy between parties who were already before the court." *Alpers v. Bliss*, 145 Cal. 565, 571, 79 P. 171, 173.

[4] Applying the test announced in the last case cited, it cannot be doubted that a complete determination of the controversy before the court may be had with the presence of the present parties only. The pleadings on behalf of the state in the pending action conform generally to the allegations of the complaint filed by the Attorney General of Indiana in the leading case of *Ohio Oil Company v. Indiana*, 177 U. S. 190, 20 S. Ct. 576, 44 L. Ed. 729. The Indiana statute was upheld in an exhaustive treatment of the subject by

the Supreme Court of the United States. It is true that the question of necessary or indispensable parties was not involved in that case, but it is significant that the state of Indiana was proceeding thereon against the operators of the gas wells who were the only persons transgressing the statute and as to whom obedience to its commands was sought by injunction. So here the state is proceeding only against those alleged to be violating the statute, viz., the operators of oil and gas wells, who are the only ones capable of altering the conditions which are alleged to be unlawful. If they only who are violating the statute are compelled by injunction to remedy the abuses, a complete determination of the controversy is had as between the parties before the court and constitutional requirements are to that extent satisfied.

Petitioners earnestly urge the other aspect of the equity rule codified in section 389 of the Code of Civil Procedure as applicable to the present proceeding in their favor. It is alleged in their answer that they are operating such oil and gas wells under leases which require them diligently to prosecute the work of production under penalties of forfeiture of their rights thereunder for failure so to do, that their lessors are entitled to a percentage of the material produced, either in kind or in cash, and that, if they as lessees be compelled to conform to any program of conservation of gas imposed by the state, production will be diminished or destroyed with the consequent diminution of so-called royalties to the lessors. It is therefore argued that any order of injunction against the lessees either temporary or permanent will seriously result in prejudice to the rights of the lessors under their leases, and will further subject the petitioners to litigation against them prosecuted by the lessors based upon an alleged failure to prosecute production with due diligence. Wherefore, it is claimed, the lessors are indispensable parties defendant to the pending action. The rule invoked is expressed by the Supreme Court of the United States in *Waterman v. Canal-Louisiana Bank Co.*, 215 U. S. 33, at page 49, 30 S. Ct. 10, 14, 54 L. Ed. 80, as follows: "The relation of an indispensable party to the suit must be such that no decree can be entered in the case which will do justice between the parties actually before the court without injuriously affecting the rights of such absent party. 1 Street Fed. Eq. Pr. § 519. If the court can do justice to the parties before it without injuring absent persons, it will do so, and shape its relief in such a manner as to preserve the rights of the persons not before the court."

Many cases are cited by the petitioners wherein the court has found that certain absent parties were indispensable and has refused to proceed without their presence, or where the court has threatened to proceed in

their absence and been prohibited from so doing until they are brought in. These cases need not be discussed in detail. Generally, it may be said that they involve disputes between private owners or lessees or rival claimants of oil or gas wells or property, or involve conflicting claims of the parties in their private capacities. When the action is one to enjoin the continuance of or to abate a nuisance, a different rule has been applied. For example, in the federal jurisdiction it has been held that the lessor is not a necessary party in actions to enjoin the use of real property for the unlawful purpose. *Denapolis v. United States* (C. C. A.) 3 F.(2d) 772; *United States v. Lento* (D. C.) 8 F.(2d) 432. On the other hand, the St. Louis Court of Appeals, in *State v. Bandall*, 220 Mo. App. 1222, 299 S. W. 155, held that the trial court committed reversible error in denying the motion of the Attorney General to bring in a co-owner of a defendant owner-lessor when it was discovered during the course of the trial that the absent co-owner had an interest in the property. In *United States v. Gaffney* (C. C. A.) 10 F.(2d) 694, 696, both the lessor and lessee were made parties. In the decision the court said: "In a certain sense the suit was *against the nuisance*, and such a suit must be (as was this one) against the owner of the fee, unless the nuisance be of such a nature that the owner's presence is not necessary to a complete determination of the controversy."

When the purpose and effect of the gas conservation statute of this state are considered, we are unable to say that the presence of the lessors in the pending action is necessary to a complete determination of the controversy. They are not charged with any violation of the law. The lessees have possession of the property and complete control of production operations, and, when coercive obedience to the state's program of conservation is enjoined upon them by appropriate court action, the controversy would seem to be fully determined.

[5] The contention of the petitioners to the effect that they will be subjected to actions on the part of their lessors to forfeit their leases, if they obey the injunctive regulations, based on the ground that the petitioners are not prosecuting the production of oil and gas with due diligence, is not persuasive. The leases contain the implied covenant that the lessees shall use the property lawfully. *United States v. Gaffney*, supra. The fact that the royalties of the lessors may be cut down by reason of regulations imposed upon the lessees would not result in any legal prejudice to their rights. If it be assumed that any temporary injunction or final judgment in the pending action may curtail production, such curtailment will be to the extent only that the operations of the petitioners constitute unlawful operations and a statutory nuisance.

The interests of the lessors will therefore be curtailed only to that extent. Their interest in the continuance of such a nuisance would not appear to be such an interest as the law contemplates should require them to be brought into the action. Whether they should be allowed to intervene on their own motion on the ground of interest or on a showing that the petitioners are not prosecuting a defense to said action in good faith are questions not involved in this proceeding. There is nothing in the record to convince us that the issues tendered and joined in the pending action may not as effectually be determined in the absence of the lessors as in their presence and without legal prejudice to them. This conclusion would apply equally to the trustee bank.

[6] It is suggested with much force by the respondents that the petitioners are operating said oil and gas wells under permission and authority granted them by their lessors, that the interests of both lessors and lessees in defeating the pending action are identical in so far as said action may result in a diminution of production, and that the petitioners are therefore the representatives of their lessors in defending said action. Certain it is that the interests of the parties so claimed to be represented and the interests of those before the court are not antagonistic. The statute permits the action to be prosecuted against all operators in the area as a class. The interests of the numerous lessors—in many instances the owners of small city lots in a single lease—are so inseparably bound up and identical with the interests of the lessees in the subject-matter of the action that both might well be deemed in the same class in the pending litigation. No violence would therefore be done to the doctrine of representation to hold that in defending said action the petitioners are representing their lessors.

The contention of the respondents that the present proceeding is premature is entitled to notice. The petition was filed and the alternative writ was served before the hearing on the order had developed. The respondent judge, in ruling on the motion, announced that at that time he was not satisfied that the lessors should be brought into the action, but that, if it should appear during the hearing that they should be brought in, a proper order to that end would be made. Notwithstanding this attitude on the part of the court, the present proceeding was commenced.

We conclude that the respondent court committed no abuse of discretion in denying the motion. It will therefore be justified in proceeding as it intends to do.

The alternative writ is discharged, and the petition for the preemptory writ is denied.

208 Cal. 688
PEOPLE v. SUPERIOR COURT IN AND FOR IMPERIAL COUNTY et al.
(L. A. 11826.)

Supreme Court of California. Jan. 22, 1930.

Criminal law ⇨1001—Court could grant probation on manslaughter charge, although after commission thereof defendant was convicted of another offense committed prior to manslaughter (Pen. Code, § 367c, and § 1203, as amended by St. 1927, p. 1493).

On May 21, 1928, motorist entered plea of guilty on charge of manslaughter arising from automobile collision on November 12, 1927. On November 16, 1927, four days after commission of manslaughter offense motorist was convicted of failing to stop and render aid on August 23, 1927, in violation of Pen. Code, § 367c. Motorist filed application for probation in manslaughter charge. *Held*, court had power to entertain and act on such application under Pen. Code, § 1203, as amended by St. 1927, p. 1493, for provision therein that probation should not be granted to any defendant unless court should be satisfied that he had never been previously convicted of felony applies to time of commission of offense, and not to time when application for probation was made.

In Bank.

Application by the People for a writ of mandate prayed to be directed to the Superior Court of the State of California, in and for the County of Imperial, A. C. Finney, Judge, to require enforcement of judgment. Writ denied.

Superseding opinion in 280 P. 203.

See, also, 284 P. 451.

U. S. Webb, Atty. Gen., John L. Flynn, Deputy Atty. Gen., and Elmer W. Heald, Dist. Atty., and Edward B. Patterson, Deputy Dist. Atty., both of El Centro, for petitioner. Hickcox, Trude & Johnson, of El Centro, and Edgar B. Hervey, of San Diego, for respondents.

R. B. Whitelaw and Utley & Nuffer, all of El Centro, for Salvadore Maggio.

SHENK, J. This is an application for a writ of mandate to compel the respondent court and judge to enforce a judgment against the defendant Salvadore Maggio in an action (No. 1959) against him, charging manslaughter.

On the night of November 12, 1927, the defendant was returning in a truck to the Imperial Valley from Yuma, Ariz. About half-way between Yuma and Holtville the truck collided with a Ford car which had been left partly on the paved portion of the highway. The driver of the Ford car had stopped it at that place for the purpose of repairing a tube. The impact knocked the driver of the Ford car forward into another car which had

stopped a few feet in front of the Ford car pending the tube repairs. From the injuries thus received the driver of the Ford car subsequently died, and Maggio was charged with manslaughter. The jury returned a verdict of guilty as charged in the information, and a new trial was granted on February 14, 1928. On May 21, 1928, the defendant appeared before the court, entered a plea of guilty as charged, and applied for probation. On June 1, 1928, he was sentenced to confinement in the state prison. The sentence was thereupon suspended and the defendant was placed on probation.

In another action in the same court (No. 1947) against this same defendant he was charged with a violation of section 367c of the Penal Code, so-called "failure to stop and render aid," etc., charge, committed on or about August 23, 1927. He was convicted in that action on November 16, 1927, four days after the commission of the manslaughter offense and the judgment of conviction was affirmed. *People v. Maggio*, 90 Cal. App. 683, 266 P. 813. The question is now presented whether it was within the power of the court to entertain and act upon an application for probation in the manslaughter charge in view of the fact that after the commission of that offense he was convicted on the so-called "failure to stop and render aid," etc., charge.

Section 1203 of the Penal Code, as amended in 1927 (St. 1927, p. 1493), contains the provisions of the law under which application for and admission to probation were authorized in the action here involved. It is therein provided that after conviction or plea of guilty of a public offense, in cases where discretion is conferred on the court, the defendant may be placed on probation under the circumstances indicated in the section with the following proviso: "Further provided, however, that probation shall not be granted to any defendant who at the time of the perpetration of the crime or at the time of his arrest was armed with a deadly weapon (unless at the time he had a lawful right to carry the same) nor to one who used or attempted to use a deadly weapon in connection with the perpetration of the crime, nor to one who in the perpetration of the crime inflicted great bodily injury or torture, nor to any defendant unless the court shall be satisfied that he has never in any place been previously convicted of a felony. * * *

It is the contention of the petitioner herein that the word "previously" used in the clause last above quoted has reference to the time when the court is passing upon the application for probation. The respondents contend that the word "previously" has reference to the time of the commission of the offense, and that in any event the "second offense" rule laid down or approved in *Re Tung Fong*, 59 Cal. App. 499, 211 P. 32, and *People v. Rose*, 63 Cal. App. 762, 219 P. 1043, and kindred

cases, should be applied. Those cases hold that in order to justify the heavier penalty the second offense must have been committed after conviction of the first.

There may be some analogy between the rule in "second offense" cases and in probation cases. In each the law imposes a more stringent penalty for the second offense. In the one case a more severe penalty is prescribed for the second violation of the same law. In probation cases a prior conviction of a felony in any place removes the defendant from the operation of the probation law and in so doing increases the penalty for the subsequent offense. The theory in both classes of cases is the same, in this, that the law as to both bears down more heavily on those who have failed to respond to the corrective purposes inherent in the prior conviction. But whatever the foregoing analogy may be, we find in the theory of the probation law itself, as expressed in the statute, a legislative intent in harmony with the respondents' contention. Under section 1203 the court must, if permission to apply for probation be not denied, refer the matter to the probation officer for investigation and report "upon the circumstances surrounding the crime and concerning the defendant and his prior record, which may be taken into consideration either in aggravation or mitigation of punishment." It is made the duty of the probation officer to "make an investigation of circumstances surrounding the crime and the prior record and history of the defendant," and report the same to the court. The "prior record" obviously means the record of the defendant before the commission of the offense of which he has been convicted and as to which he is making an application for probation. If it appear that he has suffered a prior conviction of a felony, that fact is in aggravation of punishment by removing him from the application of the probation law. If no such prior record appear, discretion is then vested in the court to determine whether there were mitigating circumstances requiring, or that the ends of justice would be subserved by granting, probation. The frequent reference in the section to the "circumstances surrounding the crime" and to the time of "the perpetration of the crime," together with the general theory and purposes of the probation law, indicate persuasively an intention to use the word "previously" as applying to the time of the commission of the offense and not to the time when the application for probation is being passed upon.

We are, of course, not to be taken as holding or intimating that the court may not, in the exercise of its discretion in passing upon an application for probation, take into consideration any fact or circumstance concerning the defendant, developed at any time prior to the court's final action on the application. Circumstances might arise after

the commission of the offense or even after conviction which would render a probationary order inadvisable. We are here dealing with a question of power to entertain the application, and not with the discretionary exercise of that power.

The peremptory writ is denied.

We concur: WASTE, C. J.; RICHARDS, J.; SEAWELL, J.; PRESTON, J.; LANGDON, J.; CURTIS, J.

208 Cal. 692

PEOPLE v. SUPERIOR COURT IN AND FOR IMPERIAL COUNTY et al.
(L. A. 11827.)

Supreme Court of California. Jan. 22, 1930.

1. Criminal law ⇨1001—Court held not shown to have abused its discretion in granting probation after affirmance of judgment of conviction on appeal (Pen. Code, § 367c).

Facts held not to show abuse of discretion on part of trial court in granting probation after affirmance of judgment of conviction of failing to stop and render aid in violation of Pen. Code, § 367c.

2. Criminal law ⇨1001—Application for probation may be granted after affirmance of judgment of conviction on appeal.

Trial court has power to hear and determine application for probation after affirmance of judgment of conviction on appeal.

In Bank.

Application by the People for a writ of mandate to be directed to the Superior Court in and for the County of Imperial and A. C. Finney, Judge. Writ denied.

Superseding opinion in 280 P. 202.

U. S. Webb, Atty. Gen., John L. Flynn, Deputy Atty. Gen., and Elmer W. Heald, Dist. Atty., and Edward W. Patterson, Deputy Dist. Atty., both of El Centro, for petitioner.

Hickcox, Trude & Johnson, of El Centro, and Edgar B. Hervey, of San Diego, for respondents.

R. B. Whitelaw and Utley & Nuffer, all of El Centro, for Salvatore Maggio.

SHENK, J. This is an application for a writ of mandate to compel the respondent superior court and judge thereof to issue an appropriate order to put into effect a judgment heretofore rendered in said court in an action entitled *People v. Salvatore Maggio* (No. 1947). In said action the defendant was charged by information with the crime of failure to stop and render aid, etc., a felony (committed on or about August 23, 1927), as defined by section 367c of the Penal Code. Maggio was convicted on November 16, 1927, and sentenced to imprisonment in the state

prison. He appealed from the judgment and from an order denying his motion for a new trial. The judgment and order were affirmed. *People v. Maggio*, 90 Cal. App. 683, 266 P. 813. Upon the going down of the remittitur, the respondent court, on May 31, 1928, made an order purporting to amend the judgment which had been thus affirmed, and on an appeal by the people from such order the same was reversed. *People v. Maggio* (Cal. App.) 274 P. 611. The remittitur on the second appeal was filed in the respondent court on February 24, 1929. Thereafter on March 15, 1929, the district attorney moved said court to direct that the commitment be issued and delivered to the sheriff for the purpose of enforcing the judgment. Concurrently, the defendant made an application for probation. The motion of the district attorney was denied and the application for probation was granted. On April 2, 1929, the petition in the present matter was filed, alleging that the superior court was without power to grant probation after the affirmance of the judgment of conviction on appeal.

[1, 2] The facts of the case, which need not be further recounted, show no abuse of discretion on the part of the trial court in granting probation, provided the court had the power to make the order. The question of the power of the court under present law to grant probation after the affirmance of a judgment of conviction was determined in the recent case of *Lloyd v. Superior Court* (Cal. Sup.) 283 P. 931. It was there decided that the court has such power. On the authority of that case the petition for the issuance of the peremptory writ is denied.

We concur: WASTE, C. J.; RICHARDS, J.; SEAWELL, J.; PRESTON, J.; LANGDON, J.; CURTIS, J.

HOFFMAN v. DEPARTMENT OF INDUSTRIAL RELATIONS, DIVISION OF INDUSTRIAL ACCIDENTS AND SAFETY.★
(S. F. 13510.)

Supreme Court of California. Jan. 15, 1930.

Rehearing Granted Feb. 13, 1930.

1. Master and servant ⇨115(3)—Subcontractor held bound to lay and maintain plank flooring at second story for workmen's protection, though building had not yet reached higher elevation (St. 1921, p. 453, § 1(b)).

One contracting to erect steel frame of five-story building held bound by St. 1921, p. 453, § 1(b), to lay and maintain required plank flooring at second story for protection of workmen, though building had not reached elevation of "more than two stories"; statute applying to

buildings which are to rise to more than such height.

2. Master and servant ☞352—Subcontractor held not guilty of "serious and willful misconduct" authorizing penalty in leaving spaces between second story temporary floor planks (Workmen's Compensation Act, § 31 (b), and § 6(b), as amended by St. 1923, p. 376; St. 1921, p. 453, § 1(b)).

Subcontractor erecting steel frame of building held not guilty of "serious and willful misconduct," within Workmen's Compensation Act (St. 1917, p. 831), § 31(b), and section 6(b), as amended by St. 1923, p. 376, authorizing imposition of penalty on employer guilty thereof, in leaving spaces of 2 or 3 inches between planks forming temporary floor of second story, in violation of St. 1921, p. 453, § 1(b), where planks belonged to general contractor and were to be used later in forming joists and woodwork of upper stories and employee's injury was chiefly due to unknown hidden defect in plank, which broke under his and coemployee's combined weight.

[Ed. Note.—For other definitions, see Words and Phrases, Third Series, Serious and Willful Misconduct.]

3. Master and servant ☞405(1)—Evidence held to show that subcontractor knew of statutory requirements as to plank flooring on second story of building for workmen's protection (St. 1921, pp. 453, 454, §§ 1(b)(c), 3, 4).

Evidence held sufficient to show that subcontractor, erecting steel frame of five-story building, was aware, in at least general way, of requirements of St. 1921, pp. 453, 454, §§ 1(b)(c), 3, 4, as to laying plank flooring on second and successive alternate stories of building for protection of workmen.

4. Master and servant ☞352—"Serious and willful misconduct," authorizing imposition of penalty on employer, means intentional doing of something with knowledge, or wanton and reckless disregard of its probable consequences (Workmen's Compensation Act, § 31(b), and § 6(b), as amended by St. 1923, p. 376).

"Serious and willful misconduct," within Workmen's Compensation Act (St. 1917, p. 831), § 31(b), and section 6(b), as amended by St. 1923, p. 376, authorizing imposition of penalty on employer guilty thereof, is more than negligence, however gross, and means intentional doing of something with knowledge that it is likely to result in serious injury, or wanton and reckless disregard of its probable consequences.

5. Master and servant ☞352—Whether employer's acts or omissions constitute serious and willful misconduct authorizing penalty depends on particular circumstances (Workmen's Compensation Act, § 31(b), and § 6(b), as amended by St. 1923, p. 376).

Whether employer's acts or omissions in violation of Workmen's Compensation Act (St. 1917, p. 831) constitute "serious and willful misconduct" within section 31(b) and section 6(b), as amended by St. 1923, p. 376, authorizing imposition of penalty on employer guilty

thereof, depends on circumstances of each particular case.

6. Master and servant ☞352—Statutory provisions authorizing imposition of penalty on employer for serious and willful misconduct must be strictly construed (Workmen's Compensation Act, § 31(b), and § 6(b), as amended by St. 1923, p. 376).

Penal provisions, such as those of Workmen's Compensation Act (St. 1917, p. 831) § 31(b), and section 6(b), as amended by St. 1923, p. 376, authorizing imposition of penalty on employer guilty of serious and willful misconduct, are to be strictly construed, and must not be so applied as to impose penalties without clear showing of such acts and conduct as evince, not only actual knowledge of law, but such intentional disobedience thereof as amounts to reckless disregard of employees' safety.

7. Master and servant ☞352—Subcontractor permitting plank flooring over wider space than statute allows without intermediate beams held not guilty of serious and willful misconduct authorizing penalty (Workmen's Compensation Act, § 31(b), and § 6(b), as amended by St. 1923, p. 376; St. 1921, p. 453, § 1(b)).

Steel framework contractor, causing or permitting plank flooring to be laid over portions of space more than 13 feet wide between beams without intermediate beams, in violation of St. 1921, c. 453, § 1(b), held not guilty of such serious and willful misconduct as to authorize imposition of penalty, in addition to compensatory award to employee injured when plank broke because of unknown hidden defect, under Workmen's Compensation Act (St. 1917, p. 831), § 31(b), and section 6(b), as amended by St. 1923, p. 376.

Seawell, J., Waste, C. J., and Curtis, J., dissenting.

In Bank.

Certiorari to the Industrial Accident Commission.

Proceeding by Paul Broschinsky, employee, for compensation under the Workmen's Compensation Act, opposed by Leo Hoffman, employer, and his insurance carrier. Compensation with penalty for serious and willful misconduct was awarded by the Industrial Accident Commission of the Department of Industrial Relations, Division of Industrial Accidents and Safety, and the employer brings certiorari. Award annulled as to penalty.

Superseding opinion, 276 P. 1060.

George D. Collins, Jr., of San Francisco, for petitioner.

G. C. Faulkner, Frank J. Burke, and F. W. Sawyer, all of San Francisco, for respondent.

RICHARDS, J. The petitioner applied for a writ of review wherein he sought to have reviewed and annulled a decision of the Industrial Accident Commission, rendered upon

the application of one Paul Broschinsky for an award against his employer, the petitioner herein, and the latter's insurance carrier, wherein, in making said award, the Industrial Accident Commission found that the petitioner, as the employer of Broschinsky, had been guilty of serious and willful misconduct with relation to the circumstances and conditions attending the injuries to the employee, and that, by reason thereof, the compensation payable upon said award should be increased 50 per cent.; the penalty thus imposed to be borne solely by the employer. It is the latter portion of the award imposing such penalty that the petitioner seeks to have annulled through the instant proceeding. The facts leading up to the accident which occasioned the employee's injuries are practically undisputed, and may be briefly stated as follows: The Golden Gate Iron Works had entered into a contract for the erection of a five-story steel frame apartment house at Palo Alto, Cal., and had sublet its contract for the erection of the steel frame portion of the building to Leo Hoffman, the petitioner herein. The building thus to be erected had no excavation under it, but was to rise from the ground level, and the work of its erection had so far progressed that the first and second stories of the steel structure had been erected and had risen to an elevation of about 20 feet, when it became necessary, in order that the further work of erection might proceed and also in order that the workmen engaged upon the portions of the building thus far constructed might be protected, that a temporary plank floor should be laid over the beams forming the framework of the second story. An inspection of the blueprints which show the detail of the structure discloses that the spaces between these beams, and which were to be covered by such flooring, varied in width from about 11 to about 16 feet. At the particular place where the accident occurred the span from center to center of the beams was 15 feet 2 inches. In order to lay such flooring, the usual arrangement was made between Hoffman and the general contractor by which the wooden floor joists which were eventually to be put in place upon the upper floors of the structure, and which consisted of pine boards 16 feet long, 12 inches wide, and 2 inches thick, were to be made use of by the subcontractor for the required temporary flooring, and, on the day before the accident in question, this planking had been hoisted and distributed along and across the beams in question to constitute said temporary flooring. This having been done, the employees of Hoffman, whose duty it was to distribute the columns which were to constitute the frame work for the third story, went about the performance of this work, and, while thus engaged, Broschinsky and another fellow laborer, one Jensen, happened to step upon the same plank at the same time,

and, as they did so, the plank broke under their combined weight. Jensen succeeded in catching hold of a support and did not fall to the ground, but Broschinsky was not so fortunate, and he fell through the aperture caused by the broken plank to the ground, suffering the injuries which formed the basis of his claim for an award. The space which was occupied by the plank which thus broke was 15 feet and 2 inches from center to center of the beams upon which it had been laid, and its examination after the accident disclosed that it was a piece of timber which had been sawed immediately adjacent to a knot, so that the board thus produced, while apparently clear on one side, had the rings of the knot upon the other, and this constituted the weakness which caused it to break when the combined weight of the two men was placed upon it. This board had been placed in its position upon the temporary flooring with the knot side down, so that its defect was not visible either to those who laid the board or to the workmen whose combined weight caused it to give way.

[1, 2] The main award to the applicant, Broschinsky, is not disputed in the instant proceeding. The only question presented herein is as to whether the decision of the commission to the effect that the employer, Hoffman, was guilty of such serious and willful misconduct as would suffice to justify that portion of said decision which affixed the aforesaid penalty under the provisions of those sections of the Workmen's Compensation Law (section 6(b), St. 1917, p. 834, as amended by St. 1923, p. 376, and section 31(b), St. 1917, p. 860), which permit the imposition of such penalty shall be upheld. The serious and willful misconduct of which the petitioner herein was thus found guilty consisted in his alleged violation of the provisions of that certain statute enacted by the Legislature in 1921 (St. 1921, p. 452, et seq.), which purported to amend an earlier act requiring the placing of temporary floors in buildings of a certain height in course of construction. The original statute enacted in 1909 (St. 1909, p. 157) and amended in 1911 (St. 1911, p. 1112) was made applicable to buildings more than three stories high while in course of construction, and by its later amendments, and particularly that adopted in 1921, was made applicable to buildings more than two stories high in the course of construction. By the terms of section 1, subdivisions (b) and (c) of its later amendment, it is provided that: "(b) If such building has a structural frame of iron or steel, the entire floor of every second story, except such space as may reasonably be required for the proper construction of such building, shall be thoroughly covered with planks tightly laid together, so that workmen shall have at all times planked floors within two stories below them. (c) If a span of a floor exceeds thirteen (13) feet, an

intermediate beam shall be used to support the temporary flooring; provided, however, that spans not to exceed sixteen (16) feet may be covered by three (3) inch planks without such beam. Such intermediate beam shall be of a sufficient strength to sustain a live load of fifty (50) pounds per square foot of the area supported." By sections 3 and 4 of said act it is further provided as follows: "Sec. 3. Planked floors shall consist of planks tightly laid together of number one common lumber, not less than two inches thick and eight inches wide, free from protruding nails or other objects," etc. "Sec. 4. No owner, agent of the owner, general contractor, contractor, subcontractor, or other person shall proceed with any work assigned to or undertaken by him, or require or permit any other person to proceed with work assigned to or undertaken by either, unless the planking or nets required by this act are in place. Violation of this section shall constitute a misdemeanor."

During the hearing before the Industrial Accident Commission, evidence was introduced to the effect that from time to time the commission had issued certain safety orders based upon the provisions of the foregoing statute containing more definite directions as to how the temporary flooring required by the terms of said statute should be laid, and there was also some evidence to the effect that these orders had been posted upon some of the buildings which were being erected by the Golden Gate Iron Works, but there was no evidence that the petitioner herein had been engaged in the work of erecting any of said buildings, nor that he had ever seen or heard of such orders or the contents thereof. No such orders had been posted upon the building in question; but there was some evidence to the effect that some three or four months prior to the accident, while erecting another building, the attention of Hoffman had been drawn by an agent of the commission to the fact that he was violating the provisions of the statute of 1921 above quoted.

It is the contention of the petitioner herein that at the time of the accident and in the state of construction to which the building had progressed he was not violating in any manner the provisions or requirements of said statute. His contention in this respect is based upon his interpretation of the terms of said amended statute which are embraced in section 1 thereof, and which provides in part as follows: "Any building more than two stories high in the course of construction shall have the joists, beams or girders of floors below the floor or level where any work is being done, or about to be done, covered with flooring laid close together, or with such other suitable material as will protect workmen engaged in such building from falling through joists or girders, and from falling planks, bricks, rivets, tools, or any other substance,

whereby life and limb are endangered." It is the petitioner's contention that, since the building wherein the accident occurred had not at the time thereof reached an elevation of "more than two stories," it was not subject to the requirements of said statute with relation to the laying of a temporary floor, and hence that, at the time said floor was laid, or in the manner of the laying thereof, the petitioner was not violating the provisions of said amended statute. We do not deem this contention to be meritorious, in view of the manifest purposes and express provisions of said statute. We are of the opinion that it was intended, and manifestly intended, to have application to buildings which were in the course of their construction to rise to a height exceeding two stories, and to provide that in all such structures the temporary flooring designated by its terms should be laid at every second story of such proposed building, and hence that the petitioner herein was bound under the compulsions of said amended statute to lay and maintain in place at the second story of said structure the flooring of planks which the provisions of the act required. It is obvious that the petitioner herein so interpreted the terms of said act in so far as he was familiar with the same when he caused to be laid the flooring in question.

During the hearing before the commission some evidence was introduced bearing upon the question as to whether in laying such flooring the petitioner had sufficiently complied with the provisions of the subdivisions of the act above quoted, which required that the space to be occupied by such flooring "shall be thoroughly covered with planks tightly laid together, so that workmen shall have at all times planked floors within two stories below them." § 1(b). The evidence touching this subject indicated that in laying said planks the petitioner herein, or his workmen, had not closely followed the foregoing requirement, but that spaces amounting to 2 or 3 inches had been left between the planks, and that the existence of these spaces was due to the fact that, in order to avoid their presence, it would have been necessary to saw such spaces in said planks as would enable them to fit closely together. But in this regard the evidence disclosed that the planks in question were not the property of the petitioner herein, but that they belonged to the original contractor, and were to be used later on in forming joists and woodwork of the upper stories. It would seem, therefore, that whatever omission there may have been on the part of the petitioner to comply strictly with the foregoing requirement of the statute could hardly be held to be serious and willful misconduct on his part, especially in view of the fact that the accident in question was not due in any respect to the fact that the planks had not been laid closely together, but was chiefly due to the fact that the particular

plank which broke under the combined weight of his two employees was defective in the respect above indicated, since the undisputed evidence before the commission disclosed that, had the plank in question been sound, it would have supported the weight of the two men, notwithstanding the fact that the space over which it was laid exceeded by about 2 feet the span of 13 feet designated in the act, and which requires an intermediate supporting beam under such temporary flooring when the span over which the same is laid exceeds 13 feet. In connection with the foregoing fact, the further fact should be noted that the undisputed evidence before the commission disclosed the defect and consequent weakness of the particular piece of planking which broke under the combined weight of the petitioner's employees was not known either to himself or to them, and that this was due to the circumstance that such defect was only observable upon the under side of said piece of planking, and that, so far as the upper side thereof disclosed, it was apparently as sound as the other pieces of planking which composed such temporary flooring.

[3-7] We are thus brought to consider the question as to whether such further evidence as we shall find to have been presented before the commission relating to petitioner's alleged violation of the requirements of said statute was such as to furnish a sufficient basis for the finding of the commission that the petitioner was guilty of "serious and willful misconduct" under the provisions of the Workmen's Compensation Act. It was sufficiently shown in evidence before the commission that the petitioner herein was aware, in at least a general way, of the provisions and the requirements of the act of 1921 having relation to the laying down of plank flooring upon the second and successive alternate stories of such a building as was in this instance being erected. It is not necessary for the respondents herein to rely upon the presumption that all persons know the law, since it appears not only that the petitioner had upon a previous occasion had his attention called to his violation of certain other provisions of said act, but that, as to the particular provisions thereof which require the laying down of such plank flooring in such a structure, the petitioner showed by his compliance in the particular instance with the general terms of said act that he was familiar with its provisions. The undisputed evidence shows that the petitioner did put down such flooring, comprised of planking which was even larger in width and hence stronger in sustaining quality than the terms of the act require. His only non-compliance with the provisions of said act, upon the basis of which the respondents herein can sustain the charge of serious and willful misconduct on the part of the petitioner, consisted in the fact that he caused or permitted such flooring to be laid over portions of the

space to be covered thereby, wherein the distance between the beams which were to support said flooring was in excess of 13 feet, without an intermediate beam sufficient to support such temporary flooring where the span was in excess of 13 feet. It may not be questioned that the omission of the petitioner to support this particular part of said flooring with an intermediate beam would have been such an act of negligence upon his part as would have amply sufficed to sustain the finding of the commission with respect to a compensatory award, but whether or not such omission would in and of itself be sufficient to justify a finding that the petitioner was thereby guilty of such serious and willful misconduct as would support the added award of the penalty complained of is the question which we are thus brought to the point of deciding. This court has had occasion in certain earlier cases to discuss and define the meaning of the phrase "serious and willful misconduct" as the same is used in the provisions of the Workmen's Compensation Act here under review.

In the case of *E. Clemens Horst Co. v. Industrial Accident Commission*, 184 Cal. 180, 188, 193 P. 105, 108, 16 A. L. R. 611, this court, in undertaking to define these terms, adopted the view expressed by Beven in his treatise on "Workmen's Compensation," at page 394 et seq., to the effect that "to constitute 'serious misconduct,' it is probable that the Legislature intended to signify conduct that an average workman in being guilty of either would know, or ought to know, if he turned his mind to consider the matter, to be conduct likely to jeopardize his own and his fellow workman's safety." "In our opinion," says this court, "the serious misconduct of an employer under our statute may be similarly defined. There should be no difference in principle between the degree of care required of an employer and that exacted from an employee 'Serious misconduct' of an employer must therefore be taken to mean conduct which the employer either knew, or ought to have known, if he had turned his mind to the matter, to be conduct likely to jeopardize the safety of his employees." The court in that case having found that the employer, in providing places and conditions of the employment which were patently unsafe, was guilty of "serious misconduct," proceeded to discuss the question as to whether such serious misconduct was "willful," and in so doing the court said: "It has frequently been said that willful misconduct involves the knowledge of the person that the thing which he is doing is wrong. (Citing cases.) Conceding that knowledge is required, it seems to us that in order to prove the requisite knowledge, it is not necessary for the evidence to show positively that the person was notified of the unsafe condition of his premises, but that it is sufficient if it appears that the circum-

stances surrounding the act of commission or omission are such as *'evinced a reckless disregard for the safety of others, and a willfulness to inflict the injury complained of.'*"

In *Helme v. Great Western Milling Co.*, 43 Cal. App. 416, 421, 185 P. 510, 512, it is said: "'Willful misconduct' means something different from and more than negligence, however gross. The term 'serious and willful misconduct' is described by the Supreme Judicial Court of Massachusetts as being something 'much more than mere negligence, or even gross or culpable negligence,' and as involving 'conduct of a quasi criminal nature, the intentional doing of something either with the knowledge that it is likely to result in serious injury, or with a wanton and reckless disregard of its probable consequences.'" (Citing *In re Burns*, 218 Mass. 8, 105 N. E. 601, Ann. Cas. 1916A, 787.) The mere failure to perform a statutory duty is not, alone willful misconduct. It amounts only to simple negligence. To constitute 'willful misconduct' there must be actual knowledge, or that which in the law is esteemed to be the equivalent of actual knowledge, of the peril to be apprehended from the failure to act, coupled with a conscious failure to act to the end of averting injury. *Smith v. Central, etc., Ry. Co.*, 165 Ala. 407, 51 So. 792." In denying a rehearing in the above case, this court reserved its opinion on the question as to "whether every failure to comply with a requirement of the Industrial Accident Commission or the statute is necessarily gross negligence or willful misconduct. On these questions we reserve expression of opinion."

Upon a maturer consideration of this question, we are satisfied that the foregoing quotation from the case of *Helme v. Great Western Milling Co.*, supra, furnishes a correct interpretation of the meaning to be given to the terms "serious and willful misconduct" as the same are used in the Workmen's Compensation Act. The question as to whether the acts or omissions of the employer in violation of the requirements of the Workmen's Compensation Act constitute serious and willful misconduct depends upon the circumstances of each particular case. In that connection it may be stated as a sound principle to be applied to penal provisions of the nature of that here under review that such provisions are to be strictly construed and are not to be given application so as to impose penalties upon employers who are otherwise subject to the compensatory remedies provided for in the Workmen's Compensation Act, without a clear showing before the commission of such acts and conduct on the employers' part as evince not only actual knowledge of the law, but such an intentional disobedience thereof as would amount to a reckless disregard of the safety of their employees. We are unable to find in the facts of this particular case such a sufficient showing of

willful and intentional disregard of the safety of his employees as would suffice to justify the findings and conclusion of the commission that the petitioner was guilty of such serious and willful misconduct as to bring him within the penalty prescribed by the Workmen's Compensation Act and imposed upon him in this particular case.

The award of the commission, in so far as it undertakes to impose such penalty, is therefore hereby annulled.

We concur: LANGDON, J.; SHENK, J.; PRESTON, J.

SEAWELL, J. I dissent. I am of the view that the award made by the Industrial Accident Commission on the issue of willful misconduct should not be annulled.

The petitioner failed to comply with the statute prescribing the duties of contractors constructing buildings more than two stories in height. The floor supports were at a greater distance by 2 feet than permitted by statute. The statutory distance of such supports is doubtless founded upon building experience. While a greater distance than that fixed by the statute, to wit, 13 feet, may in a great majority of cases prove safe for workmen, experience proves that a shorter distance makes for better safety, and correspondingly minimizes the hazards resulting from injuries inflicted by the breaking of the boards which may be weakened by such imperfections as seemed to have been the immediate cause of the workman's injuries. It is common knowledge that the most serious and common defect in the carrying strength of lumber is made by the intersection of the branches with the trunks of trees, commonly called knots. It is a defect reckoned with by owners and builders, and the presence or absence of knots in lumber determines its classification. The knot in the instant case is said to have been on the under side of the board. But some one handled it and saw or ought to have seen danger in its use. Willful negligence is a relative term. If the board upon which the workmen are required to do their work is of such height that death or injury will surely ensue should the board break, surely some degree of care in its selection should be exercised by the person responsible for its placement. A patent defect, such as a knot causes, ought, it would seem, to be seen upon a casual inspection. The seriousness of the injury that will probably result to the workman from a failure or refusal to comply with safety devices or measures is to be considered in determining whether an employer is guilty of serious and willful misconduct. Such conduct has some relevancy to the perils of the situation.

The object of the statute is not solely to award compensation for injuries received, but also by its rather drastic penalties to prevent

Injuries and deaths which in a wider sense are noncompensable. It was also intended to have a preventive effect.

Had the plain provisions of the law been complied with, there is reasonable probability that the injuries would not have been inflicted. No sufficient reason appears for excusing its violation.

We concur: WASTE, C. J.; CURTIS, J.

103 Cal. App. 367

SAN BERNARDINO COUNTY v. GATE CITY CREAMERY CO. (Civ. 50.)★

District Court of Appeal, Fourth District, California. Jan. 23, 1930.

Rehearing Denied Feb. 17, 1930. Hearing Denied by Supreme Court March 20, 1930.

Contracts ¶131 — Subscription undertaking to pay specified sum toward purchase of designated site for county courthouse held not invalid as being against public policy.

Subscription contract undertaking to pay to board of supervisors of county contribution of \$2,000 for purchase of designated site for county courthouse held not invalid as being against public policy, where no personal benefit or advantage was offered or accrued to any member of board, especially in view of Pol. Code, § 4041, subd. 6, and § 4062a, recognizing and authorizing acceptance of private contribution in aid of public enterprises.

Appeal from Superior Court, San Bernardino County; Benjamin F. Warmer, Judge.

Action by the County of San Bernardino against the Gate City Creamery Company. From a judgment dismissing action, plaintiff appeals. Reversed.

George H. Johnson, Dist. Atty., and M. O. Hert, both of San Bernardino, for appellant. Walter E. Byrne, of San Bernardino, for respondent.

SLOANE, P. J. This appeal was taken to the Supreme Court of the state of California and thereafter transferred to the Fourth District Court of Appeal, upon a judgment of dismissal of plaintiff's action, after demurrer sustained to second amended complaint and failure of plaintiff to amend.

The action was brought by the county of San Bernardino to recover from the defendant, Gate City Creamery Company, a corporation, a balance of \$1,800 alleged to be due and owing upon a subscription contract, whereby the defendant had undertaken and agreed to pay a contribution of \$2,000 toward the purchase of a site for the county courthouse.

The subscription agreement was executed by the defendant and a number of other citizens and taxpayers of San Bernardino for

the payment of various individual amounts, and is in words and figures as follows:

"January 12, 1925.

"We, the undersigned citizens and taxpayers of San Bernardino County, promise to pay to the Board of Supervisors on demand, the sums placed opposite our names, provided said sum is to be used for the purchase of ground situate on Third and Arrowhead Streets, comprising six hundred feet on Arrowhead Avenue to a depth of three hundred feet, said land to be purchased by the Board of Supervisors, if possible, and to be condemned, if necessary. The purchase price of the entire property is not expected to exceed Seventy-five thousand dollars, the salvage of the houses thereon to go toward the purchase of said property, and to be deducted from the total of Seventy-five thousand dollars. The Board of Supervisors is to agree to use this property for the purpose of erecting thereon the County courthouse and other buildings which are necessary, such as jail, hall of records, etc. In the event that a bond issue for the Court House should fail, this agreement is to be null and void, unless the Board of Supervisors decide to build the County Court House and other county buildings on said property by direct taxation. In such case, the undersigned agree to furnish the same (designated below) amount of money (\$75,000.00) as per their respective signatures. The undersigned also agree to pay the cost of all condemnation proceedings on any property that can not be bought outright."

The courthouse site designated in this agreement was accepted and purchased by the board of supervisors and the county courthouse constructed thereon. Defendant paid \$200 upon its subscription contract, and having refused to pay any further amount this action was brought to collect the unpaid balance. The second amended complaint alleges:

"V. That after the execution of the agreement herein set out, the plaintiff herein, relying upon the promises of the defendant and of the various persons signing said agreement, and agreeing to contribute money toward the buying of said site for said buildings, bought the said site and said lands for said purpose, and proceeded to, and has constructed thereon the buildings mentioned and designated in said agreement, and said buildings are completed and are now occupied by the officers and governmental agencies of plaintiff herein and by the Superior Courts of the State of California, in and for the County of San Bernardino and the various other agents of said plaintiff. * * *

"VII. That by reason of the subscription of the said defendant hereinbefore referred to, and by reason of the said plaintiff relying thereon and acting as hereinbefore alleged in good faith upon said subscription, and by reason of the payment by said defendant of

★Rehearing denied. Hearing denied by Supreme Court.

the said sum of two hundred dollars to apply thereon, the said defendant is, and should be estopped from denying the validity of said subscription agreement and is and should be estopped from denying and refusing to pay the remainder of said subscription so made."

This amended complaint was demurred to on the ground that the same "does not state facts sufficient to constitute a cause of action against said defendant."

The defense relied upon by defendant to avoid the obligation of this agreement is that the contract is void and unenforceable, "is against public policy and illegal, in that it has a tendency to influence the board of supervisors in the discharge of their official duty by trammeling their judgment in the matter of a selection of a courthouse site in which the board should have been left free to act as the public interest alone may dictate or require."

It is conceded and indeed affirmatively alleged in the complaint that the board of supervisors, in selecting the site for the courthouse, was influenced in making such selection, by these stipulated contributions to the purchase price. The sole question to be considered is as to whether or not the acceptance and consideration of such contributions is, in the state of California, against public policy.

It may be conceded, as set out in respondent's brief, that "subscription contracts to acquire particular sites and to erect thereon public buildings are of three classes:

"(1). To the first class belong all such contracts which are authorized by statute; and as each state has a right to determine its own questions of public policy, contracts so authorized are not illegal.

"(2). To the second class belong all such contracts where the location and selection of the site is determined by the votes at an election held for that purpose;" it being the law that the influence of such agreements upon the electors themselves is not against public policy.

(3). To the third class belong all such contracts where the contract is not expressly authorized by the statute, or the selection of the site determined by a popular vote, but where the location sought to be influenced by the subscription is left solely to the judgment of the administrative officers, who are elected by the people to exercise their judgment and determination for the best interests of the entire community, freely and unhampered, and without undue influence.

The case at bar belongs either to the first or third of these classifications. If it can be held that the Legislature of the state of California has authorized the consideration and acceptance of this class of subscriptions, it will be unnecessary to go further into the discussion of this case.

In enumerating the powers of boards of supervisors, subdivision 6 of section 4041 of the

Political Code includes the power "to purchase, receive by donation, lease or otherwise acquire water rights, or real or personal property necessary for the use of the county, for a courthouse, jail, hospital * * * and other public purposes, and also property upon which to sink wells to obtain water for sprinkling roads and other county purposes, and to improve, preserve, take care of, manage and control the same."

Section 4052a of the Political Code provides that: "The board of supervisors are hereby authorized to accept or reject, as they may deem advisable, any gift, bequest, or devise heretofore, or that hereafter may be made to or in favor of the county represented by such board in their official capacity, or to or in their favor in trust for any public purpose, and to hold and dispose of the same, and the income and increase thereof to and for such lawful uses and purposes as have been or may hereafter be prescribed in the terms of such gift, bequest or devise."

It is contended by respondent that the subscription which is the subject matter of the present case is not a gift or donation; that it is merely a conditional promise to contribute to the county of San Bernardino the specified sum of money in consideration of the location of the county courthouse at a designated place. It certainly does not come within the legal definition of a gift. Section 1146 of the Civil Code defines a gift as "a transfer of personal property made voluntarily, and without consideration." The instrument in question certainly does not transfer any property or thing, and the promise to do so is not absolute, and is for an express consideration which imports something of value to be received by the donor.

There is reason to assume, however, that contributions of this character to the public use were intended by the Legislature to come within the provisions of the sections of the statutes above quoted. The use of the words in section 4052a of the Political Code "in trust for any public purpose, and to hold and dispose of the same, and the income and increase thereof to and for such lawful uses and purposes as have been or may hereafter be prescribed in the terms of such gift, bequest or devise," would seem to indicate transactions specifying some particular use and application of the gift directing and restricting the dominion of the public over it to that specific purpose. What may be said to be the almost universal accompaniment of such contributions to the public gives further force to the language of the Legislature as being intended to apply to subscriptions of the character here under consideration. It rarely happens that such subscriptions to public buildings are not conditioned upon the choice of some specified location. As is said by the supreme court of Ohio, in the case of *Commissioners of Canal Fund v. Perry*, 5 Ohio, 56, an action on a contract to subscribe to the location of a canal:

"We think the common usual method of doing such things was in the contemplation of the law, the obtaining a promise to give or convey, at an agreed time, upon whatever condition the giver chose to impose, and the obtaining written evidence of the undertaking. One proposes to give one thousand dollars in a year, if the canal goes through his land. The construction contended for by the defendant's counsel, would deprive the state of power to avail itself of aid under such a condition. We are unable to perceive any sound reason against the making a valid contract, under the law, to pay on the happening of the condition."

Whether or not the above code citations may be construed as empowering the board of supervisors to accept and take into consideration a subscription of this kind, they obviously have their bearing upon the question of public policy in this state. They recognize and authorize the acceptance of private contributions in aid of public enterprises, and the fact that legislative sanction or acceptance of such contributions by popular vote removes the ban of corrupting and undue influence requires only an additional step to sanction such considerations on the part of other representatives of the public interest.

"We do not deem it necessary, however, to go to the extent of holding that there is express authority in these code provisions for accepting and considering a subscription of this character in the selection of a site for a public building. Considering the liability created by such a subscription purely on the grounds of public policy, we think that the weight of reasoning and authority is against the contention of respondent. The principle applicable to the definition of the term is well expressed and generally accepted as set forth in 6 California Jurisprudence, at page 109 et seq.: "Public policy is a term of vague and uncertain meaning, and it has been said that few cases can arise in which its application may not be disputed. The term has not been precisely defined by the courts, but has been left loose and free of definition in the same manner as fraud. The authorities all agree, however, that a contract is not void as against public policy, unless it is injurious to the interests of the public or contravenes some established interest of society. Fundamentally it pertains to the law-making power to declare what contracts are against public policy. The policy of the state can be ascertained only by reference to the constitution and laws passed under it, or which is the same thing, to the principles underlying and recognized by the constitution and laws. Courts are apt to encroach upon the domain of the law-making branch of the government if they characterize a transaction as invalid because contrary to public policy, unless the transaction contravenes some positive statute or some well established rule of law."

It will be conceded that any influence brought to bear upon a public board or official which has the evil tendency to influence such officer or board in the discharge of its public duty by trammeling the judgment in matters about which these public representatives should be left free to act as the public interests alone may dictate or require, is against public policy, and if such vitiating element is present and has that tendency in the eyes of the law, it makes no difference what the actual motive of the public officials in the particular instance may be. But is such a tendency present or apparent in the case in question? Here is a condition where the board of supervisors of San Bernardino county is called upon to select and procure a site for a county courthouse. In this, as in every such determination, one of the important considerations to be taken into account is the cost to the public. Other things being equal, it would clearly be the duty of the board to select the site which could be obtained at the least expense to the public. Of two locations offered, otherwise equally desirable, one at the full market value of the property, and the other as a donation, irrespective of the fact that the motive for the gift might be a selfish and self-serving one, it would be clearly the right and duty of the official body to accept the offered donation. What difference in principle is involved if a part or if the whole of the cost of a building site is tendered by a subscription from individuals who expect a profit by a location.

We have examined each of the numerous authorities cited by counsel in this case and find that in most of the decisions where the location of a public building has been influenced by private contributions to the cost, and the transaction held to be against public policy, the circumstances have been such that the contribution offered or suggested some personal gain or benefit to the officials having the decision in hand.

In the case of *Spence v. Harvey*, 22 Cal. 336, 83 Am. Dec. 69, cited by respondent, the question of the location of a postoffice was involved, and the offer of financial aid inured directly to the postmaster. In holding this agreement against public policy, the decision recites: "It is said that this particular contract is not against public policy, because in fact the place selected was suitable and convenient for the public use. The question of the validity of the contract does not, however, depend upon the circumstance, whether it can be shown that the public has in fact suffered any detriment, but whether the contract is in its nature such as might have been injurious to the public, and which public policy requires should not be made by public officers in regard to the discharge of their duties. Upon this point the case of *Fuller v. Dame*, 18 Pick. (Mass.) 472, is pertinent. In that case, it appears that Fuller was a stockholder in the Boston and Worcester Railroad Corporation,

and for a consideration he agreed to use his influence in procuring that corporation to locate its depot at a particular place in Boston, it being expressed in the agreement that Fuller was of the opinion that the road ought, from a view to the public good and the good of the stockholders, to locate its depot at that place. The contract was held to be void on the ground that the road was established for the public accommodation, although a private corporation, and that the public had an interest in the question of the location of the depot, and that though the contract was not made to induce a party to do an unlawful act, it put him under an influence to do that which might injuriously affect the interests of the public. * * * 'Nor is it any satisfactory answer to say that when the agreement was entered into, he had come to the opinion that the location in question was the best for the interests of the public and for the interests of the corporation. That opinion might be changed by new views and new offers; and besides, the terms upon which this boon was to be obtained, was still an open question. But upon all these questions the influence of the promise of separate and distinct advantage deprived him of the power of exercising a free, disinterested, and unbiased judgment.'

A similar distinction is pointed out in many of the cited cases. In the present case no personal benefit or advantage was offered or accruing to any member of the board of supervisors. The subscription tendered was purely in the interest of the tax-paying public, and its acceptance does not even suggest any improper motive.

The true doctrine applicable to this case, we believe, is set forth in the case of *Currier v. U. S.*, 184 F. 700, 701, decided by the Circuit Court of Appeals, involving a contract to contribute to the purchase of a site for a public building. The court says:

"The plaintiffs in error invoke the familiar rule against agreements which tend improperly to influence those engaged in the performance of public duties, or to induce them to subordinate the public welfare to individual gain.

"Assuming that we can take cognizance of their objection in a case like this, we think it is untenable. There is no charge of the receipt of a personal consideration by any representative of the government connected with the transaction, and for that reason most of the cases cited for plaintiffs in error are inapplicable. The action of the Secretary was wholly free from any influence, save his judgment of the suitability of the location and the donations towards its cost. Those donations were to the government, the public itself, not to an official, and we perceive nothing in them that would tend to public detriment. Even if they influenced him, it does not follow the public interest was not subserved. All reasonable inferences are to the

contrary. Obviously a site at least as suitable and convenient could be procured with the larger means as with the smaller, and in all reasonable probability a better one, notwithstanding any claim to the contrary. Every influence upon official action is not against public policy. It is only that which is immoral in its conception, or tends to impair official fidelity, or otherwise contravenes the established interest of society. * * * It is not against public policy for the owners of a very valuable location to reduce the price to the sum appropriated by Congress for the sake of profiting by an increase in value of their adjacent property, or for the owners of adjacent property to pay direct to the owners of the property selected, and thereby reduce the cost to the government. A contribution to the government itself cannot be different in principle.

"A public building was to be erected in Greeley, and a site satisfactory to the Secretary of the Treasury had to be selected. The donations in question inured to the benefit of the public. They were not given to any official for the purpose of influencing his judgment, nor to an individual to influence the judgment of an official charged with a public duty, nor was there tendency to affect the exercise of the judgment of an official contrary to the public interest. There is abundant authority for the rule that, if a public institution must be located or structure built, private contributions on condition that a particular location is selected are not against public policy. (Citing *Island County v. Babcock*, 17 Wash. 438, 50 P. 54; *State v. Johnson*, 52 Ind. 197; *Stilson v. Commissioners*, 52 Ind. 213; *George v. Harris*, 4 N. H. 533, 17 Am. Dec. 446; *Ford v. North Des Moines*, 80 Iowa, 626, 45 N. W. 1031; *Wells v. Taylor*, 5 Mont. 202, 3 Pac. 255.)"

Most of the decisions sustaining the validity of this class of contracts subscribing to public improvements do not turn upon the construction of the subscription as a gift, but rather recognize the benefits received by the subscriber as a legitimate and binding consideration.

In *Fearnley v. De Mainville et al.*, 5 Colo. App. 441, 39 P. 73, the syllabus, as sustained by the text, recites: "A contract by which one, in consideration of another's leasing to the government a building for a post office at a nominal rent, agrees to pay to the lessor a certain sum for each month of the term is valid, notwithstanding the purpose was to enable the lessor to outstrip other competitors for the location of the office at some other point."

Stilson v. Board of Commissioners, 52 Ind. 213, and *State v. Johnson*, 52 Ind. p. 197, contain an exhaustive discussion and citation of authorities covering the question of public policy. In the *Stilson Case* the conclusions of the court are covered by the syllabus in the

following language: "A written promise to pay into the county treasury a certain sum of money, upon the condition that the county commissioners, who had removed the county court-house from the public square and were building a new court-house elsewhere, would remove it back to said square, which offer was accepted by said commissioners, who entered on their records an order for such relocation, was not void as against public policy, though the commissioners were not expressly authorized by statute to receive such donations."

The court says in the opinion: "The question arising in the record was fully considered, and decided adversely to the appellant, in the case of *The State v. Johnson*, at the present term, ante, [52 Ind.] p. 197. Upon the authority of that case, the judgment in the present case must be affirmed. The two cases differ in this, that in the above cited case there was a statute which authorized the reception of donations in money or materials, while in the present case there is no such legislative sanction. But the ruling in the present case is predicated upon the general principles of law relating to public policy, as laid down in the above cited case."

In the case last cited, the court, in discussing the question of public policy, adopted the following proposition:

"The propriety of any particular location of public buildings may depend, in some measure, upon the sum proposed to be given by the citizens of any place. The public interest obviously requires that such location should be made with a view to all the circumstances, and the greater or less burden to the whole State would be an important circumstance to be taken into consideration, in determining between several places, in other respects equally convenient. The increased value of the property, in the vicinity of public buildings, would seem to require that those, who are benefited, should contribute some part of the increase, for the purpose of erecting them, rather than that the whole advantage should accrue to them, and the expense be wholly borne by the citizens generally. We can see no foundation for the objection made to this subscription, on the ground of public policy or propriety."

* * * What principle of public policy does it violate? The members of the board of police, as individuals, will not receive any portion of the money for which the note was given. At the time of the contract it was not intended or expected that they should receive it. It was not a proposition by the defendants to pay them so much as individuals, in consideration that they would not change the site of the court-house. If it had been, it would have been clearly illegal, and could not have been enforced. But the contract was made by them in their official capacity, for the benefit of the county. * * *

"But further than this, the power of courts to declare a contract void for being in contra-

vention of sound public policy, is a very delicate and undefined power, and like the power to declare a statute unconstitutional, should be exercised only in cases free from doubt."

"After mature and thoughtful consideration, we have arrived at the conclusion that the contract sued upon is not against sound public policy. * * * The sum donated lessened the public burden and placed it on those who would receive a personal advantage by such location. The money donated went into the fund provided for the erection of suitable buildings. * * * There is no pretence that there was any favoritism or partiality on the part of the Governor or the commissioners who aided him by their counsel. Nor is it claimed that a bad location was made. In the case of railroads and other quasi public corporations, the directors are stockholders and have a personal and pecuniary interest in all donations made. Under these circumstances, they might, in consulting their own interest, lose sight of the public good. In the case in judgment, the Governor was not subjected to any such temptation."

It would serve no useful purpose to consider all the authorities cited in detail. The general principles discussed may, however, be reinforced by calling attention to the conclusions reached by recognized commentators on the law as to where the weight of authority lies. *Corpus Juris*, under the subhead "Location of Public Offices," vol. 13, p. 437, says:

"When the general public is interested in the location of a public office, a contract to influence its location at a particular place for individual benefit or personal gain, is against public policy; although a contract which is conditioned on the location of a public building or office in a particular place will be sustained where the use of improper influence to secure such location is not contemplated."

"Where individual contributions to secure the location of a public building or the construction of a public improvement inure to the benefit of the public, and are not given to any official for the purpose of influencing his judgment, or to an individual to influence the judgment of an official charged with a public duty, and do not tend to affect the exercise of the judgment of an official contrary to the public interest, they are not against public policy."

Ruling Case Law, one of the most careful and reliable compilations of elementary principles as adopted by the courts, on this subject says (6 R. C. L. p. 748): "Without denying the fact that there may be circumstances under which contributions to the expense of erecting a public building might be lawful and proper to be considered in determining the best location for the public, some courts have declared that the donation of money must not be the inducement to the selection of a site apart from the public interests concerned. The argument urged against the validity of

contracts tending to influence the location of public buildings is that the administrative officers charged with the duty of procuring a site are bound by virtue of their office to exercise their best judgment in procuring a location which will be most advantageous to the public, and hence it would be contrary to public policy to allow them to be influenced by external aid. But the weight of authority is in favor of the validity of a contract, the object of which is to influence the location of a public building by contributing money or property into the public fund on condition that the building shall be located at a particular place, even though the officers in charge of the construction of the building have not express legislative sanction to receive contributions. This conclusion would seem to presuppose that there is no improper motive or corrupt conduct and that the benefit of the contribution inures to the public and not to the administrative officer. It has been said that the propriety of any particular location of public buildings may depend, in some measure, upon the sum proposed to be given by the citizens of any place. The public interest obviously requires that such location should be made with a view to all the circumstances, and the greater or less burden to the whole state would be an important circumstance to be taken into consideration, in determining between several places in other respects equally convenient. * * * In such cases contributions made on condition that the building should be erected at a particular place constitute valid agreements when accepted by the public officers."

In the present instance, nothing appears in the record to indicate that the subscription agreements in question tended in any way to influence the board of supervisors in the selection of a site for the courthouse, beyond the legitimate consideration of the fact that the money subscribed was an element of value to the general public in selecting such location.

The judgment appealed from is reversed.

We concur: BARNARD, J.; MARKS, J.

HIBERNIA SAVINGS & LOAN SOC. v. DE RYANA et al. (Civ. 7061.)★

District Court of Appeal, First District, Division 2, California. Jan. 16, 1930.

Rehearing Denied Feb. 4, 1930. Hearing Granted by Supreme Court March 17, 1930.

1. **Fraudulent conveyances** §241(2)—Equitable action to establish trust could be maintained, where property was attached, though claim against principal defendant was not reduced to judgment (Code Civ. Proc. § 542, subd. 2).

In action to recover loan and to establish trust in realty, plaintiff *held* entitled to proceed

in equity to reach property fraudulently transferred, though case against principal defendant was dismissed and plaintiff's claim had not been reduced to judgment, where property was attached and parties other than principal defendant tendered issue of ownership, in view of Code Civ. Proc. § 542, subd. 2, providing that property standing in name of one person but owned by debtor may be attached at suit of creditor.

2. **Appeal and error** §1170(6)—Error, if any, in permitting continuance of equitable action before proceeding against principal defendant held not to affect codefendant's substantial rights (Const. art. 6, § 4½; Code Civ. Proc. § 956a).

On appeal by defendants in action to establish trust in realty, error, if any, in dismissing action against principal defendant and permitting action to continue against others before plaintiff's claim against principal defendant was reduced to judgment, *held* not to affect substantial rights of codefendant, and therefore did not result in miscarriage of justice, justifying reversal under Const. art. 6, § 4½, in view of additional evidence admitted on appeal under Code Civ. Proc. § 956a, showing that since trial plaintiff in another action has reduced claim against principal defendant to judgment.

Appeal from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

Action by the Hibernia Savings & Loan Society against J. V. De Ryana and others. Judgment for plaintiff, and defendant Rachel Cafiero appeals. Modified, and as modified affirmed.

Walter E. Hettman, Chauncey F. Eldridge, and Leo R. Friedman, all of San Francisco, for appellant.

Tobin & Tobin and Geo. A. Clough, all of San Francisco (Robert H. Borland, of San Francisco, of counsel), for respondent.

NOURSE, J. Plaintiff sued to recover the sum of \$7,000 loaned to defendant J. V. De Ryana and to establish a trust upon certain real property standing in the name of defendant Cafiero and claimed to be owned by said De Ryana. Plaintiff had judgment as prayed, and the defendant Cafiero alone appeals on typewritten transcripts.

The defendant J. V. De Ryana was a fugitive from justice and was not served with process. The cause was dismissed as to him and proceeded to trial against the appellant and Rosalia De Ryana, wife of J. V. De Ryana. The evidence disclosed that J. V. De Ryana while serving a term in the state penitentiary for the crime of forgery was released on parole and came to San Francisco, where he assumed the name of De Ryana and entered into the real estate business on a large scale. He transacted all his business in the name of his wife and kept his principal bank account in her name. During this time his average bank

deposits, carried in the name of his wife, totaled \$30,000 annually, and upon his disappearance in 1927 these deposits ceased and the account was practically closed. The appellant was the sister of Rosalia De Ryana. She had about \$4,000 which she possessed in her own right. During the times mentioned real properties were purchased by De Ryana in the name of his said sister-in-law, the source of the funds used for that purpose being one of the questions in dispute at the trial.

In 1922 the real property in dispute was purchased by J. V. De Ryana in the name of his wife and J. V. De Ryana and his wife and appellant moved into the premises and continued to reside there during the transactions hereinafter noted. Other flats on the premises were leased in the name of the wife. In 1924 a pretended sale of these premises was made by Mrs. De Ryana to the appellant, the entire transaction being conducted by J. V. De Ryana. No change of possession was made by the parties and no change was made in the outstanding leases of the flats, but the lessees continued to pay rent to Mrs. De Ryana according to the terms of their leases. In November, 1926, by means of forgery of deeds and other documents, J. V. De Ryana fraudulently secured from respondent a loan of \$7,000, which sum was deposited in the respondent bank to his credit. A few days after obtaining this credit, J. V. De Ryana withdrew from respondent bank two separate amounts, and at about the same time appellant made two separate deposits to her account in another bank of approximately like amounts to those withdrawn by J. V. De Ryana. The appellant then withdrew from her bank the sum of \$3,500 which J. V. De Ryana paid through the title company in satisfaction of a second mortgage on the property in suit.

The case made by respondent was that this property was at all times owned by J. V. De Ryana; that the original purchase in 1922 was made in the name of his wife but for his account; that the transfer to appellant in 1924 did not convey to her any title because Mrs. De Ryana had given to the title company a deed which was intended as a mortgage, and hence when the title company deeded to appellant (the only conveyance to appellant under which she could claim title) it had no title to convey to her. The respondent further claims that the parties disclosed by their actions that no transfer of title or ownership was made or intended.

The trial court found upon conflicting evidence that the real property in suit was in fact the property of J. V. De Ryana and that the legal title which stood in the name of his wife and later in the name of appellant was held merely in trust for him. On this appeal the main attack upon the judgment is based on the claim that this finding is not supported by the evidence. It would serve no purpose to

outline the evidence more in detail. The positive evidence of the transactions of J. V. De Ryana, taken with the inferences which were properly drawn from these facts, is sufficient to support the finding. It is true that the testimony of the appellant raised some conflict, but her testimony was so evasive, contradictory, and, in many respects, wholly impossible that the trial court might well have disbelieved her entire testimony. In this respect the case is not unlike *Staples v. Hawthorne* (Cal. Sup.) 283 P. 67, and *Waizman v. Black* (Cal. App.) 281 P. 1087, where the direct testimony of an interested party was held to have been overcome by the uncontroverted evidence of facts and circumstances, illustrating, as said in *Pugh v. Bell*, 21 Cal. App. 530, 534, 132 P. 286, 288, the truth of the old saying that "actions speak louder than words." Our examination of the entire record satisfies us that the evidence is sufficient to support this finding and this disposes of the appeal except for the questions of procedure.

[1] The objection is made that because the respondent dismissed the action as to the principal debtor the trial court lost jurisdiction to proceed as to the others. The argument is that a creditor must first reduce his claim to judgment against the debtor before he can resort to an equitable action to reach property fraudulently transferred by the debtor. The respondent does not quarrel with the rule contended for, but insists that the case here is an exception to the rule. With this we agree. Section 542, subd. 2, Code of Civil Procedure, provides that property standing in the name of one person but owned by the debtor may be attached at the suit of the creditor. Such was the procedure followed here. An attachment lien was placed on the property, and thereafter the appellant and Mrs. De Ryana tendered the issue of ownership, which issue was met by respondent and fairly tried and determined. Manifestly the trial court had jurisdiction to try this issue. *Horan v. Varian* (Cal. Sup.) 263 P. 637; *Becker v. Beldt* (Cal. Sup.) 271 P. 1059.

[2] Since the issue of ownership in so far as this appellant is concerned was fairly presented and determined, the question of the effect of the dismissal as to J. V. De Ryana is to be considered on the basis of prejudice to this appellant and not on the basis of any rights which J. V. De Ryana might assert. As to appellant, therefore, it is merely a question of procedure. Then the question is: Did the error in procedure, if any, result in a miscarriage of justice? This is the question which the Constitution requires us to determine before we can reverse the judgment. But we find nothing in appellant's briefs which suggests any prejudice to her in this respect. Her sole claim is that because decisions have read that the creditor must first reduce his claim to judgment the court in this instance was without jurisdiction to pro-

ceed with the trial of the issues tendered. To offset any possible claim of prejudice to appellant the respondent has moved that a certified copy of the final judgment rendered against J. V. De Ryana on the claim in another action be filed herein as new evidence. Such a motion is permitted under section 956a, Code of Civil Procedure, the evidence of the judgment being "additional evidence of or concerning facts occurring * * * prior to the decision of the appeal." The motion is granted and the evidence is admitted for the purpose of showing the want of prejudice to appellant from any of the proceedings complained of. With this evidence before us the case presented on this appeal is simply this: The plaintiff, in another action in which J. V. De Ryana was a party, has now reduced its claim against him to final judgment and has subjected the property here involved to the lien of that judgment. Throughout the trial of the cause which is on appeal the claim thus reduced to judgment was treated as an adjudicated claim; that is to say, the claim here asserted and the circumstances under which it arose were the same as those appearing in the other action in which final judgment was had. The appellant had her day in court upon a fair trial of all the issues involved. The failure of plaintiff to reduce its claim to judgment prior to this trial did not affect the trial of the issues in any particular in so far as this appellant is concerned. Hence, if the reduction of the claim to judgment were a prerequisite the failure to do so was an error in procedure only—an error which did not affect the substantial rights of appellant and hence one which did not result in "a miscarriage of justice" which would support a reversal of the judgment under the terms of section 4½ of article 6 of the Constitution.

However, for the purpose of terminating the litigation as we are enjoined to do by the provisions of section 956a, Code of Civil Procedure, the complaint should be amended so as to plead the entry of the final judgment against J. V. De Ryana in the other action and the sale of the property here involved in execution of that judgment, and the findings should be amended so as to find in accord with the amendment. It is therefore ordered that the plaintiff may file in the superior court, prior to the time our judgment herein becomes final, an amendment to its complaint covering these allegations. In the meantime the complaint will be deemed to have been so amended, and upon the record and evidence before us the findings are amended by adding thereto: "That, in the action entitled Hibernia Savings & Loan Society v. J. V. De Ryana et al., in the superior court of the state of California, in and for the city and county of San Francisco, No. 194314, judgment was duly entered in favor of said plaintiff and against

J. V. De Ryana, on the 17th day of December, 1928, adjudging and decreeing that said defendant was indebted to said plaintiff in the sum of \$7,000 for money loaned; that said defendant was the owner of an interest in the real property described in said judgment; that a portion of said sum was used by said defendant for the purpose of paying of incumbrances upon said property which were purchase money incumbrances used by said defendant as a part of the purchase price of said property; that the real property described in said judgment is the same property which is involved in this action and which is fully described in finding No. 12 on file herein; and that said judgment constitutes a lien upon all the right, title, and interest of said J. V. De Ryana in and to said real property. That, in execution of said judgment of December 17, 1928, all the right, title, and interest of said J. V. De Ryana in and to said real property described in said judgment was duly and regularly sold at sheriff's sale to Hibernia Savings & Loan Society, plaintiff therein, for the sum of \$7,000.00."

It is further ordered that the judgment appealed from be modified so that the third paragraph thereof shall read: "It is further ordered, adjudged, and decreed that the said Rachel Cafero holds the legal title to the real property hereinafter described in trust for the benefit of the said J. V. De Ryana, subject to the lien of said judgment of December 17, 1928, and claim of plaintiff, etc."

The judgment as modified is affirmed, with costs to the respondent.

We concur: KOFORD, P. J.; STURTEVANT, J.

103 Cal. App. 349

In re HARNEY'S ESTATE. ★

HARNEY v. GARVEY et al.

(Civ. 7252.)

District Court of Appeal, First District, Division 2, California. Jan. 23, 1930.

Rehearing Denied Feb. 21, 1930. Hearing Denied by Supreme Court March 20, 1930.

1. Wills §55(1)—Contestant's testimony showing mental incapacity held sufficient to support verdict finding testator was of unsound mind when he executed will.

In will contest, contestant's testimony, if believed by jury, showing testator's mental incapacity, held sufficient to support verdict finding testator was of unsound mind at time he executed will.

2. Wills §384—Whether verdict finding execution of will was procured through undue influence was supported by evidence was immaterial where evidence supported verdict finding mental incapacity.

On appeal by proponents in will contest, whether verdict finding testator executed will

while under undue influence was sustained by evidence held immaterial, where verdict finding testator was of unsound mind at time he executed will was supported by evidence.

3. Wills §360—Complaint for first time on appeal that mere propounding of questions to proponents' witness in will contest was misconduct held too late.

Proponents' complaint for first time on appeal in will contest that mere propounding of questions to proponents' attorney on cross-examination while on stand as witness was misconduct held too late.

4. New trial §143(2)—Jurors' misconduct cannot be shown by their affidavits.

Misconduct on part of jurors cannot be shown by their affidavits.

5. Wills §360—Proponent in will contest, if knowing of jurors' misconduct, held under duty to call matter to court's attention and not to take chance on favorable verdict.

Proponent in will contest, if knowing of misconduct of jurors, held under duty to call matter to court's attention, and not to wait and take chance on favorable verdict.

6. Appeal and error §1078(1)—Objections on appeal were not considered, where no portion of record was quoted, no argument made, and no authorities cited calling upon court to pass on points.

Objections presented on appeal by proponents in will contest, where no portion of record was quoted, no argument made, and no authorities cited calling upon court to pass thereon, were not considered.

Appeal from Superior Court, Alameda County; E. C. Robinson, Judge.

Proceeding by Julia Harney, to contest the will of John Harney, deceased, opposed by John J. Garvey and others. From a judgment for contestant, proponents appeal. Affirmed.

Frank W. Hooper (Albert M. Hardie, of Oakland, of counsel), for appellants.

Stanley R. Sterne and Richard Liebman, both of Oakland, for respondent.

STURTEVANT, J. After the death of John Harney, John J. Garvey filed a petition asking that a certain document be admitted to probate as the will of the deceased. Julia Harney, the surviving widow, appeared and filed an opposition to the petition. The opposition was answered, and a trial was had before the court sitting with a jury. The jury returned a verdict in favor of the contestant. The verdict consisted of two special verdicts. By the terms of the first one, the jury found that the decedent was not of sound mind at the time the alleged will was executed, and by the second verdict it found that he was acting under undue influence. From a judgment entered on the verdict, the proponents

have appealed, and have brought up typewritten transcripts.

[1] The proponents claim that the evidence produced by contestant was insufficient. Before proceeding to discuss the point further, it should be noted that the parties proceeded on two distinct lines. In her case in chief, the contestant introduced proof tending to show that, from the 18th day of April, 1928, until the 14th day of May, 1928, the date of the death of the decedent, the decedent was in the last stages of the disease from which he died. Covering said period of time the contestant took the stand in her own behalf and testified to the things that she observed, and she called certain intimate acquaintances who testified to things that they had observed, and then she called certain doctors who testified regarding the examinations which they had made and the conclusions they formed after making said examinations. One of those doctors was a specialist in nephritis or Bright's disease. Going further, she called another doctor whose specialties are nervous and mental diseases. To the latter her attorney propounded a hypothetical question based on the history of the case as told by the witnesses just mentioned. In this manner she produced testimony to the effect that from April 18, 1928, the decedent was suffering from senile dementia with associated arteriosclerosis; that said disease was progressing from day to day; that from these causes the brain cells had become dead; and that on the 26th day of April, 1928, the decedent no longer had any mentality but that at that time "he was a vegetable, no mental capacity." On the other hand, the proponents called as witnesses the two witnesses of the will, the executor named in the will, the attorney who drew the will, and others. From said persons the proponents elicited testimony to the effect that, during the afternoon on which the will was drawn, and at the particular time at which it was drawn and signed, they talked to the decedent, and he talked to them or in their presence, and from said conversation they formed the opinion that the decedent was of sound mind. If the jury believed the testimony given by the witnesses for the contestant, then the verdict of the jury, which was to the effect that the decedent was of unsound mind, is abundantly supported by the evidence. The evidence went further than the verdict—it was to the effect that at said time the deceased had no mind.

[2] In the next place the proponents contended that the verdict of undue influence was against both the evidence and the law. We have just shown that the verdict based on unsound mind was abundantly sustained. That being so, it is immaterial whether the verdict based on undue influence was sustained or was not sustained. Estate of Baker, 176 Cal. 430, 437, 168 P. 881. We need not

further consider the point. However, it is only fair to the trial court and the jurors to state that it cannot be said that the evidence was insufficient to support the verdict of undue influence.

[3] When introducing the case for the proponents, one of their attorneys took the stand as a witness. On cross-examination he was asked if he was going to call Dr. Parker as a witness for the proponents. The proponents objected to the question, and the objection was sustained. There was no claim in the trial court that the mere propounding of the question was misconduct, and the trial court was not asked to rule thereon. It is too late at this time to claim misconduct.

After the jury had been out some time, it returned into court, and the following proceedings were had:

"The Court: The jurors are present. Ladies and gentlemen, have you agreed upon a verdict?"

"Juror Love: Your Honor, the jury would like to know if Mr. Sterne would have had the right to put Dr. Parker on the stand before he closed his case?"

Thereupon followed a colloquy covering nearly five typewritten pages. The proponents assert that "the comment of the court tended to call the attention of the jurors to the fact that Dr. Parker could be called by contestant, but that they did not have the right to go into the enemy's camp if they chose." They do not print in their brief any language which supports them. We have read the transcript, and we do not find anything in the language used by the trial court that was in the least improper.

The proponents assert that the verdict was contrary to the evidence measured in terms of law. In this connection they quote from *Estate of Sexton*, 199 Cal. 759, 768, 251 P. 778, 782: "Ability to transact important business, or even ordinary business, is not the legal standard of testamentary capacity, though it seems to be quite generally but mistakenly supposed, outside the ranks of the legal profession, that a capacity to transact important business is the criterion of fitness to make a valid will." The contestant did not assume the law to be different than as just quoted. On the contrary, she was at great pains to develop the facts that at the time the decedent made the purported will he did not have sufficient mental capacity to understand his relation to his relatives and those around him with a clear remembrance as to those in whom, and those things in which he was mostly interested; nor to be able to understand and carry in his mind the nature and situation of his property; nor to understand the act he was doing; nor to understand the relation in which he stood to the objects of his bounty free from any delusions or effect of

disease which might lead him to dispose of his property otherwise than he would if he knew and understood what he was doing.

[4, 5] The proponents assert misconduct on the part of the jurors. They do not claim it was shown by the reporter's transcript. In the trial court they attempted to use affidavits of jurors. They were not entitled to do so. *Rosenberg v. George A. Moore & Co.*, 194 Cal. 392, 396, 229 P. 34. Disregarding the affidavits of jurors and addressing ourselves to the other evidence, the record shows that the affidavit of Mattie Frazier was fully contradicted by the affidavit of juror Jones. The affidavit of John J. Garvey does not show any misconduct, and, if he knew of any, it was his duty to have called the matter to the attention of the court and not to wait and take a chance on a favorable verdict. Furthermore, if we assume that all of the affidavits were competent evidence, the affidavits do not disclose any misconduct on the part of the jury that was prejudicial to the rights of either party.

The proponents contend that their motion for a new trial should have been granted. In this behalf they rely upon the alleged misconduct of a juror. That subject has already been considered, and we need not repeat what has been said above.

[6] Other objections are presented, but no portion of the record is quoted, no argument is made, and no authorities are cited calling upon the court to pass on the points.

We find no error in the record. The judgment is affirmed.

We concur: KOFORD, P. J.; NOURSE, J.

COMMUNITY LUMBER CO. OF BALDWIN PARK et al. v. CHUTE et al., and Four Other Cases. (Civ. 3913.)★

District Court of Appeal, Third District, California. Jan. 18, 1930.

Rehearing Denied Feb. 17, 1930. Hearing Granted by Supreme Court March 17, 1930.

1. Bills and notes $\S$ 376—Note not made void in its inception by usury statute is valid in hands of innocent purchaser (Usury Law, $\S$ 2).

Where note is not made void in its inception by Usury Law, $\S$ 2 (St. 1919, p. lxxxiii), it is valid in hands of innocent purchaser, and when law only makes note void as to interest, note itself is not void.

2. Bills and notes $\S$ 370, 375—Neither lack of consideration nor illegality of consideration prevents note from being good in hands of innocent holder.

Neither lack of consideration nor illegality of consideration prevents note from being good in hands of innocent holder for value.

3. Usury ☞111(2)—Usury is special defense which must be pleaded.

Usury is special defense, and as such must be pleaded.

4. Usury ☞95—Principal, if due, must be tendered before plea of usury can be relied on.

Since agreement to pay interest is separable from agreement to pay principal, persons alleging usury must tender principal, if due, before they can rely on plea of usury.

5. Usury ☞126—Third party should not be permitted to complain of usury except for exceptional reason.

Where parties to agreement are willing to comply with it, third party should not be permitted to complain of usury except for some exceptional reason.

6. Corporations ☞92—Note held not illegal on ground part was given in full payment of stock, whereas 40 per cent. of purchase price should have been paid in cash, where stock was purchased a week after corporation purchased note.

Note *held* not illegal because part thereof was given in full payment of stock of corporation which corporation was only authorized to sell and issue when at least 40 per cent. of purchase price was paid in cash, where corporation paid price for note crediting amount to account of stock purchaser and agreeing to pay it out at stated intervals, and a week later stock was purchased and account charged with amount thereof.

7. Bills and notes ☞525—Corporation under evidence held to have taken note in due course without notice of rights of mechanic's lien claimants.

Corporation *held* under evidence to have taken note in due course and without any notice of rights of mechanic's lien claimants, where maker, payee, and indorser, who were only persons who might object when corporation took collateral, all assured purchaser there were no secret equities.

8. Mortgages ☞151(3)—Trust deed representing purchase price of lots recorded before commencement of work or furnishing of materials held superior to mechanics' lien claims.

Deed of trust representing entire purchase price of lots, which was of record before commencement of any work or furnishing of any material and recited it was subsequent to certain specified deed of trust only, *held* superior to claims of mechanics' liens.

Appeal from the Superior Court, Los Angeles County; John L. Fleming, Judge.

Actions by the Community Lumber Company of Baldwin Park and others, by George H. Whyte, Jr., by the Truscon Steel Company, and by C. W. Grizzelle and others, against W. H. Chute and others, and by the Weaver Roof Company against the West Coast Trim-mings Company and others. From judgments establishing priorities respecting plaintiffs' mechanics' liens, plaintiffs appeal. Affirmed.

Zach Lamar Cobb and Earl A. Littlejohns, both of Los Angeles, James B. Ogg, of Alhambra, and Musick, Burr & Pinney, Mitchell, Silberberg & Davis, and Hulme, Hastings & Bartlett, all of Los Angeles, for appellants.

Bush & Bush, of Los Angeles, M. W. Conkling, of San Diego, and Clarence E. Fleming, Fredericks & Hanna, Arthur L. Veitch, James Van Law, and A. G. MacRobbie, all of Los Angeles, for respondents.

PULLEN, Justice pro tem. The question here is one of priorities between appellants, who are mechanics' lien claimants, and respondents, who are beneficiaries under certain liens, secured by deeds of trust. The trial court granted priorities to the holders of the trust deeds, and the mechanics' lien claimants appeal. It will be necessary to set forth the facts in some detail.

W. H. Chute, one of the respondents, purchased the property in question from James A. Keeney, giving him as the entire purchase price a promissory note for \$5,000, secured by a deed of trust, which recited that it was subsequent and subordinate to a deed of trust for \$15,000 dated June 1, 1925, maturing six months from date in favor of the Union Engineering Company, Inc.

Chute, desiring to improve the property by the erection of a building thereon, entered into an agreement with respondent Union Engineering Company whereby Chute employed the Union Engineering Company as his agent or superintendent to erect such building and the Union Engineering Company was authorized to make all contracts relating to the construction of such building in the name of the owner, W. H. Chute.

In accordance with the further terms of such contract, Chute executed and delivered to Union Engineering Company promissory notes in the sum of \$32,000, \$15,000 of such notes being secured by a trust deed which was a first lien upon the property and immediately prior to the deed of trust in favor of Keeney for \$5,000 already referred to, and the balance of the \$32,000 in notes to be secured by a third deed of trust upon the property. In said agreements between the owner and the engineering company it was provided that the company should accept said notes "secured as aforesaid, as the agent of the owner and shall use said notes for the payment of all material and labor necessary to erect and construct to completion the above-mentioned building. The Superintendent shall have full authority to pay said subcontractors and materialmen performing the work or furnishing material in connection with the said building by said Trust Deed notes, by assignment thereof to said contractors and materialmen without recourse. The Superintendent shall also have full authority to sell such portion of said notes as it may deem necessary to

obtain cash which may be necessary for the erection of said building," and "after said erection and construction of said building is completed and all costs of said erection and construction have been paid, the Superintendent shall be entitled to retain any and all of the above-mentioned notes which have not been used in defraying costs of said building as its full compensation for service rendered under this agreement."

Thereafter the Union Engineering Company entered into contracts with the various plaintiffs, in the name of W. H. Chute, and the materials and labor were furnished as agreed, and the building completed and notice of completion duly filed in the office of the recorder of Los Angeles county.

Shortly after the execution and delivery of the notes referred to, the Union Engineering Company borrowed from defendant Leonard L. Jones the sum of \$6,000 and executed to Jones its promissory note in the sum of \$6,500 and secured the repayment thereof by a transfer and assignment of the note and deed of trust of \$15,000 already referred to. Thereafter Jones sold the note of \$6,500 of the Union Engineering Company to the Western Discount Corporation and also assigned the collateral referred to which he had received from the Union Engineering Company, Jones receiving therefor \$6,000 in cash.

Thereafter the engineering company borrowed from the Western Discount Corporation \$950 and gave its note therefor in the sum of \$1,000, and the engineering company assigned to the discount corporation all its equity in the note and deed of trust for \$15,000 of Chute, which had been theretofore pledged by the engineering company to Jones and by Jones transferred to the Western Discount Corporation as heretofore set up.

The court found that the notes of \$6,500 and \$1,000 had not been paid and that there was due thereon to the Western Discount Corporation the sums of \$6,000 and \$950, respectively, with interest, according to the terms of the notes as the amounts found due. All of the deeds of trust were recorded June 12, 1925, and the first work and materials furnished was on June 13, 1925.

Appellants urge as their first specification of error that the court should not have allowed the Western Discount Corporation interest on the amounts advanced by them because both of the notes were usurious.

It is clearly established, and the court found, that on the note of the engineering company to Jones in the sum of \$6,500 they were to receive and did receive only the sum of \$6,000; that Jones in turn sold the \$6,500 note of the engineering company to the discount corporation and received \$6,000 cash. As to this transaction the court found:

"That in purchasing the note for \$6,500 secured by the note and trust deed for \$15,000

in these findings referred to, the defendant Western Discount Corporation had no knowledge whatsoever of the existence of the contract between W. H. Chute and the Union Engineering Company herein referred to and had no knowledge of the terms and conditions hereof."

And it is further found by the court:

"That subsequent to the execution of said promissory note by Union Engineering Company in favor of said Leonard L. Jones the defendant Western Discount Corporation purchased said promissory note in good faith for value and in the due course of business from said Leonard L. Jones, and said Leonard L. Jones by proper endorsement on the back of said promissory note duly assigned, transferred and set over the same and all of his right, title and interest therein to the defendant Western Discount Corporation, and did at the same time and as part of the same transaction assign, transfer and set over unto said defendant the collateral security on said promissory note consisting of said note and trust deed for \$15,000 executed by W. H. Chute and Leotta Chute in favor of Union Engineering Company as hereinabove set forth, and that said Western Discount Corporation ever since has been and now is the owner of said promissory note and of said collateral security; that said promissory note was purchased by said defendant in good faith for value in the ordinary course of business and without notice of any offsets of any kind or nature and without notice of the existence of the contract between W. H. Chute, Leotta Chute, his wife, and Union Engineering Company hereinabove referred to."

As to the note of the engineering company of \$1,000 in favor of the Western Discount Corporation, the court found:

"That on or about the 4th day of August, 1925, and subsequent to the purchase by defendant Western Discount Corporation of said note for \$6,500 from Leonard L. Jones, together with collateral upon the same, the defendant Western Discount Corporation loaned to Union Engineering Company, one of the defendants herein, the sum of \$950.00 for a period of thirty days with interest at the rate of 8% per annum, and said Union Engineering Company by its officers thereunto duly authorized did execute and deliver to said Western Discount Corporation its certain promissory note in writing in the principal sum of \$1,000 dated August 4, 1925, and due thirty days after date with interest at the rate of 8% per annum; that said Union Engineering Company did then and there pledge, assign, transfer, hypothecate and deposit with said Western Discount Corporation all of its equity in and to said promissory note of \$15,000, executed by W. H. Chute and Leotta Chute, his wife, in favor of Union Engineering Company as collateral security on the said promissory note for \$6,500 in fa-

vor of Leonard L. Jones and which by said Leonard L. Jones had been assigned, transferred and set over to Western Discount Corporation, as hereinbefore found.

"The Court finds that said last mentioned loan of \$950.00 to Union Engineering Company was made by Western Discount Corporation in the ordinary course of business and in good faith and without any knowledge on its part of the various agreements alleged by certain of the plaintiffs to have existed between said Union Engineering Company and said W. H. Chute and Leotta Chute, his wife."

The trial court gave judgment in favor of Western Discount Corporation for \$6,000 with interest from date of the note on the note of \$6,500, and also the sum of \$950 on the note of \$1,000 with interest from date of the note.

[1, 2] The provisions of the Usury Law as adopted by the electors at the general election November 5, 1918 (St. 1919, p. lxxxiii), which are applicable to the case, are as follows:

Sec. 2. "No person * * * shall directly or indirectly take or receive in money, goods or things in action, or in any other manner whatsoever, any greater sum or any greater value for the loan or forbearance of money, goods or things in action than at the rate of twelve dollars upon one hundred dollars for one year. * * * Any agreement or contract of any nature in conflict with the provisions of this section shall be null and void as to any agreement or stipulation therein contained to pay interest and no action at law to recover interest in any sum shall be maintained and the debt can not be declared due until the full period of time it was contracted for has elapsed."

It will be noted that the act quoted above does not declare the note void, but only the portion of the agreement or contract as to the payment of interest shall be null and void, which is entirely different from declaring the entire instrument void.

It is true that there is a divergence of authority in other states, but many apparent conflicts may be reconciled by a reading of the acts themselves.

It is said in *Tilden v. Blair*, 21 Wall. 241, 22 L. Ed. 633, that unless a note is by statute made void in its inception it is valid in the hands of an innocent purchaser, and that when the law only makes the note void as to interest the note itself is not void and that neither lack of consideration nor illegality of consideration prevents a note being good in the hands of an innocent holder.

In the note to Union Trust Co. v. Preston N. Bank, 4 Ann. Cas. 347, California is placed in the list of states in which all illegalities are cured where negotiable paper passes into hands of an innocent purchaser for value.

In the note found in the case of Gate City Bank v. Thrall, Ann. Cas. 1912D, 886, may be found an analysis of the cases and the reasons therefor.

The courts of New York, in discussing this matter, said:

"The business of the country is done so largely by means of commercial paper that the interests of commerce require that a promissory note, fair on its face, should be as negotiable as a government bond. Every restriction upon the circulation of negotiable paper is an injury to the state, for it tends to derange trade and hinder the transaction of business. * * * It would be intolerable if every bank had to learn the true history of each piece of paper presented for discount before it could act in safety." *Chemical Nat. Bank v. Kellogg*, 183 N. Y. 92, 75 N. E. 1103, 1104, 2 L. R. A. (N. S.) 299, 111 Am. St. Rep. 717, 5 Ann. Cas. 158.

The Supreme Court of our own state, in the leading case of *Haight v. Joyce*, 2 Cal. 64, 56 Am. Dec. 311, which case has been many time approved, and particularly as late as *Union Coll. Co. v. Buckman*, 150 Cal. 166, 88 P. 708, 9 L. R. A. (N. S.) 568, 119 Am. St. Rep. 164, 11 Ann. Cas. 609, used substantially the same language, saying:

"A rule requiring the indorsee of every bill or note to inquire into the consideration, would retard commercial transactions, and, in the language of Lord Kenyon, 'shake paper credit to its foundation.' * * * Any other decision would destroy confidence in commercial transactions, and open a wide door to fraud and perjury."

[3, 4] There is another reason why appellants may not urge their defense of usury. Usury is a special defense and as such must be pleaded, and the agreement to pay interest being separable from the agreement to pay the principal, they must, if due, tender the principal before they can rely upon the plea of usury. *Innes v. Goldwater*, 30 Cal. App. 101, 157 P. 18; *Jackson v. Shawl*, 29 Cal. 267; 14 Cal. Jur. 686, 687.

The court below gave judgment in favor of respondents for the amounts actually advanced, and therefore appellants cannot complain.

[5] It will be noted also that the parties to the agreement here set forth are willing to comply with their agreement, and except for some exceptional reason a third party should not be permitted to complain. *De Wolf v. Johnson*, 10 Wheat. 392, 6 L. Ed. 343; *In re Worth* (D. C.) 130 F. 927, 930; *Levy v. Hallager*, 119 Misc. Rep. 695, 197 N. Y. S. 257.

In the case of *Matthews v. Ormerd*, 140 Cal. 578, 74 P. 136, 137, the court in discussing the constitutional provision prohibiting a contract for the payment of taxes on a mortgage debt by the debtor, as the law then stood, said:

"With respect to the constitutional provision in question, and the rights of parties under it, the principles are clearly applicable which have been judicially applied to the asserted rights of parties under general usury laws. It is in its essential elements a usury law. In *Matthews v. Ormerd*, 134 Cal. 87, 66 P. 67, 210, it is called by the court, 'this provision against usury'; and in *Harralson v. Barrett*, 99 Cal. 611, 34 P. 342, and *London Bank v. Bandmann*, 120 Cal. 224, 52 P. 583, 65 Am. St. Rep. 179, the doctrine generally applied to usury laws, namely, that they are for the benefit of the borrower, and that he may waive the privilege, * * *

[6] Appellants also claim that the court erred in excluding from evidence the permit issued by the commissioner of corporations to the Western Discount Corporation and in not adjudging the \$6,500 note illegal and void because the note to the extent of \$1,500 thereof was given in full payment of certain stock of the Western Discount Corporation, which stock it was only authorized to sell and issue when at least 40 per cent. of the purchase price was paid in cash.

The court found that the discount corporation paid Jones the sum of \$6,000 in cash for said \$6,500 note, and the evidence supports that finding. It appears that upon the consummation of the transaction \$6,000 was credited to Mr. Jones' account upon the books of the discount corporation, they agreeing to pay it out at stated intervals. A week later Jones purchased the stock in question and his account was charged with the amount thereof. It nowhere appears that the purchase of the stock was a part of the consideration at the time the money was placed to the credit of Jones. We therefore see no error in the ruling of the trial court.

[7] Appellants also claim that the Western Discount Corporation was charged with notice of the contract between Chute and Union Engineering Company, and that it took the \$15,000 collateral deed of trust and note subject to the provisions of that contract or agreement. The answer to that is that these appellants were not parties to this agreement in any way. Prior to the commencement of any work or the furnishing of any material by any of these appellants, the deed of trust referred to was of record. The amounts being definite and ascertained, nothing has been attempted by the discount company, by Chute, or the engineering company that would increase the amount of the prior obligation. If the parties to the agreement saw fit, they could waive the entire amount or proceed to pay in accordance with the terms thereof. When the discount corporation took the collateral referred to, the only persons who might object were the maker, the payee, and the indorser. They all assured the purchaser

there were no secret equities. The evidence sustains the findings that the discount corporation took the notes in due course and without any notice of right of appellants.

[8] Appellants also object to the findings of the trial court holding the lien of the deed of trust held by Keeney superior to the claims of the mechanics' liens, but we cannot agree with appellants. Keeney's deed of trust represented the entire purchase price of the lots in question, it was of record before commencement of any work or the furnishing of any materials, it recited it was subsequent to a certain specified deed of trust only, and there is nothing appearing in this case which would tend to deprive Keeney of his rights under the trust deed.

The judgment is affirmed.

We concur: PLUMMER, Acting P. J.; THOMPSON, J.

103 Cal. App. 289

BOWERS v. PUTMAN et al. (Civ. 3947.) ★

District Court of Appeal, Third District, California. Jan. 20, 1930.

Rehearing Denied Feb. 19, 1930. Hearing Denied by Supreme Court March 20, 1930.

1. Appeal and error ⇨1011(1)—The rule that decision will not be disturbed for insufficiency of evidence, where the evidence is conflicting, requires for its operation that the conflict be material and substantial.

A conflict in the evidence must be material and substantial in order to overrule assignment of error that evidence is insufficient to support decision, on the principle that such assignment is not well taken where the evidence is conflicting.

2. Automobiles ⇨244(10)—Conflicting evidence as to collision between truck and automobile held to sustain judgment for defendant.

Conflicting evidence as to the facts surrounding the collision of plaintiff's car with defendant's truck held to support judgment and determination for defendant.

Appeals from Superior Court, Colusa County; Ernest Weyand, Judge.

Separate actions by George Bowers, individually and as administrator of the estate of Alice Alma Lubman, against O. O. Putman and another, individually and as copartners transacting business under the firm name and style of the Colusa Milk Company and another. Judgment for defendants in each case, and plaintiffs appeal. Affirmed.

Frank Duryea, of Marysville, for appellant. A. A. King, of Colusa, and Theodore W. Chester and Downey & Chester, all of Sacramento, for respondents.

PLUMMER, J. The above-entitled actions are based upon a collision between two mo-

tor cars, were tried before the court sitting without a jury, and upon a stipulation that both cases should be tried at once, and that the evidence should apply to both cases, so far as applicable. Findings of fact and conclusions of law were made and judgments entered in both cases for the defendants. From the respective judgments the plaintiff in both cases prosecutes the appeals now being considered herein.

The first action is for damages on account of the death of Alice Alma Lubman, caused by the collision referred to herein. The second action is for the sum of \$1,250 alleged to be the damages to the automobile belonging to the plaintiff. The answer, among other things, presents the question of contributory negligence. Upon the appeals herein the plaintiff presents in both cases, as grounds for reversal, the following: First, insufficiency of the evidence to justify the decision; second, that the decision is against law.

[1] So far as the authorities cited by the appellant to sustain his appeals in the respective cases, we may state that a consideration of them fully sustains the position taken by the appellant that, where a conflict of the testimony is relied upon in answer to the assignment that the evidence is insufficient to support a verdict, it must appear that the conflict is substantial. As we read the record in this case, the correctness of the authorities cited, based upon the facts of the respective cases being considered, the respondents do not take issue with the appellant. It being conceded that the law requires a substantial conflict, and not merely the semblance of a conflict, and that the conflict must be upon some question which goes to the real merit of the issues presented, and not to immaterial questions, we will proceed with the consideration of the first assignment as to the insufficiency of the evidence to justify the decision of the trial court in the respective cases.

[2] The record shows that on or about the hour of 6 o'clock in the afternoon of July 30, 1926, one Homer A. Bowers was driving westward on a highway leading from Colusa to Williams, in the county of Colusa, the automobile driven by him being known as a Willys-Knight. The deceased, Alice Alma Lubman, was one of three women riding in said Willys-Knight car, and was killed in the collision involved in this action. It is alleged in the pleadings that, as Homer A. Bowers was driving said Willys-Knight in a westerly direction, a Graham truck driven by Wayne Crowell, and belonging to the other defendants named, was so carelessly and negligently operated that it collided with the Willys-Knight car, resulting in the death of said Alice Alma Lubman, and the damage to the Willys-Knight car. The testimony shows that just prior to the collision there was another truck preceding the Willys-Knight car, and

traveling in the same direction, at a distance of from 75 to 100 feet in advance thereof; that the Graham truck, traveling in the opposite direction, met the truck so preceding the Willys-Knight car, both trucks traveling on their respective right-hand halves of the paved highway; that almost instantly thereafter the collision occurred between the Graham truck and the Willys-Knight car. The testimony shows that the paved portion of the highway was approximately 15 feet in width.

It is contended on the part of the plaintiff that upon the meeting of the two trucks the defendant, Wayne Crowell, the driver of the Graham truck, recognized the driver of the other truck and turned to wave his left hand in salutation or as a sign of recognition, and that as he did so he turned the steering wheel so as to propel the truck in a direction toward the left-hand half of the paved portion of the highway, and in so doing caused the Graham truck to collide with the Willys-Knight car. The testimony tends to show that the left-half front of the Graham truck collided with the Willys-Knight car a short distance in front of the rear left wheel. The Willys-Knight car was turned over; Alice Alma Lubman was thrown from the car and sustained injuries which resulted in her immediate death. On the part of the respondents it is contended that the Graham truck remained upon its proper right-hand half of the paved highway; that the Willys-Knight car, following the truck which we have heretofore mentioned, had swerved to the left, and that the driver thereof had endeavored to bring the car back to its proper right-hand side, and thus gave the Willys-Knight car a position on the highway slightly diagonal to the direction of the westerly course of the highway, and at this instant of time it was struck by the Graham truck.

As it appears in the transcript, it would seem that the testimony in favor of the appellant preponderates somewhat over the testimony introduced by the defendants, and, if the court had found in favor of the plaintiff in both cases, the transcript would have contained sufficient evidence to sustain the judgments in favor of the plaintiff. On the other hand, we may state that, if the trial court believed the testimony of Wayne Crowell, the driver of the Graham truck, and which the trial court had a right to accept as the true version of the accident, then and in that case there is nothing presented to us upon which to base an order of reversal. The testimony of the driver of the Graham truck is to the effect that he was on his own proper right-hand side of the paved portion of the highway; that, immediately after the two trucks had gone on their respective courses, the Willys-Knight car loomed up in front of him on his left-hand side, and on the wrong side of the highway—that is, on the wrong side of the dividing line—and in this manner

the two cars collided. If this is true, the Willys-Knight car was where it should not have been, and the owners of the Graham truck are not liable.

The transcript contains evidence to the effect that a deputy sheriff and the traffic officer visited the scene of the collision shortly after its occurrence and testified to certain marks on the highway, indicating that from a point south of the medial line of the paved portion of the highway were tracks indicating that the impact between the two cars was on that half of the highway where the Graham truck properly belonged, and that from these marks there were automobile tracks leading off to the right to the place where the Graham truck finally came to a standstill against the embankment of a ditch to the south of the highway, and on the right-hand side as the Graham truck was traveling eastward, and that from the same marks on the highway there were automobile tracks to the right and to the north of the paved portion of the highway toward where the Willys-Knight car finally stopped. The transcript shows much contention as to whether the marks to which we have referred were made by the Willys-Knight car or by the truck. That was one of the disputed questions for the court to decide.

It appears that the traffic officer revisited the scene the next morning and found the tracks just as he had found them the evening before. One of the witnesses who examined the tracks made a memorandum of what he saw on his visit immediately after the collision, and refreshed his memory therefrom at the trial, which was had a little over a year thereafter. This testimony is all contradicted by a number of witnesses for the plaintiff, but it only raises a conflict. The vital issue to be determined was the point on the paved portion of the highway where the impact occurred. If it occurred to the south of the medial line, the owners of the Graham truck were not and are not responsible. If it occurred to the north of the medial line, the judgments should have run in favor of the plaintiff. Upon the testimony to which we have referred, the trial court, if it accepted the version given by the defendants' witnesses rather than that given by the plaintiff's witnesses, could only enter judgments as it did.

The foregoing shows that the conflict in the testimony was and is substantial, and involves directly the material facts presented for decision, and having been resolved in favor of the respondents, the judgments in both cases must be and are affirmed.

We concur: FINCH, P. J.; R. L. THOMPSON, J.

103 Cal. App. 203

SARINA v. PEDROTTI et al. (Civ. 3858.)★

District Court of Appeal, Third District, California. Jan. 16, 1930.

Rehearing Denied Feb. 15, 1930.

1. Landlord and tenant ⇨130(2)—Persons entering possession before lease terminated without lessee's consent were mere trespassers, not making landlord liable under covenant of quiet enjoyment.

If others entered into possession of premises prior to date of expiration of lease without consent of lessee, they were mere trespassers, and landlord was not liable under covenant of quiet enjoyment and possession of leased premises, such covenant being equivalent to stipulation that lessee shall not be rightfully disturbed in his possession during term, and not that he shall not be disturbed at all.

2. Landlord and tenant ⇨130(2)—Lessor is not responsible under covenant of quiet enjoyment for acts of mere trespasser.

The lessor is not responsible under the covenant of quiet enjoyment for the acts of a mere trespasser, though the effect of the trespasser's acts may be to deprive the lessee of the benefits of the lease, the remedy of the lessee being against the trespasser, not against the lessor.

3. Tenancy in common ⇨51—Tenant in common cannot bind cotenants by contract.

A tenant in common has no power to bind any of his cotenants by contract.

4. Landlord and tenant ⇨48(2)—Evidence held insufficient to prove agreement between lessee and lessor to sell land and personal property of lessee together.

Testimony held insufficient to prove agreement between lessee and one of lessors, who was tenant in common with other lessor, to sell land leased and personal property of lessee together, but merely to show that parties had under consideration prospect or possible opportunity of making sale.

5. Landlord and tenant ⇨180(6)—Whether, lessee, suing for eviction, was entitled to reasonable value of plowing and seeding land held for jury.

Where evidence relating to count of complaint in action for eviction demanding reasonable value of plowing and seeding certain land alleged to be certain amount conflicted, it was for jury to determine whether lessee was entitled to recover judgment in some amount from one of lessors for plowing and seeding part of land.

Appeal from Superior Court, Del Norte County; Harry W. Falk, Judge.

Action by Robert Sarina against Mathias J. Pedrotti and others. From an adverse judgment, the defendants appeal. Reversed.

Thomas P. Boyd, of San Rafael, and George W. Howe, of Crescent City, for appellants.
Puter & Quinn, of Eureka, for respondent.

FINCH, P. J. For many years prior to the transactions herein mentioned the defendants were the owners of a dairy ranch of something over 500 acres in Del Norte county, which was held under lease by the plaintiff and on which he kept a dairy herd of more than 100 cows. October 4, 1926, a new lease of the premises was executed by the parties for a "term beginning on the first day of December, 1926, and ending on the 30th day of November, 1927."

The complaint contains three counts. In the first it is alleged that the defendants evicted the plaintiff from 160 acres of the land to his damage in the sum of \$5,000. In the second it is alleged that the defendants, "during the winter of 1926-27, proposed to plaintiff that said plaintiff and defendants should sell out together, that is get a buyer for all the land and personal property together, and in that way a better price could be secured for both the real and personal property than if the personal property were sold separate and apart from the real property, and as an inducement and as a consideration for a combined sale of said real and personal property the said defendants proposed to plaintiff that plaintiff plow up and seed 110 acres, and that they would furnish and pay for the seed in order that said dairy ranch would be in a better shape and condition for dairy purposes, and bring about a sale more easily, and also render easier a sale of the personal property, * * * and said defendants promised at said time and prior thereto promised plaintiff not to sell said real property unless a sale of plaintiff's personal property was made at the same time; that relying upon said promises of defendants said plaintiff did plow up 110 acres of said land and did seed the same to grass as requested by said defendants and all of said seeding was done in the months of March and April, 1927; * * * that without notifying or consulting plaintiff said defendants did on or about the first day of September, 1927, enter into an agreement for sale of said premises with one John L. Childs and * * * did then and there abandon all intention or attempt of endeavoring to make a combined sale of the personal property belonging to plaintiff and the real property belonging to defendants; * * * that said personal property could have been sold much more advantageously as a whole and in combination with the sale of said premises than if said personal property had to be sold and removed from said premises and that by reason of the failure of said defendants to carry out their said promise concerning a combined sale of said premises and said personal property as aforesaid, plaintiff has been damaged in the sum of \$7,500." The third count is for the reasonable value of plowing and seeding said 110 acres of land, alleged to be the sum of \$1,500.

The jury returned a verdict for the plaintiff against all the defendants in the sum of

\$5,000, the respective amounts awarded on the several counts not being specified. Judgment was entered in accordance with the verdict and the defendants have appealed.

[1, 2] By an instrument dated October 5, 1927, the defendants leased the lands involved in the action to John L. Childs for "the term of four years from and after the first day of December, 1927," at the rental of \$3,750 a year, payable semiannually in advance, with the option to purchase the land for the sum of \$75,000, said option to "continue during the life of this lease," and the further option, "during the term of this lease only," to purchase "lots 9, 10, and 11" of the leased lands for \$18,000. The evidence shows without conflict that the lease was not delivered to Childs until after the expiration of the plaintiff's term, but it is probable that the terms of the lease were agreed upon prior to its execution, for in the early part of September, 1927, Childs leased two parcels of about 80 acres each to Manuel Mellow and W. Ammons, respectively, and placed them in possession. Childs testified that he placed these men in possession with the plaintiff's consent; that early in July, 1927, he and the plaintiff came to an understanding that the former would endeavor to acquire the land from the defendants and that he and the plaintiff would cooperate in the sale thereof and divide the profits equally between them; that "it was understood between these people (defendants) and myself that I had nothing to do with that place until the first day of December," but that the plaintiff cooperated with him in placing Mellow and Ammons on the land. The plaintiff contradicted a large part of Childs' testimony, but there is no evidence tending to show that the defendants were in any manner instrumental in putting Mellow or Ammons in possession or in interfering with the plaintiff's possession or use of the lands. The defendants did not convey to Childs any part of or interest in the estate which they had theretofore conveyed to the plaintiff by their lease to him. Childs was as much a stranger to such interest as if he had received no conveyance from the defendants. If he and his grantees entered into possession prior to December 1, 1927, without the plaintiff's consent they were mere trespassers. The landlord's covenant of quiet enjoyment and possession of leased premises "is equivalent to a stipulation that the lessee shall not be rightfully disturbed in his possession during the term, not that he shall not be disturbed at all. The lessor is not responsible under the covenant for the acts of a mere trespasser, though the effect of the trespasser's acts may be to deprive the lessee of the benefits of the lease, the latter's remedy being against the trespasser, not against the lessor." 15 Cal. Jur. 635.

[3, 4] In support of the second count of the complaint the plaintiff testified that he received a letter from the defendant Pedrotti

and another from the defendant Winfield Strain, neither of which letters was produced. On the ground that he was unable to find the letters the plaintiff testified in relation to their receipt and contents as follows: "I received a letter from Mr. Pedrotti sometime after the first of the year (1927). * * * He told me in the letter that he wanted me to send him price for anything I own there. He said he had a buyer. He wanted my creamery statement for 1926. So I sent him the creamery statement. * * * About a month after that I got a letter from Winfield Strain. He told me he got a letter from Mr. Pedrotti and he said the price is all right that I made on the cattle and that they be up inside of two weeks and buy what I had. * * * He told me to keep the place up in order to get better price, so they get better price for the sale of the place, they pay for the seeding and everything else that I do. * * * Well, I started in to seed and put the ranch in good shape so when they come up it be in shape; it would be seeded anyway and get better price for it. * * * Contents of the letter was they want to know when the cows was coming in and they was willing to pay for seeding and have me put the place in shape so we get better price for the sale; for the ranch and cattle. * * * I went to work and seeded about 100 acres. * * * I seed two fields with rye grass and another field with clover."

Another witness for the plaintiff testified that he saw and read a letter from Winfield Strain to the plaintiff in which Strain "wrote to him about going to keep up the place and he was going to fetch some parties up and buy him out, and the price was all right. * * * Went on to tell him to keep the place up; he had some buyers and was going to fetch them up. * * * He was going to buy him out and the price was all right." Both Strain and Pedrotti testified that they did not send the plaintiff any letter of the character described by him. There is no evidence to show that either William Strain or Pedrotti authorized Winfield Strain to make any agreement in their behalf. The defendants owned the land as tenants in common. "A tenant in common has no power to bind any of his cotenants by contract." 7 Cal. Jur. 358.

Taking the testimony of the plaintiff and his witnesses as true, it is wholly insufficient to prove an agreement, even between the plaintiff and Winfield Strain, to sell the land and the personal property together, as alleged in the second count of the complaint. At most, such evidence merely shows that the parties had under consideration a prospect or possible opportunity of making such a sale. The evidence does not show that there was any agreement as to the price at which the

land was to be sold or the terms of the proposed sale of either the land or the personal property. "It is well settled that no action will lie to enforce the performance of a contract, or to recover damages for its breach, unless it be complete and certain; and the rule applies as well to price as to subject-matter and parties." *Talmadge v. Arrowhead R. Co.*, 101 Cal. 367, 371, 35 P. 1000, 1002. "An agreement that parties will, in the future, make such contract as they may then agree upon amounts to nothing. An agreement to enter into negotiations and agree upon the terms of a contract, if they can, cannot be made the basis of a cause of action." *Dillingham v. Dahlgren*, 52 Cal. App. 322, 330, 193 P. 832, 835.

[5] The evidence relating to the third count is conflicting, and it cannot be held as a matter of law that the plaintiff is not entitled to recover judgment in some amount from Winfield Strain for plowing and seeding a part of the land; but it cannot be ascertained from the record what sum, if any, the jury allowed therefor. There is no evidence tending to show that the other defendants are liable for such plowing and sowing.

The court erred in some of the instructions to the jury and in refusing to give some of the instructions requested by the defendants, but such errors are sufficiently indicated by what has already been said.

The judgment is reversed.

We concur: PLUMMER, J.; R. L. THOMPSON, J.

LACOE v. INDUSTRIAL ACCIDENT COMMISSION OF DIVISION OF INDUSTRIAL ACCIDENTS AND SAFETY, DEPARTMENT OF INDUSTRIAL RELATIONS et al. (Civ. 6775.) ★

District Court of Appeal, Second District, Division 1, California. Jan. 21, 1930.

Rehearing Denied Feb. 7, 1930. Hearing Granted by Supreme Court March 20, 1930.

Master and servant §363—Injuries received by farm employee while trimming trees held sustained while engaged in "household domestic service," and hence not compensable (Workmen's Compensation, Insurance, and Safety Act 1917).

Where husband and wife were employed on farm, wife to attend to housework and husband to perform other farm services, such as putting in crop, garden work, carpenter work, caring for horses and trimming trees, injury sustained by husband by falling out of tree which he was trimming held sustained while engaged in household domestic services within meaning of Workmen's Compensation, Insurance, and Safety Act (St. 1917, p. 831) and hence not compensable under section 70 (St. 1917, p. 877) and St. 1927, p. 1681.

Houser, J., dissenting.

Proceeding under Workmen's Compensation Act by John Swanson, employee, opposed by R. D. Lacoe, employer. The Industrial Accident Commission of the Division of Industrial Accidents and Safety, Department of Industrial Relations, granted an award, and employer applies for certiorari. Award annulled.

Sweet & Plank, of San Diego, for petitioner.

Edward O. Allen and G. C. Faulkner, both of San Francisco, for respondents.

CONREY, P. J. John Swanson presented to the Industrial Accident Commission his application for an award of compensation for disability resulting from an injury received by him while working as an employee of R. D. Lacoe. Compensation, having been allowed, the employer now seeks to have the award annulled.

The award should be sustained unless the evidence fails to show that the injury was received while rendering service in an employment coming within the scope of the compensatory provisions of the Workmen's Compensation, Insurance, and Safety Act of 1917 (St. 1917, p. 831). According to section 8(a) of this act, the definition of the word "employee" as used therein excludes "any person whose employment is both casual and not in the course of the trade, business, profession or occupation of his employer"; and also excludes "any employee engaged in household domestic service, farm, dairy, agricultural, viticultural or horticultural labor, in stock or poultry raising." In *George v. Industrial Accident Commission*, 178 Cal. 733, 174 P. 653, the applicant George was employed as janitor and gardener at a school for girls which was conducted by the employer. The employee was injured while trimming an acacia tree adjacent to the school building. It was held that George's employment was dual in character, and that, in so far as he acted as a gardener, his work was horticultural and beyond the purview of the Compensation Act. No question relating to domestic service was included in that case.

Section 70 of the Compensation Act provides for a procedure whereby an employer and employee may by their joint election bring within the compensation provisions any excluded employment. The provisions of section 70 and of section 8(a), to which we have referred, were part of the Compensation Act as enacted in the year 1917 and have not been amended, except as those provisions are affected by the statute next herein mentioned. By statute enacted in the year 1927, a rule of presumption was created, with reference to all of the excluded employments hereinabove mentioned, other than "household domestic service." St. 1927, p. 1681. Section 1 of this act reads as follows: "Any employer and his

employees engaged in farm, dairy, agricultural, viticultural or horticultural employments or in stock or poultry raising, not subject to the compensation provisions of the 'workmen's compensation, insurance and safety act of 1917,' as amended, shall, from and after the date this act takes effect, be conclusively presumed to have accepted the compensation provisions of said act and amendments thereto and to have included in their contract of hire or apprenticeship, express or implied, a mutual agreement to accept said provisions, unless either such employer or employee shall, prior to the occurrence of any injury have given notice of rejection of said provisions of said act in the manner herein provided." The remaining sections refer to the manner of giving notice of rejection or of making withdrawal of such notice.

In the case at bar it does not appear that the employer and employee, or either of them, ever made any election of the kind referred to in section 70 of the Compensation Act or gave any notice of rejection in accordance with said act of 1927.

The evidence shows that Lacoe was the owner of a 30-acre tract of land in San Diego county. On this land there was a family residence, and at a short distance therefrom a small house for employees. He lived in San Diego and kept this country place for part time residence and recreation. Part of the land was used for agricultural purposes, the actual work being done by a neighboring farmer who worked the land on "shares." The house and garden were, therefore, in their use distinctly separate from the leased land. In May, 1928, Lacoe and his wife sold their house in the city and decided to move out to this ranch, but not remain there all of the time. They therefore planned "to put a man and his wife on the place to keep the place going and when we would come there it would be running, and the table run, and everything." It was under these circumstances that Swanson and his wife were employed, with the understanding that Mrs. Swanson would attend to the housework and that Swanson would perform other services. We are now concerned only with the nature of the employment in respect to Swanson. After he had been there a few days he received an injury by falling out of a tree into which he had climbed for the purpose of cutting off a limb of the tree. The location of the tree was about 150 feet from Lacoe's house. It was not claimed by the employee that he received any direct instruction to trim this tree or that he was doing this work with knowledge of the employer. His contention was that the work was within the scope of his employment, and that the nature of the employment, including this work, was such that the disability resulting from the injury is compensable. In the testimony of Swanson, in answer to a question as to the kind of arrangement under which he

was working he said: "My duties were to do farm work, put in the crop when it was the season, and do garden work, and carpenter work which was specified, and that was what I had been doing mostly, carpenter work and trimming trees and taking care of horses * * * during the six days that I had worked I had been doing carpenter work mostly." Again: "Q. Your duties were to do all things necessary about the home of Mr. Lacoe, which was on this ranch, that were necessary for the care and upkeep of his place? Your wife doing some of the inside and you doing the work on the outside? Ans. I think so."

We think that the decision of this case depends upon the answer to one question. At the time of the accident in which Swanson was injured was he an employee "engaged in household domestic service?" We are of the opinion that he was so engaged. One may be engaged in employment pertaining to the household without being strictly a house servant. This particular question does not appear to have been answered in any of the decisions in this state. The cases mentioned in the brief for petitioner are in harmony with our view as above stated. The cases referred to by counsel for respondent commission do not meet the point or discuss the nature or limitations of household domestic service. In *Catto v. Plant*, 106 Conn. 236, 137 A. 764, the Supreme Court of Connecticut discussed some of the leading English and American cases bearing upon the definition of the term "domestic servant." The court then said (page 766 of 137 A.): "Without * * * attempting to formulate a definition which would be applicable to all cases, we think it may be said that ordinarily a domestic servant is one whose service is connected with the maintenance of the house and land connected with it and constituting the establishment of his employer in such a way that his work and duties, whether in or outside the house, have to do with the running of the establishment or estate in providing for and ministering to the wants and comforts of the members of his employer's household." The court further refers to an old English case in which it was held that a head gardener was a household servant. The Connecticut court further said: "Here plaintiff lived and worked in the domain of this country estate, and the services he performed were rendered in and for the household of the master of the domain and quite distinct, as it seems to us, from services rendered by an employee or laborer upon a farm or any other enterprise conducted apart from the household of the employer." In the case at bar, the employee was performing service pertain-

ing to the maintenance of the household, or premises, constituting the family home; not service pertaining to the operation of the farm. He was injured while doing work of the household. We think that this was "household domestic service," within the meaning of those words as used in the Compensation Act.

The award is annulled.

I concur: YORK, J.

HOUSER, J. I dissent. I am not in accord with the conclusion that a man is a household domestic servant whose duties are "to do farm work, put in the crop (on 30 acres of land) * * * do garden work, and carpenter work, * * * trimming trees, and taking care of horses." That sort of employment would appear to be the common, every day work of the ordinary ranch hand on a comparatively small place.

On concededly substantial evidence adduced at the hearing, the commission found that the "applicant while employed * * * as a gardener * * * sustained injury arising out of and in the course of said employment. * * *" There was no finding that the employee was ever engaged in "household domestic service," as such.

In the case of *George v. Industrial Accident Commission*, 178 Cal. 733, 174 P. 653, 654, it was held that one might be employed in a dual capacity—that of janitor and that of gardener; that "in so far as he acted as a gardener his work was horticultural, * * *" and that "whether or not George [the employee] at the time of his injury, was engaged in horticultural labor was a question of fact to be determined by the commission. Its finding thereon, if supported by any rational view of the evidence, is beyond review here." To the same effect, as to the conclusiveness on this court of a finding of fact by the commission that in the instant case the employee was a gardener (and consequently engaged in horticultural work), see 27 Cal. Jur. 578, and cases there cited; also, note in the supplement to the same work, p. 1619.

By the provision of section 1 of the Statutes of 1927, p. 1681, "any employer and his employees engaged in * * * horticultural employments * * * shall * * * be conclusively presumed to have accepted the compensation provisions" of the Workmen's Compensation, Insurance, and Safety Act. It would seem to follow that the applicant before the respondent commission was entitled to be compensated for the injury received by him.

103 Cal. App. 386

SUDDEN LUMBER CO. v. SINGER et al. ★
(Civ. 6892.)

District Court of Appeal, First District, Division 1, California. Jan. 24, 1930.

Rehearing Denied Feb. 21, 1930. Hearing Denied by Supreme Court March 20, 1930.

1. Mechanics' liens ⇨281(1)—Evidence supported court's finding that neither bondsman on building contractor's bond was good and sufficient surety (Code Civ. Proc. § 1183).

In action to foreclose materialman's lien, evidence held to support trial court's finding that bondsmen on building contractor's bond given under Code Civ. Proc. § 1183, were not good and sufficient sureties.

2. Mechanics' liens ⇨279—In action to foreclose materialman's lien, burden was on plaintiff to prove bondsmen on contractor's bond were not sufficient sureties (Code Civ. Proc. § 1183).

In action to foreclose materialman's lien, burden rested on plaintiff to prove that bondsmen on building contractor's bond given under Code Civ. Proc. § 1183, were not sufficient sureties.

3. Appeal and error ⇨994(3)—Trial ⇨140(1)—Jury or trial court sitting as jury are exclusive judges of witness' credibility (Code Civ. Proc. § 1847).

Under Code Civ. Proc. § 1847, jury or trial court sitting as jury are exclusive judges of credibility of witness.

4. Mechanics' liens ⇨229—To limit owner's liability to contract price, contractor's bond must conform to statutory requirement that sureties be good and sufficient (Code Civ. Proc. § 1183).

In order to limit building owner's liability to contract price, contractor's bond given under Code Civ. Proc. § 1183, must, among other things, conform to statutory requirement that sureties be good and sufficient; otherwise it furnishes no protection to owner against liens for labor and material.

5. Mechanics' liens ⇨263(1)—In action to foreclose materialman's lien, bondsmen, though not good and sufficient sureties, were properly joined as defendants with contractor and owner (Code Civ. Proc. § 1183).

In action to foreclose materialman's lien, bondsmen, although they were not good and sufficient sureties as required by Code Civ. Proc. § 1183, were nevertheless liable upon their contract and were properly joined as defendants with contractor and owner.

6. Mechanics' liens ⇨229—Entry of judgment against one of sureties on contractor's bond did not absolve owner's property from liability (Code Civ. Proc. § 1183).

Entry of judgment against one of sureties on building contractor's bond given under Code Civ. Proc. § 1183, did not absolve property of owner from liability, where bondsmen were not good and sufficient sureties.

7. Appeal and error ⇨918(1)—Where there is conflict in affidavits supporting motion for leave to file amended and supplemental complaint, those in favor of prevailing party must be taken as true.

Where there is conflict in affidavits supporting motion for leave to file amended and supplemental complaint, those in favor of prevailing party must be taken as true, and facts stated therein must be considered as established on appeal.

8. Appeal and error ⇨1041(2)—In action to foreclose materialman's lien, granting permission to file amended and supplemental complaint alleging insufficiency of sureties, if error, held harmless.

In action to foreclose materialman's lien, granting of motion for leave to file second amended and supplemental complaint in which insufficiency of sureties was alleged, if error, held harmless, where evidence taken at trial showed that neither bondsman was at any time a good and sufficient surety.

9. Pleading ⇨236(6), 276—Leave to file second amended and supplemental complaint alleging insufficiency of sureties was addressed to court's discretion.

In action to foreclose materialman's lien, motion for leave to file second amended and supplemental complaint in which insufficiency of sureties was alleged was addressed to sound discretion of trial court.

Appeal from Superior Court, City and County of San Francisco; Stanley Murray, Judge.

Action by the Sudden Lumber Company against F. M. Singer, Robert J. Walsh and others to foreclose a materialman's lien. From the judgment, Walsh appeals. Affirmed.

Goldman & Altman, of San Francisco, for appellant.

Philip S. Ehrlich, of San Francisco (Albert A. Axelrod, of San Francisco, of counsel), for respondents.

PER CURIAM. The plaintiff, a materialman, furnished F. M. Singer, a contractor, with lumber to be used and which was used in the construction of a building on premises owned by defendant and appellant, Robert J. Walsh. The contractor having failed to pay for the lumber, the present action was brought against the owner of the premises to foreclose plaintiff's claim of lien thereon and for a personal judgment against the contractor and defendants Charles Gust and R. O. Ostrander, who were sureties upon a bond filed by the contractor. Defendants Singer and Ostrander were not served with summons and the case was tried against Walsh and Gust. Judgment was entered against Gust for \$4,000, the value of the lumber, and \$1.77, the expense of filing the claim of lien, and

against Walsh for the foreclosure of the lien and sale of the premises. The latter has appealed from the judgment.

The complaint alleged that the bondsmen were not good or sufficient sureties at the time of the execution of the bond or thereafter. The bond, which was for \$9,218, in addition to a condition for the performance by the contractor, was also, as provided by section 1183 of the Code of Civil Procedure, conditioned for the payment in full of the claims of all persons performing labor upon or furnishing materials to be used in the work, and by its terms was made to inure to the benefit of all such persons. Appellant alleged, and the court found, that the contract price of the building was \$18,435; that he had paid to the contractor, who had abandoned the work before completion, the sum of \$11,553.75, and in addition the sum of \$600 as architect's fees, with \$2,136.08 to complete the building, the total payments thereon being \$14,289.83; that claims of lien which, including that of plaintiff, aggregated \$11,318.23, had been filed thereon, and there remained in his hands as the balance of the contract price the sum of \$4,145.17.

Appellant denied that the bond was insufficient, and it was stipulated at the trial that if the court should find the bond to be sufficient under the provisions of section 1183 of the Code of Civil Procedure, then the plaintiff would be entitled to recover from appellant but 36.6 per cent. of his claim, namely, \$1,464.

[1, 2] The court found that neither at the time the bond was executed nor at any time thereafter was either bondsman a good or sufficient surety.

As grounds for the appeal it is contended that the above finding is unsupported; that by suing the sureties and obtaining a judgment against one of them the plaintiff is estopped from asserting a claim against the property in excess of the contract price; and that an order by the trial court permitting the plaintiff to file a second amended and supplemental complaint was prejudicially erroneous.

Appellant testified that he had never seen Ostrander and that his first and only meeting with Gust was after the transaction in question; that before the bond was executed he inquired of the assistant cashier of a bank as to Gust's financial condition, and was told that the latter had equities in second mortgages which the bank controlled sufficient to cover his liability on the bond, and that the witness requested his architect to make inquiries regarding Ostrander and was informed by the architect "that he was positive that Ostrander had securities to the amount of \$50,000 or \$60,000." The witness further stated that Ostrander was at the time a contractor engaged in business near Antioch. According to Gust, who testified that he could not read English, he stated to the contractor

before signing the bond that he had no money or property, further testifying in that connection, "I had lots of bills at the time." After stating in effect that he and Ostrander were together when the bond was signed, he testified: "I knew Mr. Ostrander. He worked for Mr. Singer at the time I knew him. I have not seen him since he signed the bond." The witness also stated: "At the time I executed the bond I had fourteen houses subject to mortgage. My equity in the property over the mortgages at that time was about \$10,000. The holders of the first mortgages on the properties which I had at that time have since foreclosed. The only property which I have today is my home. It is worth \$7,000. It is subject to a mortgage of \$4,000. * * * It is homesteaded."

The testimony of the last witness leaves it doubtful whether the person referred to by the architect signed the bond. The circumstances shown strongly support the conclusion of the trial court that the bondsmen, and particularly defendant Gust, were at no time sufficient, and amply sustain the burden which in this respect, according to *Tyler v. J. I. Mitrovich, etc., Co.*, 47 Cal. App. 59, 190 P. 208, rested upon the plaintiff.

[3] While, as urged by appellant, the uncontradicted and unimpeached testimony of a witness may not be arbitrarily disregarded (*Stewart v. Silva*, 192 Cal. 405, 221 P. 191), nevertheless the presumption that a witness speaks the truth may be overcome by the character of his testimony; and the jury, or the trial court sitting as a jury, are the exclusive judges of his credibility (Code Civ. Proc. § 1847). There was sufficient in connection with the testimony of the witness Gust to make the Code section peculiarly applicable and to justify the trial court in refusing to give full credit to all of his testimony.

[4] The bond provided in accordance with the statute (Code Civ. Proc. § 1183) that the persons for whose benefit it was given should have a right of action thereon in any suit brought to foreclose a lien provided for in chapter 2 of title IV of part 3 of the Code of Civil Procedure, or in a separate suit. The purpose of requiring a bond to accompany the contract is to create an additional fund or security for the satisfaction of lien claimants (*Hubbard v. Jurian*, 35 Cal. App. 757, 170 P. 1093; *Sunset Lumber Co. v. Smith*, 91 Cal. App. 746, 267 P. 738; 17 Cal. Jur., *Mechanics' Liens*, § 46, p. 75), and also to limit the owner's liability to the contract price (*Roystone Co. v. Darling*, 171 Cal. 526, 154 P. 15); but to have the latter effect it must, among other things, conform to the statutory requirement that the sureties be good and sufficient (*S. R. Frazee Co. v. Arnold*, 46 Cal. App. 74, 188 P. 822); otherwise it furnishes no protection to the owner against liens for labor and material on the building (*Roystone Co. v. Darling*, *supra*).

[5, 6] It is claimed, however, that the plaintiff, having procured the entry of a judgment against one of the bondsmen, is thereby estopped from asserting the insufficiency of the bond as against the owner. While, as held in *Tyler v. J. I. Mitrovich, etc., Co.*, supra, a party cannot denounce a contract as void and at the same time demand the enforcement of such of its provisions as are favorable to himself, here the bond was not found to be nor was it void, but the same was insufficient to afford protection to the owner. The bondsmen, notwithstanding that they were not good and sufficient sureties, were nevertheless liable upon their contract (*Hammond Lumber Co. v. Willis*, 171 Cal. 565, 153 P. 947); and were properly joined as defendants with the contractor and owner (*Holden v. Mensinger*, 175 Cal. 300, 304, 165 P. 950; *Hillcrest Co. v. Schrier*, 41 Cal. App. 624, 183 P. 239). The entry of judgment against one of them did not absolve the property of the owner from liability, and their lack of the statutory qualifications afforded sufficient ground for refusal to restrict plaintiff's recovery to the amount of the contract price. *S. R. Frazee Co. v. Arnold*, supra.

The action was commenced on January 28, 1927, and on May 16, 1927, the plaintiff filed his amended complaint. No attack was made in these pleadings upon the sufficiency of the sureties. Appellant answered on June 15, 1927, and on February 14, 1928, the plaintiff moved for leave to file a second amended and supplemental complaint in which the insufficiency of the sureties was alleged. The motion was granted. The appellant contends that the notice of motion was insufficient and that the order was an abuse of discretion. The affidavit in support of the motion alleged that appellant on numerous occasions after the action was filed stated that the sureties were worth the amount of the bond over and above their just debts and liabilities, exclusive of property exempt from execution, and that plaintiff ascertained their insufficiency subsequent to the filing of his amended complaint. Appellant in reply denied making the statement alleged and averred that the original pleadings not having attacked the sufficiency of the sureties he had made no attempt during the year last past to ascertain their sufficiency, and that the whereabouts of Ostrander were unknown to appellant.

[7] Where there is a conflict in the affidavits, those in favor of the prevailing party must be taken as true and the facts stated therein must be considered as established (*Doak v. Bruson*, 152 Cal. 17, 91 P. 1001; *Corgiat v. Realty Mortgage, etc., Corporation*, 86 Cal. App. 37, 260 P. 573); and if the plaintiff was misled by the statements of appellant there was no abuse of discretion in granting leave to amend. Moreover, it sufficiently appears from the evidence taken at

the trial that neither bondsman was at any time a good and sufficient surety, and that appellant was not justified in accepting him as such.

[8, 9] But it is contended that this evidence, not having been before the court when the motion was granted, cannot cure the error. Should error be conceded, it was not reversible, however, as the above evidence shows that appellant was not prejudiced thereby. *Gill v. Southern Pacific Co.*, 174 Cal. 84, 161 P. 1153; *Shull v. Crawford*, 33 Cal. App. 36, 41, 164 P. 330; *Batcher v. Hoepfner*, 65 Cal. App. 385, 224 P. 117. The motion was addressed to the sound discretion of the trial court, and we cannot say that the order was an abuse of discretion.

The findings of the court are fully supported, and on an examination of the entire case, including the evidence, we are satisfied that no error has been shown which can reasonably be said to have resulted in a miscarriage of justice.

The judgment is affirmed.

103 Cal. App. 253

BAYSIDE LAND CO. v. DOLLEY et al.*
(Civ. 40.)

District Court of Appeal, Fourth District, California. Jan. 18, 1930.

Hearing Denied by Supreme Court March 19, 1930.

1. Certiorari ⇨70(6)—Record containing no formal return to alternative writ of review other than demurrer must be considered as adopting allegations of petition.

Where record on appeal from judgment directing writ of review to issue annulling assessment contains no formal return to the alternative writ other than a demurrer, it must be considered as adopting allegations of the petition as a return and as a part of judgment roll.

2. Certiorari ⇨28(2)—Writ of review can only be employed to review proceedings in judicial capacity beyond jurisdiction.

A writ of review can only be employed to review the proceedings of a court or other body acting in a judicial capacity beyond its jurisdiction.

3. Certiorari ⇨21—Trustees in determining protest to report and assessment for removing weeds acted in judicial capacity as respected right to writ of review (Weed Abatement Act).

Board of trustees hearing and acting on protest to report of street superintendent and his assessment of cost of removing weeds from lots, pursuant to resolution adopted under authority of Weed Abatement Act (St. 1915, p. 841), acted in a judicial capacity so as to authorize writ of review.

4. Constitutional law ☞290(7)—Municipal corporations ☞623(2)—Trustees had no power to cause removal of weeds or assess cost therefor on property, unless resolution contained particular description of property (Weed Abatement Act; Const. Cal. art. 1, § 13; Const. U. S. Amend. 14).

Board of trustees of city had no power or authority to cause weeds to be removed from lots or cost to be assessed on property unless resolution therefor adopted pursuant to authority of Weed Abatement Act (St. 1915, p. 841) contained particular description of property, in that any attempt to assess property without such notice would be in violation of Const. Cal. art. 1, § 13, and Const. U. S. Amend. 14, providing that no person shall be deprived of property without due process of law.

5. Municipal corporations ☞623(2)—Defect in mode of assessment against lots for removal of weeds could not be reached in proceedings for alternative writ of review (Weed Abatement Act).

Defect in mode of assessment against lots for removal of weeds pursuant to resolution adopted under authority of Weed Abatement Act (St. 1915, p. 841), by apportioning total cost of removal among total number of lots affected, could not be reached in proceeding for an alternative writ of review on ground board of trustees was without jurisdiction to confirm assessment.

Appeal from Superior Court, Orange County; James L. Allen, Judge.

Action by the Bayside Land Company against R. E. Dolley and others. Judgment for plaintiff, and defendants appeal. Reversed, with directions.

Burr A. Brown, of Long Beach, for appellants.

Nelson & Burns, of Santa Ana, for respondents.

MARKS, J. The appellant city of Seal Beach is a municipal corporation of the sixth class, situated within the county of Orange, state of California, and the other appellants composed its board of trustees, at all times material to this proceeding. Respondent is a corporation that owned about 700 lots within the city of Seal Beach, of which at least a large number were subjected to the assessment sought to be voided by the writ of review granted by the trial court herein. For convenience we will refer to the city of Seal Beach as the city, and the individual appellants as the board of trustees.

On April 7, 1927, the board of trustees passed a resolution whereby it instituted proceedings to abate noxious and dangerous weeds upon certain lots within the city, under an act of the Legislature of the state of California approved May 26, 1915 (Stats. 1915, p. 841), which we will refer to as the Weed Abatement Act. The proceedings were

taken to the point of receiving the report and assessment of the street superintendent by the board of trustees, without objection on the part of property owners. Respondent filed its protest to this report and assessment, which was overruled by the board of trustees, and the report and assessment were confirmed.

Respondent secured an alternative writ of review from the court below upon the ground that the board of trustees was without jurisdiction to confirm the assessment. Upon the return day fixed in the alternative writ appellants filed a general and special demurrer to the petition of respondent, which was overruled. Appellants declined to answer or make further return to the petition, and judgment was rendered against them directing a peremptory writ to issue annulling the assessment.

[1] The record before us consists of the petition, demurrer, order overruling the demurrer, judgment, order for transcript, and notice of appeal, besides affidavits of mailing. Where, as in this case, the record contains no formal return to the alternative writ, other than a demurrer, it must be considered as adopting the allegations of the petition as a return and as a part of the judgment roll. *Stoner v. City of Los Angeles*, 8 Cal. App. 607, 97 P. 692. The allegations of the petition, therefore, constitute the only record before us from which we may attempt to determine the jurisdiction of the board of trustees to make the order confirming the report and assessment of the street superintendent.

The Weed Abatement Act does not seem to have been construed by any of the Courts of Appeal of this state. A study of the act would indicate the following general steps necessary to legally levy an assessment to pay the cost of removing the weeds described in section 1 of the act: First, the board of trustees must, by resolution, declare such weeds to be a public nuisance, and shall describe the street, or streets, along which the work is to be done, by the name under which it, or they, are commonly known, and describe the property upon, or in front of, which the nuisance exists, by the lot and block number of the same according to the official map or the assessment map of such municipality. Second, after the passage of the resolution, the street superintendent shall cause to be posted a notice, in the form prescribed in the act, in front of the property on, or in front of, which such nuisance exists, at a distance of not more than 100 feet apart, and not less than three in all. The notice must give a time and place for the hearing of protests of property owners, and must be posted at least five days prior to such hearing. Third, at the time fixed, the legislative body must hear

and consider all objections or protests, and shall allow or overrule any or all of the same. The act provides that the legislative body shall be deemed to have acquired jurisdiction of the proceedings at this point. Fourth, after the disposition of protests, if any, the legislative body of the municipality shall order the street superintendent to abate the nuisance, and he is authorized to enter upon private property so to do. Any property owner is given the right to remove the weeds at his own expense prior to the arrival of the superintendent of streets to do such work. This would seem to give the property owner an opportunity to escape an assessment on his property, if he so desired. Fifth, the street superintendent is required to keep an account of the cost of abating such nuisance on, or in front of, each separate lot or parcel of land where work is done, and shall render an itemized report in writing to the legislative body showing the cost of removing such weeds on, or in front of, or both, of each separate lot. A copy of such itemized report must be posted on or near the chamber door of the legislative body for at least three days prior to its submission to such body for confirmation, together with a notice of the time when it will be so submitted. The act does not provide who shall give such notice. Sixth, at the time fixed in the notice, any owner whose property is liable to be assessed may protest. The legislative body must hear and consider such protests, and may make such modifications thereof as may be deemed necessary, after which the report, or the report as modified, must be confirmed. The amount of the cost of the removal of the weeds upon, or in front of, the respective parcels of land, shall constitute a special assessment against, and a lien upon, each of such parcels, such assessment to be collected by the tax collector of the municipality at the same time and in the same manner as the ordinary municipal taxes. This summary of the Weed Abatement Act is of necessity very general, and is only particularized to such an extent as to enable us to consider the objections raised to the assessment in the case before us.

[2-4] A writ of review can only be employed to review the proceedings of a court or other body acting in a judicial capacity beyond its jurisdiction. In this case the writ is directed to the resolution of the board of trustees overruling the protests and confirming the report and assessment of the street superintendent. Under various local improvement acts of this state, similar proceedings before boards of supervisors and legislative bodies of municipalities have been held judicial actions and subject to review in proceedings such as the one before us. *Federal Construction Co. v. Curd*, 179 Cal. 489, 177 P. 469, 2 A. L. R. 1202; *People v. Sacramento Drainage District*, 155 Cal. 373, 103 P. 207; *Wulzen v.*

Board of Supervisors, 101 Cal. 15, 35 P. 353, 40 Am. St. Rep. 17; *Cutting v. Vaughn*, 182 Cal. 151, 187 P. 19. We therefore hold that the board of trustees of the city of Seal Beach acted in a judicial capacity in hearing and acting upon the protest of respondent to the report of the street superintendent and his assessment of the cost of removing weeds from on or in front of respondent's lots. It appears from the petition that on April 7, 1927, the board of trustees passed the first resolution under the Weed Abatement Act. It is alleged that thereafter the street superintendent of the city caused to be posted a notice to destroy weeds, which notice failed to describe some 63 lots belonging to respondent from which the weeds were subsequently removed and which lots were assessed to pay the cost thereof. The Weed Abatement Act does not require the lots to be particularly described in the notice. They must be described in the resolution, and the notice must refer to the resolution for a particular description of the property. Of course, if the lots in question were not described in the resolution, the board of trustees would have no power or authority to cause the weeds to be removed or the cost to be assessed on the property. Such an act would exceed the jurisdiction of the board, as the property owner must have notice of the proceeding and the right to protest. Any attempt to assess property without such notice, where the property may be sold upon default of the payment of such assessment, would be in violation of article I, section 13, of the Constitution of California, and the Fourteenth Amendment to the Constitution of the United States, which provide that no person shall be deprived of property without due process of law. *Brookes v. City of Oakland*, 160 Cal. 423, 117 P. 433; *Peck v. Bernard*, 12 Cal. App. 558, 108 P. 55. There is nothing in the record to show whether or not the resolution was in form to give such notice to the property owner. If such notice was not given, the assessment on these 63 lots must fail. We intend to express no opinion of the effect of such an omission, if such there was, upon the balance of the assessment.

The proceedings are further attacked upon the ground that the board of trustees failed to post a copy of the itemized report of the street superintendent on, or near the door of the council chamber, together with a notice of the time and place of the hearing of such report at least three days prior to the submission of the report to the board. The act does not impose upon the board of trustees the duty of posting the report or giving such notice. The report must be posted and the notice given prior to its being submitted to the board, which would indicate that the duty should be performed by some other authority, presumably the street superintendent, in

whose possession the report would seem to remain until its submission to the board.

[5] Respondent attacked the proceeding upon the further ground of an alleged erroneous assessment of the property by the street superintendent. It is alleged that, instead of keeping an actual account of the cost of removing the weeds from in front of and on each parcel of ground, he took the total cost of removing the weeds from on and in front of all the lots, and divided this figure by the total number of lots affected reaching the result of \$1.85 which sum he assessed against each lot. This mode of assessment is not contemplated by the act. Each lot should bear the cost of removing the weeds on and in front of it. It may be assumed here that the board of trustees should not have confirmed the assessment in the form submitted by the street superintendent. However, this defect cannot be reached in this proceeding. It is at most an erroneous judgment of the board of trustees, and is not a void act if jurisdiction of the proceedings were obtained by it. *Larsen v. City and County of San Francisco*, 182 Cal. 1, 186 P. 757; *Hutchinson v. Coughlin*, 42 Cal. App. 664, 184 P. 435; *Barber v. San Francisco*, 42 Cal. 630. Respondent has other remedies to protect itself against such an assessment if the method of its levy is correctly set forth in the petition.

The judgment is reversed, with directions to the trial court to take appropriate action in conformance herewith.

We concur: SLOANE, P. J.; BARNARD, J.

103 Cal. App. 169

McDONOUGH et al. v. WAXMAN et al.*
(Civ. 6838.)

District Court of Appeal, First District, Division 1, California. Jan. 15, 1930.

Rehearing Denied Feb. 14, 1930. Hearing Denied by Supreme Court March 13, 1930.

1. Guaranty ⚡27—Guarantor, generally, will not be held responsible for anything not within express terms of contract.

Guarantor, as a general rule, will not be held responsible for anything not within express terms of his contract, and his liability cannot be extended beyond those terms by implication.

2. Guaranty ⚡27—In determining meaning of contract of guaranty, same rules of construction as used in other contracts are to be employed.

In determining the meaning of language used in contract of guaranty, same rules of construction used in interpretation of other contracts are to be employed, and, like other contracts, they should be given a fair and reasonable interpretation, to ascertain true intent of parties.

3. Principal and surety ⚡175—Contract indemnifying surety against loss on bail bond included liability for loss from forfeiture of bond given in subsequent habeas corpus proceeding.

Contract of indemnity, for purpose of indemnifying surety on bail bond pending the hearing and determination of charge of having violated immigration laws, authorizing surety to furnish bail in a specified sum, or any other amount to which it shall be increased or reduced, held broad enough in its terms to include liability for loss suffered as a result of forfeiture of bond given in habeas corpus proceeding after surrender in exoneration of first bond executed therein.

4. Pleading ⚡46—Presence in caption of complaint inadvertently of words "a corporation" was of no importance.

Caption of complaint constitutes no part of statement of cause of action, and presence therein, inadvertently, of the words "a corporation," is of no importance, particularly where there was at no time a claim of corporate entity, nor were findings or judgment based on any such theory.

Appeal from Superior Court, City and County of San Francisco; Louis H. Ward, Judge.

Action by Peter P. McDonough and another, doing business under the name and style of McDonough Bros., against Charles C. Waxman and another. Judgment for plaintiffs, and defendants appeal. Affirmed.

Samuel D. Hamburg, of San Francisco, for appellants.

Joseph A. Brown, of San Francisco, for respondents.

KNIGHT, J. This is an appeal by the defendants from a judgment rendered against them in an action to recover upon a contract of indemnity. The material facts are as follows:

One Morris Appleman had been or was about to be arrested by the federal authorities upon a charge of having violated the Immigration Laws (8 USCA § 101 et seq.), and pending the hearing and determination of the charge he was admitted to bail in the sum of \$1,000. Plaintiffs, as agents for a surety company, were employed by defendants to furnish the bail, which they did, and Appleman was released from custody. The condition upon which plaintiffs furnished bail was that defendants enter into the contract of indemnity in question, the essential portions of which are hereinafter set forth. The charge against Appleman resulted in an order for his deportation, and habeas corpus proceedings were then instituted in his behalf to test the legal sufficiency of the charge and the validity of the deportation proceedings based thereon; but as a prerequisite to obtaining such a writ it was necessary for Appleman to surrender

into the custody of the United States marshal, which he did, immediately following which he was again admitted to bail in the sum of \$1,000, which plaintiffs again furnished. Pending the hearing of the latter proceeding Appleman disappeared, and as a consequence his bond was declared forfeited, and plaintiffs were required to pay the principal thereof to the government in conformity with the terms of the bond and the order of forfeiture.

[1, 2] The main contention defendants make in support of their appeal is that Appleman's surrender in exoneration of the first bond operated as a termination of the contract of indemnity, and that consequently they were not liable for the loss suffered by plaintiffs as a result of the forfeiture of the second bond. The general rule is that a guarantor will not be held responsible for anything not within the express terms of his contract, and that his liability cannot be extended beyond those terms by implication; but in this connection it is held that for the purpose of ascertaining the meaning of the language used in such a contract the same rules of construction used in the interpretation of other contracts are to be employed, and like other contracts they ought not to be construed with technical nicety, but should be given a fair and reasonable interpretation in order to ascertain the true intent of the parties. 13 Cal. Jur. 103.

[3] We agree with the trial court's conclusion that the contract in question, when construed in the light of the foregoing legal rules, is broad enough in its terms to include liability for the loss suffered by plaintiffs as a result of the forfeiture of the bond given in the habeas corpus proceeding. It reads in part as follows:

"Whereas, Morris Appleman, hereinafter called defendant, has been or is about to be arrested and is now or is about to be held in custody at ——— on a charge of Violation of Immigration Law, and having been admitted to bail in the sum of \$1,000 by bond, or by deposit of \$1,000 in cash; and whereas, I am desirous of having said defendant discharged from such custody and do hereby request McDonough Bros. of the city and county of San Francisco to give or cause to be given bail for the discharge of said defendant from such custody, either in said amount or in any other amount to which said bail shall be increased or reduced: Now, therefore, upon and in consideration of said McDonough Bros. giving or causing such bail to be given and thus procuring the discharge of said defendant from such custody I do hereby guarantee, undertake and promise * * * to hold and save said McDonough Bros., their heirs and assigns, free, clear, and harmless of and from and to indemnify them against any and all liability, loss, demands, claims, damages, forfeiture or loss of said bail," etc.

As will be observed from the foregoing recitals, at the time of the execution of the con-

tract Appleman had been or was about to be arrested on a charge of violating the immigration laws, and the very purpose of the employment to furnish bail was to prevent his imprisonment during the period of time he was exercising whatever legal remedies were available to establish that said charge was without foundation in law or fact. Obviously the habeas corpus proceeding, being a method of inquiry into the legal sufficiency of the charge and of the order of deportation made pursuant thereto, constituted a part and in fact was a continuation of the attack Appleman was entitled to make against said charge in order to absolve himself therefrom. It will be noted, also, that more than one bond was contemplated because the contract by its terms authorized plaintiffs to furnish bail in the sum of \$1,000, "or any other amount to which it shall be increased or reduced"; and it was not specified therein at what particular stage of the federal proceeding the bail was to be furnished, nor was defendants' liability restricted to loss which might be incurred by reason of the forfeiture of any particular bond.

Therefore, so far as the question of liability is concerned, it would seem to be immaterial whether the bond was given at one stage of the proceeding or another, so long as it served as bail to secure Appleman's release from imprisonment while pursuing a legal remedy to exculpate himself from the particular charge set forth in the contract of indemnity, namely, a violation of the immigration laws. And it is apparent that defendants themselves intended such to be the scope and effect of their contract, because evidence was adduced to show that prior to the execution of the contract they were fully informed that two bonds would doubtless be required, and that liability under their contract would continue "until the termination of the case"; and the attorney then representing Appleman explained to one of the defendants before he signed the contract that in resisting the charge habeas corpus proceedings would be resorted to, if necessary, in which event two bonds would be required. Moreover, evidence was introduced to the effect that prior to the surrender of Appleman in custody and the institution of the habeas corpus proceeding both defendants knew of the intention to take such action. Consequently, contrary to the claim made by defendants in that behalf, they were given an opportunity to object to such a move being made if they had so desired.

[4] The complaint alleged that plaintiffs "are now and have been at all of the times herein mentioned engaged in business in the city and county of San Francisco, state of California, under the firm name and style of McDonough Bros.," and at the opening of the trial defendants stipulated that the foregoing allegation was true; but it appears that the caption of the complaint read as follows:

"Peter P. McDonough and Thomas McDonough, doing business under the name and style of McDonough Bros., a corporation, Plaintiffs." Defendants did not demur to the complaint, nor did they make any point regarding the caption in the trial court, but they now contend that the findings and judgment are unsupported by the evidence because no proof was offered to establish such corporate entity. The point is without merit, for the reason that the caption of the complaint constitutes no part of the statement of the cause of action, and it follows that the presence therein, inadvertently, of the words "a corporation" is of no importance. Moreover, at no time have plaintiffs claimed a corporate entity, nor are the findings or the judgment based upon any such theory.

The judgment is affirmed.

We concur: TYLER, P. J.; CASHIN, J.

103 Cal. App. 165

PEOPLE v. FREITHOFER. (Cr. 1891.)

District Court of Appeal, Second District, Division 1, California. Jan. 14, 1930.

1. Criminal law §193½—Verdict of guilty of second degree robbery was acquittal of first degree robbery (Pen. Code, § 211a).

By verdict finding defendant guilty of robbery in the second degree, the jury in effect acquitted him of first degree robbery, under Pen. Code, § 211a.

2. Criminal law §1175—Verdict of second degree robbery will not be reversed, because conviction should have been for first degree robbery (Pen. Code, § 211a).

Where defendant is charged with robbery, verdict of robbery in second degree will not be reversed, because conviction should have been for robbery in first degree under Pen. Code, § 211a.

3. Criminal law §1023(12), §1134(10)—Order denying probation for want of jurisdiction is not appealable, but reviewable on appeal from judgment.

Order denying probation on ground that court did not have jurisdiction to consider application therefor is not appealable, but may be reviewed on appeal from judgment.

4. Criminal law §1001—Circumstances of crime and defendant's character do not affect court's jurisdiction to hear and determine application for probation on its merits.

Where application for probation is filed by court's permission after conviction of second degree robbery, circumstances of crime and defendant's character go only to court's discretion in granting or denying probation, and do not deprive it of jurisdiction to hear and determine application on its merits.

5. Criminal law §1001—Principle that all concerned in commission of felony are principals does not affect court's jurisdiction to hear application for probation (Pen. Code, § 971).

Principle that all concerned in commission of felony shall be prosecuted, tried, and punished as principals (Pen. Code, § 971) does not affect court's jurisdiction to hear and determine application for probation.

Appeal from Superior Court, Los Angeles County; Wm. T. Aggeler, Judge.

Edward Freithofer was convicted of robbery in the second degree, and he appeals. Appeal from order denying probation dismissed, order denying motion for new trial affirmed, and judgment reversed, with directions.

Wm. Christensen, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and John L. Flynn, Deputy Atty. Gen., for the People.

CRAIG, Justice pro tem. The facts are stated in the opinion of the court.

This is an appeal from the judgment imposed upon appellant following his conviction of the crime of robbery in the second degree and from the order of the trial court denying his application for probation for the reason, as stated by the trial judge at the time, that the court did not have jurisdiction to consider such application.

Appellant does not seek a reversal of his conviction, but does ask that the judgment be reversed and the cause remanded to the trial court for consideration of the application for probation. Appellant's codefendant entered a plea of guilty. Appellant's trial was by jury, and by its verdict said jury found appellant guilty of robbery in the second degree.

[1, 2] Robbery perpetrated by torture or by a person being armed with a dangerous or deadly weapon is robbery in the first degree. All other kinds of robbery are of the second degree. Pen. Code, § 211a. The robbery of the second degree, for which appellant stands convicted, is a crime wherein the use or possession of a dangerous or deadly weapon is specifically excluded. By its verdict, finding defendant guilty of robbery in the second degree, the jury in effect acquitted defendant of robbery of the first degree. "Where a defendant is charged with the crime of robbery, a verdict of robbery in the second degree will not be reversed because, under section 211a of the Penal Code, the conviction should have been for robbery in the first degree." *People v. De Verre*, 68 Cal. App. 742, 230 P. 197; *People v. North*, 81 Cal. App. 113, 252 P. 1063; *People v. Hudson*, 92 Cal. App. 593, 268 P. 687. After the verdict was recorded the judge, then presiding, permitted an applica-

tion for probation to be filed. The matter of probation and sentence came on for hearing before another judge of said court, and in disposing of said matter of probation the latter judge said in part: "The record here shows that you had a codefendant by the name of John Lichtenschul. * * * It appears, from the evidence in the case and the probation officer's report, that the man who held the gun was not this defendant, but the codefendant, John Lichtenschul. * * * The court imputes the use of a deadly weapon to this defendant, because the two were there, both engaged in the perpetration of the robbery. * * * For the reasons stated, that the court was without jurisdiction to grant probation in the case, probation is denied." The court ordered appellant committed to the state prison at San Quentin for the period prescribed by law. Thereupon defendant appealed in open court from the order denying probation on the ground stated and from the judgment.

[3] The order denying probation on the ground that the court did not have jurisdiction to consider an application for probation in this case is not appealable and the attempted appeal therefrom must be dismissed. *People v. Jones*, 87 Cal. App. 482, 262 P. 361; Pen. Code, § 1237. The action of the trial court in denying probation for lack of jurisdiction as stated may be reviewed on appeal from the judgment. *People v. Jones*, supra.

[4, 5] We are of the opinion that the court erred in disclaiming jurisdiction to hear and pass upon the pending application for probation upon its merit. It is true that the court may take into consideration, in exercising its discretion in the matter of probation, all of the facts and circumstances of the crime and of the character and life of the defendant, irrespective of whether same be disclosed by the evidence in the case, or by other proper means, as, for instance, the probation officer's report. Where, however, application for probation has been filed by permission of court after conviction of defendant of robbery of the second degree, these facts and circumstances can go only to the matter of the discretion of the court in granting or denying probation, and do not deprive the court of jurisdiction to hear and determine the application upon its merits. To hold otherwise would nullify the force and effect of the verdict of the jury. The principle of law that all concerned in the commission of a felony are to be prosecuted, tried, and punished as principals (section 971, Pen. Code) does not affect the matter of jurisdiction involved herein.

The clerk's transcript contains a copy of the minutes of the court reciting an appeal from the court's order denying a motion for a new trial. Appellant, in his opening brief,

concedes that no new trial is necessary for the relief now asked for by him.

The appeal from the order denying probation for lack of jurisdiction is dismissed. The order denying the motion for a new trial is affirmed. The judgment is reversed, with directions to the trial court to rearraign defendant for judgment, and thereupon and in accordance with law to hear and determine on its merits the application of defendant for probation, and thereafter to proceed in the premises as required by law.

We concur: CONREY, P. J.; HOUSER, J.

103 Cal. App. 249
PEOPLE v. VALENTI. (Cr. 1892.)

District Court of Appeal, Second District, Division 2, California. Jan. 17, 1930.

1. Criminal law ☞1153(2)—Appellate court cannot declare child over 10 years of age incompetent to testify in murder prosecution (Code Civ. Proc. § 1880; Pen. Code, § 1321).

Under Code Civ. Proc. § 1880, made applicable in determining competency of witnesses in criminal cases by virtue of Pen. Code, § 1321, appellate court is without right to declare that a child over the age of 10 years is incompetent to testify in murder prosecution.

2. Witnesses ☞40(2)—Competency of child as witness, even though under 10 years of age, is peculiarly for discretion of trial court.

Competency of child as witness in criminal case, even though under 10 years of age, is question whose determination rests peculiarly in discretion of trial court.

3. Criminal law ☞517(4)—Corpus delicti held sufficiently proven to authorize admission of statements made by defendant.

Evidence in prosecution for murder held to sufficiently prove corpus delicti so as to authorize the admission in evidence of statements made by defendant.

4. Homicide ☞253(1)—Evidence held to sustain conviction for first-degree murder.

Evidence in prosecution for murder held sufficient to sustain conviction for murder in the first degree.

Appeal from Superior Court, Los Angeles County; Marshall F. McComb, Judge.

Josephine Valenti was convicted of murder in the first degree, and she appeals. Affirmed.

Wm. Christensen, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and John D. Richer, Deputy Atty. Gen., for the People.

IRA F. THOMPSON, J. The defendant was convicted of the crime of murder in the first degree and sentenced to life imprisonment.

ment. She appeals from the judgment and from an order denying her motion for a new trial.

There are three reasons assigned by appellant why the judgment should be reversed. They are: (1) That the court erred in permitting Esther Garcia, 10 years old, to testify over the objection of the defense that she was incompetent; (2) that the corpus delicti was not sufficiently proven to warrant the admission in evidence of certain admissions and declarations of defendant; (3) that the evidence is not sufficient to support the verdict.

[1, 2] A Spanish girl 10 years of age was called to the stand and questioned at considerable length concerning her understanding of the nature of the oath and the consequence attending the giving of false testimony. The trial judge finally determined that she was competent. And we are asked by appellant to declare this ruling erroneous, on the ground that some of the answers of the witness were conflicting, which counsel argues demonstrates her incompetency to receive and relate just impressions of the facts respecting which she was asked to testify, or to understand the sanctity of an oath. There is very little to be said. The testimony of the witness stands without contradiction that she was 10 years of age, instead of under 10 years. Section 1321 of the Penal Code applies the same test to witnesses in criminal cases as in civil. By section 1880 of the Code of Civil Procedure it is said that children under 10 years of age who appear incapable of receiving just impressions of the facts respecting which they are examined shall not testify. Even though we were in as favorable a position to determine her ability to testify as was the trial judge, who had the opportunity of observing her manner while testifying and of fully weighing the difference between her testimony while attempting to speak English and her answers given through an interpreter, we would be without the right to declare that she was incompetent. However, we deem it proper to quote from *People v. Dunlop*, 27 Cal. App. 460, 150 P. 389, 391, as follows: "The question * * * is so far and peculiarly one whose determination rests in the discretion of the trial court that, in most cases, it would hardly be one which could be reviewed," and to say that there does not appear here that abuse of discretion which would warrant our interference, even though the child were under 10.

[3] There is no merit in appellant's contention that the corpus delicti was not sufficiently proven to authorize the admission in evidence of statements made by the appellant. It was proved beyond question that the eight months old child of appellant was burned to death while in a baby buggy outside the house in the yard on July 8, 1929.

Testimony was introduced that there was nothing in the buggy except the child's bottle and a blanket; that appellant had previously taken out an insurance policy on the child in the sum of \$325; that appellant went to see the child a few minutes before the fire and upon returning to the place where she and her mother-in-law had been sitting informed the latter that the child was asleep; that shortly before the buggy was seen in flames appellant lit a match and threw the box from which it was taken in the vicinity of the garage which was about 12 feet from the buggy; that there had been no fire in an oven situated in the yard for some time prior to the tragedy; that no fire from which the buggy might have been ignited was found in the neighborhood; and that there was no wiring or other agency to which the fire might have been attributed. The evidence thus introduced complied fully with the rule announced, after a review of the authorities in this state, by the Supreme Court in *People v. Selby*, 198 Cal. 426, 245 P. 426, 431, as follows: "It may finally be said that the authorities are unanimous on the proposition that the corpus delicti is not required to be established to a moral certainty and beyond a reasonable doubt before the extrajudicial statements, admissions, or confessions of a defendant may be received in evidence—prima facie proof of the corpus delicti being sufficient for that purpose. And, with the exception of *People v. Tapia* [131 Cal. 647, 63 P. 1001], supra, and *People v. Wagner* [29 Cal. App. 363, 155 P. 649], supra, the rule is likewise unanimously declared that it is not necessary that the jury, in resolving the question of the guilt or innocence of a defendant upon all the evidence in the case, should, before considering for any purpose the extrajudicial statements, admissions, or confessions of a defendant, be first satisfied to a moral certainty and beyond a reasonable doubt that the corpus delicti has been established by evidence aliunde." Or to sum up the evidence: The death was demonstrated beyond doubt and prima facie the criminal agency was established by proving the nonexistence of any cause for the fire other than the lighted match in the hands of the appellant very near the scene of the incineration. And additionally, the unusual circumstance of insuring the child's life by a mother in the poor circumstances admittedly endured by the appellant lends weight to the inference proper to be drawn from the other circumstances.

[4] Sufficient has been said already to indicate that the evidence is sufficient to support the verdict. However, testimony was also introduced establishing that the appellant and the child's father were not united in wedlock until approximately four months after the baby was born, and then, as she puts it, "she had to force her husband to marry her." The mother-in-law of appellant tes-

tified that the latter frequently said "she did not want the baby," and that on several occasions she stated she wanted to put it in a home. The appellant also stated, according to one of the witnesses, that she and her husband "had had some argument that morning regarding some money for the baby's milk, that he had refused to pay the milk bill and that she was ashamed to meet the milkman and tell him no, that she didn't have any money. She said she had asked her husband that morning for some money and he had refused her and she said" that she had left her husband on a couple of occasions once for a day and another time for about a week. There was considerable testimony all tending to indicate that the appellant did not entertain a motherly affection for her child, but was disturbed and worried over its presence. There was sufficient to warrant the determination arrived at by the jury.

Judgment and order affirmed.

We concur: CRAIG, Acting P. J., BURNELL, Justice pro tem.

103 Cal. App. 82

PEOPLE v. STEVENSON. (Cr. 1859, 3327).★

District Court of Appeal, Second District, Division 2, California. Jan. 7, 1930.

Rehearing Denied Jan. 22, 1930. Hearing Denied by Supreme Court Feb. 6, 1930.

1. Embezzlement ⇐2—False pretenses ⇐2—Larceny ⇐2—Under statutory amendments, larceny, embezzlement, and obtaining money by false pretenses are merged into crime of theft (Pen. Code, § 484, as amended by St. 1927, p. 1046; St. 1927, p. 1047).

Effect of amendment St. 1927, pp. 1046, 1047, and particularly that of Pen. Code, § 484, which contains definition of "theft," is that former crimes of larceny, embezzlement, and obtaining property by false pretenses are merged into one crime of theft; the change of name being one of form and not of substance.

2. Embezzlement ⇐2—Defendant committing offense before amendment making defendant's act grand theft instead of embezzlement could be prosecuted for grand theft (St. 1927, pp. 1046, 1047).

Defendant committing offense before St. 1927, pp. 1046, 1047, making defendant's act grand theft instead of embezzlement as that term was used prior to amendment, were enacted, could be prosecuted for grand theft, since punishment and offense were same and change was procedural one which did not impair substantial right of defendant.

3. Indictment and information ⇐56—Change in law, making unnecessary words "willfully" and "feloniously," in charging grand theft, did not impair substantial right of defendant (St. 1927, p. 1043).

Change in law under St. 1927, p. 1043, doing away with necessity of alleging more than

"that defendant unlawfully took property of another" and making unnecessary the words "willfully" and "feloniously," as applied to charge of grand theft committed prior to such amendment, held procedural matter which in no way impaired substantial rights of defendant.

4. Constitutional law ⇐199—Statutory amendments substituting term "theft" for words "larceny," "embezzlement," and "obtaining property by false pretenses," and providing simplified form of pleading, held not void as ex post facto laws (Pen. Code, § 489, as amended by St. 1927, p. 1047; Pen. Code, § 514; St. 1927, pp. 1046, 1047).

St. 1927, pp. 1046, 1047, substituting term "theft" for the words "larceny," "embezzlement," and "obtaining property by false pretenses," and providing simplified form of pleading, held not void under state and federal constitutional provisions as ex post facto laws, since under Pen. Code, § 489, as amended by St. 1927, p. 1047, punishment for defendant's act, now styled "grand theft," is identical with that annexed to same offense when called "embezzlement" under Pen. Code, § 514, and it does not alter legal rules of evidence and receive less or different testimony than law required at time of commission of offense; these being tests of an ex post facto law.

5. Criminal law ⇐1036(2)—Objection transcript was improperly used for impeaching testimony could not be made for first time on appeal.

Objection that transcript was improperly used for purpose of impeaching testimony of state's own witnesses could not be urged for first time on appeal.

6. Criminal law ⇐627½—Refusal to order district attorney to permit defendant's counsel to use transcript of testimony before grand jury of which prosecution made use when examining witnesses held error (Pen. Code, § 1102; Code Civ. Proc. §§ 1854, 2054).

In prosecution for theft, court's refusal to order district attorney to permit defendant's counsel to inspect and use transcript of testimony before grand jury of which prosecution had made use during its examination of certain witnesses held error, since rules of evidence in criminal cases are, generally speaking, same as those in civil cases under Pen. Code, § 1102, and Code Civ. Proc. § 2054, provides writing shown to witness may be inspected by opposite party, and section 1854 provides when part of writing is given in evidence by one party, the whole on the same subject may be inquired into by the other.

On Hearing in Supreme Court.

7. Criminal law ⇐1186(4)—Where district attorney used transcript without permitting inspection by defendant, people cannot invoke constitutional provisions placing burden on appellant to show prejudicial error (Const. art. 6, § 4½).

In prosecution for theft, where district attorney used transcript of testimony before grand jury during its examination of certain witnesses but refused to permit inspection of transcript by defendant, and court refused to order district attorney to permit defendant's

counsel to inspect and use transcript, people could not invoke provisions of Const. art. 6, § 4½, to effect that burden is on appellant to show prejudicial error, since the only way in which prejudicial error could be shown was by inspection of transcript and this right had been denied defendant.

8. Criminal law §1186(4)—**Constitutional provision placing burden on appellant to show prejudicial error does not contemplate situation, where party was denied opportunity to determine prejudicial injury (Const. art. 6, § 4½).**

Const. art. 6, § 4½, to effect that burden is on appellant to show prejudicial error, does not contemplate situation where complaining party without fault has been denied an opportunity to determine whether or not he has been prejudicially injured.

Appeal from Superior Court, Los Angeles County; William C. Doran, Judge.

William J. Stevenson was convicted of grand theft, and he appeals. Reversed.

John F. Murphy and Anderson & Sheahan, all of Los Angeles (W. H. Anderson, of Los Angeles, of counsel), for appellant.

U. S. Webb, Atty. Gen., and John L. Flynn, Deputy Atty. Gen., for the People.

BURNELL, Justice pro tem. Appellant was charged by information filed April 24, 1929, with the crime of grand theft. He was tried by the court sitting without a jury, trial by jury having been waived by appellant, his counsel, and the district attorney, and was found guilty on one of the two counts of the information and not guilty on the other. A motion for new trial was made and denied.

The first count, on which appellant was convicted and sentenced, was as follows: "The said William J. Stevenson is accused by the District Attorney of and for the county of Los Angeles, State of California, by this information of the crime of Grand Theft, a felony, committed as follows: That the said William J. Stevenson, on or about the 29th day of April, 1927, at and in the County of Los Angeles, State of California, did unlawfully take away thirty-five (35) Metropolitan Mortgage Company Collateral Trust Gold Bonds of the total value of Thirty-one Thousand, Six Hundred Sixty-six and sixty-seven hundredths (\$31,666.67) Dollars, lawful money of the United States, the personal property of one E. Bailey Webb." One of the grounds urged by appellant for a reversal of the judgment is that no crime is charged against the defendant in the count of the information on which he was found guilty, since at the time of the commission of the acts which resulted in his prosecution no such crime as "Grand Theft" was known to our law; the amendments to certain sections of the Penal Code which went into effect July 29, 1927, for the first time

defining and, as appellant contends, creating this offense.

[1, 2] Prior to the Code amendments of 1927, certain acts were declared unlawful which were committed with the object and purpose of wrongfully acquiring the money or other property of others. Depending on the method used in such wrongful acquisition, these acts were given certain names—as larceny, embezzlement, obtaining property by false pretenses, etc. The record in the case before us discloses that there was sufficient evidence to have supported a conviction for that method of such wrongful acquisition which was formerly denominated "embezzlement." In 1927 (St. 1927, p. 1046), the Legislature, by amending several sections of the Penal Code, abandoned these various names as applied to the different forms of wrongful acquisition of property and adopted the one named "theft" as the common designation of all of them. At the same session a new section (490a) was added to the Code (St. 1927, p. 1047), providing that, "Wherever any law or statute of this state refers to or mentions larceny, embezzlement, or stealing, said law or statute shall hereafter be read and interpreted as if the word 'theft' were substituted therefor." The effect of these amendments, and particularly that of section 484 (St. 1927, p. 1046), which contains the definition of theft, "is that the former crimes of larceny, embezzlement, and obtaining property by false pretenses are merged into the one crime of theft." *People v. Plum*, 88 Cal. App. 575, 263 P. 862, 265 P. 322. "The change of name is one of form and not of substance." *People v. Giron* [Cal. App.] 270 P. 462. "Nor can it be successfully argued that, because the offense was committed prior to the amendment of section 484 of the Penal Code that appellant could not be prosecuted for grand theft instead of embezzlement as that term was used prior to the amendment. The punishment and the offense are the same. The change is a procedural one which in no way impairs a substantial right of the defendant" (*People v. Dempster* [Cal. App.] 274 P. 592, 594).

That the 1927 amendments effected merely a change in nomenclature is the basis of the decisions in *People v. Giron*, supra, and in *People v. Jordan*, 92 Cal. App. 543, 268 P. 373, 374. In the first of these cases the defendant, who was charged with burglary by entering certain premises "with the intent then and there and therein to commit the crime of larceny," contended that the information failed to state a public offense for the reason that since the amendments of 1927 there is no longer any crime known as larceny in this state, and that since the word "larceny" did not describe any known offense its presence in the information should be disregarded, which would leave merely a charge of unlawful entry upon the premises of another—"in

other words, a mere trespass, but not any crime punishable under laws of this state." This contention this court found to be without merit. In the second case the situation was analogous to that in the case before us. The information, drawn in conformity with section 952 of the Penal Code, as amended in 1927 (St. 1927, p. 1043), charged the defendant with grand theft in each of its five counts. Four of the counts charged the commission of the offense at a date prior to the going into effect of the 1927 amendments. Passing upon a contention similar to that urged by appellant here, the court noted that the facts proved sufficiently established the commission by the defendant of the crime formerly known as obtaining property by false pretenses and quoted the rule that: "If an act is criminal and punishable when committed, and a statute is subsequently enacted also making it criminal and punishable, but giving the crime a designation not before given to it, the situation of the accused is not altered to his disadvantage, and hence it cannot be said that there has been any *ex post facto* legislation, nor does the new or amendatory statute obliterate the pre-existing law so that a conviction and punishment after its enactment and the consequent repeal of the former statute can be regarded as a conviction and punishment of an act not criminal when committed."

[3] Appellant in the instant case takes a position almost identical to that of the appellant in *People v. Giron*, supra, urging that since at the time of the alleged offense there was no such crime as theft known to the law, the charge of commission of grand theft must be eliminated from consideration of the information, leaving only the statement, "That the said William J. Stevenson, on or about the 29th day of April, 1927, * * * did unlawfully take away" certain personal property of one Webb, and that it therefore contains "no charge of the commission of any conceivable crime." This contention is devoid of merit. As far as the use of the term "grand theft" is concerned, no right of the defendant was, as the authorities above referred to hold, in any way prejudiced by substituting it for the word "embezzlement" as descriptive of the acts for the commission of which the defendant was tried and of which the evidence showed him guilty; so far as the failure to employ the words "wilfully" and "feloniously," or to describe the manner in which the offense was committed is concerned, section 952 of the Penal Code, as likewise amended in 1927 (St. 1927, p. 1043), did away with the necessity of alleging more than "that the defendant unlawfully took the property of another." This change in the law, relating to a matter of pleading, is also "a procedural one which in no way impairs a substantial right of the defendant." *People v. Dempster*, supra.

[4] Appellant's contention really amounts to a charge that as to him the amendments of Cal.Rep. 284-286 P.—7

1927, substituting the term "theft" for the words "larceny," "embezzlement," and "obtaining property by false pretenses," and providing a simplified form of pleading, are *ex post facto* laws and therefore void under state and federal constitutional provisions. But this position is entirely untenable for the reason that whether taken as a whole or singly, in so far as they affect appellant's case, these amendments do not nor does any one of them contain any of the elements the presence of which in a statute brings it within the definition of an *ex post facto* law. The law as amended does not "make an action, done before the passing of the law and which was innocent when done, criminal." The fraudulent appropriation of property by a person to whom it has been entrusted has always been criminal in this state. It does not "aggravate the crime or make it greater than it was when committed," nor does it "change the punishment and inflict a greater punishment than was annexed to the crime when committed," for under section 489 of the Penal Code as amended in 1927 (St. 1927, p. 1047) the punishment for appellant's act, now styled "grand theft," is identical with that annexed to the same offense when called "embezzlement." Pen. Code, § 514. Neither does it "alter the legal rules of evidence, and receive less, or different testimony than the law required at the time of the commission of the offense * * * to convict the offender." These are the tests of an *ex post facto* law as stated in *Calder v. Bull*, 3 Dall. 386, 390, 1 L. Ed. 648; *Kring v. Missouri*, 107 U. S. 221, 2 S. Ct. 443, 27 L. Ed. 506; *People v. Edenburg*, 88 Cal. App. 558, 263 P. 857; and many other cases. If we may substitute the word "embezzlement" for the words "obtaining property by false pretenses," this case falls squarely within the ruling in *People v. Jordan*, supra, from which we again quote: "If under the facts alleged the defendant could have been found guilty of a crime which would have carried a greater or different penalty, there might be something in the contention of counsel for the appellant. * * * In the given case the law as amended and under which the indictments were drawn does not alter the legal rules of evidence in the case at bar. * * * There is nothing in the law as amended and objected to under which the present proceeding is had that in any way aggravates the particular crime or crimes herein charged, or in any way makes it any greater crime than it was under the law as it stood at the time when it was committed. * * * The evidence shows that the facts proved against appellant were those establishing the commission of the crime heretofore known as the crime of obtaining property by false pretenses. Furthermore, the law as amended does not change the punishment for the particular crime herein charged, and does not in any way provide for the infliction of any greater punishment than was annexed to

the particular crime charged when the crime was committed. * * * The information, although drawn in conformity with the law as amended, did not in any way hinder defendant in the preparation of his defense as long as the facts constituting the substance of the offense charged were fully given therein."

[5] Appellant's next point is that the court erred in refusing to order the district attorney to permit his counsel to inspect and use a transcript of testimony before the grand jury, of which the prosecution had made use during its examination of certain witnesses. The transcript in question was of evidence received by the grand jury during investigation by that body of the charge against appellant which eventually resulted in the filing of the information against him by the district attorney. No indictment was returned by the grand jury, however. While appellant now insists that this transcript was improperly used for the purpose of impeaching the testimony of the state's own witnesses, no objection was made at the trial to such or any use of it, and, of course, this objection may not for the first time be urged on appeal. *People v. Durrant*, 116 Cal. 179, 48 P. 75.

[6] Appellant did, however, demand that he be accorded an opportunity to examine the transcript, and when this demand was refused by the district attorney the court was requested to order the latter to permit such examination. This the court refused to do, saying: "That is a matter that will have to be decided with them (the deputy district attorneys conducting the case for the people); the court has no authority to order them to give you a transcript or a copy of it." This ruling was clearly erroneous. The district attorney had exhibited portions of the transcript to several of the people's witnesses and also to the defendant himself during his cross-examination, and had questioned them concerning statements shown therein to have been made by them at the grand jury investigation, and had read excerpts from the testimony in the transcript into the record. Both the law and common fairness to the defendant—and the former should always include the latter—required that the defendant be accorded an opportunity to examine and, if he was so advised, to make use of the document as to which the state had examined these witnesses. The rules of evidence in criminal cases are, generally speaking, the same as those in civil cases (section 1102, Pen. Code), and it is provided by section 2054 of the Code of Civil Procedure that, "Whenever a writing is shown to a witness, it may be inspected by the opposite party, and no question must be put to the witness concerning a writing until it has been so shown to him." Section 1854 of the same Code is as follows: "When part of an act, declaration, conversation, or writing is given in evidence by one party, the

whole on the same subject may be inquired into by the other; * * * and when a detached act, declaration, conversation or writing is given in evidence, any other act, declaration, conversation, or writing, which is necessary to make it understood, may also be given in evidence." When portions of the transcript in the instant case were read into evidence in connection with the testimony of witnesses such portions were "given in evidence" and were before the court as the trier of facts. The only way in which "the whole on the same subject" might be "inquired into" by the defendant was through an examination of the writing—the transcript—from which such excerpts were read. Were the rule otherwise it might easily be possible for the party having such document in his possession to select, call the witness' attention to and read before the court or jury portions of the testimony at the former hearing which seemingly contradicted the testimony of the witness given in the pending proceeding, without the adverse party having any opportunity to discover other statements in the transcript which might explain the apparent discrepancy.

In *Hobart v. Tyrrell*, 68 Cal. 12, 8 P. 525, it was held that when a witness for one party has read an extract from testimony given by him in a previous judicial proceeding it is error to refuse the adverse party the right to introduce the whole of such testimony. The precise question involved here received very thorough consideration in *Risdon v. Yates*, 145 Cal. 210, 78 P. 641. That was an action for damages for a battery committed on the plaintiff by the defendant, and in the course of the trial the former called as a witness a justice of the peace for the purpose of identifying the record in a criminal action against the same defendant involving the same battery, and introduced the complaint and the docket of the justice showing that the defendant had entered a plea of guilty. We quote from the opinion the following excerpts: "Defendant sought, by cross-examination of the justice and by his own testimony, to prove the entire statement made to the justice at the time defendant pleaded guilty concerning such plea, and the reasons why defendant made it. In other words, defendant sought by several questions to prove the entire statement in connection with the oral plea, as made to the justice at the time, and entered in his docket. The court sustained the objections of plaintiff to each of the questions by which it was sought to elicit the full statement. In this the court erred. * * * But where a defendant has pleaded guilty in a criminal case, the plea and judgment are received in evidence as an admission, but not as conclusive. 'It is therefore to be treated according to the principles governing admissions, to which class of evidence it properly belongs.' 1 Greenleaf on Evid. (16th Ed.) § 527a. If an admission is testified to by a witness against a party, such

party has the right, in cross-examination, to bring out the whole of what was said in direct connection with, and pertaining to, the admission. In this case the plaintiff was, in effect, allowed to prove that defendant said or admitted that he was guilty of an assault and battery upon plaintiff. This admission may have turned the scale, and caused the jury to disregard all the defendant's testimony. The plaintiff was allowed to put in evidence the part of the conversation or declaration to the justice which in law amounted to an admission. The defendant was not allowed to show that he stated other facts at the time which showed that it was not an unqualified admission. The statement of defendant in the form of an admission to the justice was allowed for the purpose of corroborating the evidence of plaintiff. The statement of defendant, if such statement was made, that plaintiff struck the first blow, was not allowed to go to the jury. It is certainly evident that this was receiving evidence only on one side of the controversy. The plaintiff was not bound to offer in evidence the admission made before the justice, but, having done so, the defendant was entitled to the whole of the declaration or admission. The fact that the justice wrote down part of it in his docket makes no difference. It was, after being written in the docket by the justice, but an oral admission of defendant. The entry by the justice was only the conclusion or opinion of the justice as to the effect of what defendant said. The question is, did the defendant, in words, admit his guilt before the justice? If he did, what were the words, and what did he say? When a part of a declaration or conversation is given in evidence by one party, the whole on the same subject may be inquired into by the other." In *Freel v. Market Street Cable Ry. Co.*, 97 Cal. 40, 31 P. 730, 731, a written statement made by an employee of the defendant corporation was in the courtroom during the trial and in the possession of counsel for the defendant. The plaintiff demanded it for the purposes of cross-examination, counsel for the defendant "denied the right of counsel to demand his private papers," and the court ordered him to hand it over to the plaintiff's attorneys. One of the errors assigned by the defendant on its appeal from the judgment rendered against it was this ruling. In upholding it the Supreme Court said: "This statement was in the possession of defendant's counsel upon the trial, and, indeed, was lying upon the desk before him when the demand in question was made. The plaintiff could not, in the nature of things, know the contents of this paper. It is not claimed that she had ever seen it, nor had it ever been in her possession. It was produced for the first time by defendant's counsel. To sanction the rule claimed by the defendant in this case would enable a litigant to suppress adverse evidence of the most important character." Among other cases which

lend support to the views here expressed are: *Granite Gold Mining Co. v. Maginness*, 118 Cal. 131, 50 P. 269; *McGraw v. Friend & Terry Lumber Co.*, 133 Cal. 589, 65 P. 1051, and *Souza v. Joseph*, 22 Cal. App. 179, 133 P. 981.

As opposed to these authorities, the respondent cites *People v. Glaze*, 139 Cal. 154, 72 P. 965, in which it was held that the trial court properly refused to order the district attorney to produce a statement made by a witness for the prosecution prior to the trial. This statement, made at police headquarters and taken in shorthand by a stenographer and afterwards written out in longhand, was unsigned, and "there was nothing to show that the witness had ever read the statement or seen it, or that he was aware of its contents." While it was in the possession of the district attorney, he had made no use of it by questioning the witness as to statements claimed to have been made by him during the examination at the police station nor had he read any of it into the record or in the presence of the jury. An entirely different case is presented here, where witnesses were questioned as to testimony given by them before the grand jury as perpetuated in the transcript in question and where such portions as the prosecutor desired to have before the court were read by him from it.

We cannot say that the error in refusing to permit defendant's counsel to inspect the transcript was of an unprejudicial character, since the transcript might have contained other statements by the witnesses a portion of whose testimony contained therein was read which would have thrown an entirely different light upon the case from that diffused by the fragmentary portions selected and read by the district attorney.

As the judgment must be reversed and the cause remanded for another trial because of the error just discussed, no useful purpose would be served by a discussion of the other rulings as to matters of evidence complained of by appellant and which, in our opinion, are not apt to arise on the retrial.

Judgment and order reversed.

We concur: WORKS, P. J.; IRA F. THOMPSON, J.

Opinion of Supreme Court in Bank
Denying Hearing.

PER CURIAM. In denying the petition in the foregoing cause, we deem it proper to add:

[7, 8] Where a transcript is made under the circumstances here shown and used by the district attorney in the manner related by the decision, and its contents are denied inspection by the defendant, it comes in poor grace for the people to invoke the provisions of article 6, § 4½, of the Constitution, to the effect that the burden is upon the appellant to show

prejudicial error. The only way in which prejudicial error could possibly be shown is by an inspection of said transcript, and this right has been denied him. It was not intended that said constitutional provisions should be applied in such a case. To so apply them it would require a showing on the part of the defendant which is rendered impossible by the act of his adversary. The constitutional provisions impose the burden of showing prejudice or injury by a ruling which is within the power of the complaining party to present. It does not contemplate a situation where such party without fault has been denied an opportunity to determine whether or not he has been prejudicially injured. We do not wish to be understood as relaxing in the slightest degree the effect of the language of the Constitution that the error complained of must affirmatively appear to have resulted in a miscarriage of justice to authorize the reversal of a judgment. We do hold, however, that a complaining party should have an opportunity to show injury.

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103 Cal. App. 302

STATE BAR OF CALIFORNIA v. HULL.
(Civ. 6764.)

District Court of Appeal, Second District, Division 1, California. Jan. 21, 1930.

1. Attorney and client $\S$ 53(1)—Presumption exists that examining board and court admitting attorney to practice had no knowledge concerning conviction in foreign state, absent contrary showing (Code Civ. Proc. $\S$ 1963, subd. 15).

Absent claim or evidence to contrary, presumption exists that board of examiners and court admitting attorney to practice were wholly without knowledge or information concerning indictment and conviction in foreign state of crime, involving moral turpitude, since, under Code Civ. Proc. $\S$ 1963, subd. 15, presumption arises that official duties have been regularly performed.

2. Attorney and client $\S$ 40—Where attorney applying for admission withheld fact of conviction of crime involving moral turpitude, order admitting him to practice was vacated.

Where attorney from foreign state, petitioning for admission to bar, withheld fact from board of examiners and court that he had been convicted of offense under Rev. St. U. S. $\S$ 5209 (12 USCA $\S$ 592), which involved moral turpitude, order admitting attorney to practice was vacated and license revoked, since attorney had no right to decide for himself question which necessarily would have important bearing on inquiry to be made in connection with application.

Application by the State Bar of California for revocation of an order admitting Theo-

dore Torrey Hull to practice law. Order vacated, and license revoked.

Gibson, Dunn & Crutcher and Norman S. Sterry, all of Los Angeles, for petitioner.

Alfred L. Armstrong, Fred Aberle, Jr., Lorin Andrews, Vernon Bettin, Leonard M. Comegys, Clive W. Johnson, Laurence B. Martin, C. Fletcher Quillian, Victor H. Koenig, Paul Schwab, Steadman G. Smith, and Carl Yokum, all of Los Angeles, for respondent.

CONREY, P. J. In the year 1915 respondent Hull obtained from the Supreme Court of Indiana an order admitting him to practice law in that state. Said order has never been vacated or set aside. In the year 1920, and while respondent was practicing law in the state of Indiana, an indictment was found and returned in the District Court of the United States for the District of Indiana, against respondent Hull and one Heldt, an officer of a bank at Evansville. In the indictment it was charged that Heldt, as assistant cashier of the bank, fraudulently and feloniously, and with intent to injure the bank, willfully misapplied certain funds and credits of the bank for the use and benefit of Hull. It was further charged that Hull did fraudulently and feloniously aid and abet said Heldt in commission of the crime, the circumstances whereof are fully set forth in the indictment. Both defendants were convicted, and respondent Hull was sentenced to serve a term of 18 months in the federal penitentiary at Leavenworth.

After having served his term, respondent came to California, and on June 21, 1923, filed in this court his application to be admitted to practice law in all the courts of this state. In connection with said application he made an affidavit which contained the following statement: "That affiant has never been charged before any court with crime amounting to either felony or misdemeanor involving moral turpitude." This application was in due course referred to the State Board of Bar Examiners for examination as to the applicant's moral and other qualifications. The board appointed Mr. John E. Biby, an attorney at law in Los Angeles, to examine and report. After Mr. Biby had made his examination, which included an oral interview with the applicant, a favorable report was filed; whereupon the Board of Examiners made a favorable report to this court and the applicant obtained the order admitting him to practice in this state. The applicant did not at any time give information to Mr. Biby or the Board of Examiners of this state in any way concerning or relating to the above-mentioned indictment and conviction.

All the foregoing facts are set forth in the petition herein and are not denied in the answer filed by respondent. The petition further alleges that, in the course of his examination by Mr. Biby, respondent with intent and purpose to deceive stated to Mr. Biby that he had never been charged with any conduct involving moral turpitude, never been arrested for any cause, and that there was nothing adversely affecting his character at any time, which would have disclosed anything bearing upon his application for admission to practice in this state. The petition further alleges that respondent intentionally and fraudulently concealed the fact that during 14 months of the time that he represented to Mr. Biby that he had been in continuous and active practice of the law in Evansville he was confined in the penitentiary.

[1, 2] The answer filed by respondent denies that he stated to Mr. Biby that he had been continuously in the practice of law in Evansville for the stated period, and denies that he fraudulently or with intent to deceive stated positively, or at all, that he had never been charged with any conduct involving moral turpitude, nor had he ever been arrested for any cause, except the respondent did state to Mr. Biby that he had never been charged with any crime or felony involving moral turpitude. Respondent says he had fully satisfied himself and fully believed that the charge against him and the ensuing judgment, did not involve moral turpitude on his part, and did not come within the province of the examination by Mr. Biby and therefore did not inform said Mr. Biby of his conviction; that in not informing Mr. Biby as to said fact he was innocent of any thought of wrongdoing, or any desire to misrepresent any facts before this court or said Biby. On the ground of want of knowledge as to whether or not in making its order admitting him to practice this court was in entire ignorance of his conviction, respondent denies the same. There is a similar denial in relation to the State Board of Bar Examiners in its favorable recommendation made to this court and in relation to the recommendation made by Mr. Biby. There is an affirmative defense in which respondent asserts that he did not volunteer information about said adverse facts, for the reason that said charge and conviction did not involve moral turpitude on his part, and that he was not under any duty to disclose said facts. He alleges he possesses all the qualifications at the present time to authorize his admittance to the practice of law, and in fact had these qualifications at the time he was admitted to practice by this court, and asks that he be permitted to present testimony to establish those facts.

It will be noted that respondent does not allege or offer to prove that the Board of

Examiners, in making its favorable recommendation, or this court in making its admission, had any knowledge of the indictment or conviction. If the court or the Board of Examiners had had any such knowledge or information it would have been their duty to examine further concerning those matters in order to determine whether, notwithstanding said indictment and conviction, the applicant was entitled to be admitted to practice his profession in this state. Upon the presumption that official duty has been regularly performed (Code Civ. Proc. § 1963, subd. 15) it must be assumed, in the absence of any claim or evidence to the contrary, that the Board of Examiners and the court were wholly without knowledge or information concerning said indictment or conviction. It is too plain for argument that the charges upon which respondent was convicted involved moral turpitude. While the offense is, in section 5209 of the Revised Statutes of the United States (12 USCA § 592), described as a misdemeanor, that description is supplemented by section 335 of the federal Penal Code of 1909 (18 USCA § 541), where it is provided that all offenses which may be punished by death or imprisonment for a term exceeding one year, shall be deemed felonies.

The nature of the charges upon which respondent had been convicted were such that he had no right to withhold the facts from the court in connection with his application for admission to practice law. He had no right to decide for himself a question which necessarily would have an important bearing upon the inquiries to be made by the court in connection with his application. The situation presented by this defense is similar to that existing in *In re Mash*, 28 Cal. App. 692, 697, 153 P. 961, 963, where the First District Court of Appeal said: "In other words, having convinced himself that he was innocent of the charges previously preferred against him, he concluded that, even if the court had been informed thereof, it would have treated them as matters of little or no moment. If we were to concede the sufficiency of such a defense, we would practically oust ourselves of jurisdiction to pass on the moral character of an applicant to practice law. Regardless of whether the charges previously preferred against the respondent were well or ill founded, we hold that it was his duty to reveal to this court the fact that they had been preferred and prosecuted and had resulted in his conviction and disbarment. His failure to do so cannot be regarded as other than a willful deception which requires this court, if it is to give effect to that provision of the law permitting only persons of good moral character to be licensed to practice law in the courts of the state, and to maintain the dignity and de-

gency of its bar, to revoke the license previously granted to him."

Petitioner has demurred to the answer and has moved for judgment on the pleadings. The demurrer is sustained and the motion is granted. It is ordered that the license to practice law in this state heretofore granted by this court to the said Theodore Torrey Hull (also named in the record as Theodore T. Hull) be and the same is hereby revoked and canceled, and that respondent's name be stricken from the roll of attorneys and counselors at law in this state.

We concur: HOUSER, J.; YORK, J.

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103 Cal. App. 360

ANDREWS v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al.
(Civ. 6822.)

District Court of Appeal, Second District, Division 1, California. Jan. 23, 1930.

1. Contempt ⚭21—Disobedience of order made without or in excess of jurisdiction cannot be punished as "contempt."

A court cannot punish as a "contempt" the disobedience of an order made without or in excess of jurisdiction; disobedience of void order not constituting contempt.

[Ed. Note.—For other definitions, see Words and Phrases, First, Second, and Third Series, Contempt.]

2. Divorce ⚭269(2)—Court cannot acquire jurisdiction to punish for contempt for disobedience of nonexistent order for payment of alimony; interlocutory judgment containing no such order.

Where interlocutory judgment of divorce contained no order for payment of alimony, the court rendering the judgment cannot acquire jurisdiction to punish for contempt disobedience of alleged order which in fact does not exist, and any such adjudication of contempt is nullity.

3. Prohibition ⚭3(1)—Existence of plain, speedy, and adequate remedy precluding resort to prohibition depends upon circumstances.

Whether there is plain, speedy, and adequate remedy in the ordinary course of law precluding resort to prohibition depends upon circumstances of particular case.

4. Prohibition ⚭3(3)—Absent remedy by appeal, petitioner held entitled to prohibition to restrain superior court from punishing him for contempt in refusal to pay alimony; no valid order for such payment having been made (Code Civ. Proc. § 1222).

There being no right of appeal from adjudication of contempt of court, in view of Code Civ. Proc. § 1222, and, previous adjudication of court in proceedings to punish petitioner for contempt in violating nonexistent alimony order

being indicative of court's intention to punish for contempt unless alimony was paid, petitioner was entitled to prohibition to restrain contempt proceeding in excess of court's jurisdiction as against objection that he had plain, speedy, and adequate remedy in ordinary course of law and should not be permitted to anticipate adverse rulings in contempt proceedings.

Original prohibition by Dell Andrews against the Superior Court in and for Los Angeles County and others. On demurrer to the alternative writ. Demurrer overruled, and peremptory writ ordered to issue.

J. C. Landry and J. K. Wilson, both of Los Angeles, for petitioner.

Everett W. Mattoon, County Counsel, and S. V. O. Pritchard, Deputy County Counsel, both of Los Angeles, for respondents.

CRAIG, Justice pro tem. Upon the filing of the petition for writ of prohibition, an alternative writ of prohibition was issued. Respondents made return by general demurrer to the petition, and the matter was submitted upon briefs, which have been filed.

On September 26, 1927, during the then pendency of an action for divorce, Edith E. Andrews and Dell Andrews entered into a property settlement which included a provision for payment of \$200 per month by Dell Andrews to Edith E. Andrews. On March 1, 1928, said parties resumed full marital relations and continued thereafter to live together as husband and wife until April 20, 1928, when they again separated. This divorce action was dismissed by plaintiff on June 21, 1928, and upon the same day she commenced a new action for divorce against said Dell Andrews. Process therein was duly served, and defendant failed to appear. On July 19, 1928, the case was heard as a default matter and the interlocutory judgment was duly entered July 26, 1928. The complaint is in the usual form of a complaint for divorce on the ground of cruelty, and contains no allegation concerning property, earning ability, or other facts as a basis for an award of alimony, other than the allegation "that there is no community property," and, in relation to the charge of acts of cruelty, "that during the past year defendant, although well able financially so to do, has refused and neglected to pay the ordinary household bills of plaintiff and defendant, thus causing plaintiff to suffer great and grievous mental anguish and humiliation." By the prayer of the complaint, plaintiff prayed judgment that she be granted a decree of divorce, that she be awarded the control and custody of the minor child of plaintiff and defendant, and for such other and further relief as to the court may seem meet and just.

The interlocutory judgment contained a finding that all of the allegations of the complaint are true and is in the usual form, except for the following provision contained therein: "It is further adjudged that that certain property settlement heretofore entered into between plaintiff and defendant, and providing for payments to the plaintiff in the sum of two hundred (\$200.00) dollars per month and on file in this case, be, and the same is hereby, made a part and portion of this interlocutory judgment."

On November 1, 1928, an order to show cause was issued by said superior court requiring defendant to appear on November 21, 1928, and show cause why he should not be adjudged in contempt of court for failure to make the payments of \$200 per month as specified in the interlocutory judgment. On November 21, 1928, defendant gave notice of motion to modify the interlocutory judgment by striking therefrom the above quoted portion thereof. This motion was denied without prejudice on December 4, 1928. On December 12, 1928, defendant moved for a rehearing on said motion, and on said date said motion was denied without prejudice to motion to set aside default and judgment.

On December 20, 1928, the order to show cause in re contempt, continued from November 21, 1928, came on for hearing, and the court ordered defendant "to pay \$100.00 per week to plaintiff until all alimony was paid up."

Apparently nothing further transpired of record in the case until June 18, 1929, when the court issued an order requiring defendant to show cause, on July 2, 1929, why he should not be adjudged in contempt of court for failing to make the payments required by court order of December 20, 1928. On July 2, 1929, defendant was adjudged in contempt of court and sentenced to confinement in jail for three days; thereupon sentence was suspended on condition that defendant "keep up the payments."

On July 29, 1929, defendant moved the court for a final judgment of divorce, with said reference to property settlement omitted therefrom. This motion was denied. On July 29, 1929, an order was issued by the court requiring defendant to show cause, on August 7, 1929, why he should not be adjudged in contempt of court for disobeying the order of December 20, 1928.

On August 5, 1929, petitioner filed in this court his petition for writ of prohibition to arrest said contempt proceeding.

Before proceeding further, it is necessary to determine the legal effect or force of that part of the interlocutory judgment complained of. A close study thereof shows only that a property settlement is made a part and portion of the judgment. The phrases, "heretofore entered into between plaintiff and

defendant," "and providing for payments to plaintiff of two hundred (\$200.00) dollars per month," and "and on file in this case," clearly are matters only of identification of a certain property settlement, and in no wise state any order for the payment of any sum. The interlocutory judgment contains no order, decree, or judgment for the payment of any sum. This determination makes it unnecessary to discuss at length the contentions and citations by petitioner that the judgment is void in so far as it attempts to require the payment of alimony, for the alleged reason that the matter of alimony is without the issues of the case and beyond the prayer of plaintiff's complaint.

[1, 2] Respondents argue that, since the petitioner is not now cited for contempt for his failure to obey the interlocutory judgment, but is cited for his contempt in failing to obey the order of December 20, 1928, the petition for writ of prohibition should be denied for the reason that the judge on December 20, 1928, had jurisdiction to decide wrongly as well as correctly, that said judge had jurisdiction to make his order interpreting what was meant by the interlocutory judgment, and, having done so, entered his order accordingly. Respondents further argue that nothing has been shown by the petition that in the present contempt proceeding the superior court has not taken proper procedure to complete jurisdiction of the person of the defendant and the subject of the contempt proceeding. To these arguments petitioner replies that there can be no breach, and there can be no contempt without a corresponding and antecedent order to pay, and that the order of December 20, 1928, is a nullity because it is founded upon the interlocutory judgment, and said judgment contains no order to pay. Neither respondents nor petitioner cite any authorities in connection with said last above stated arguments. The case of *Pennell v. Superior Court*, 87 Cal. App. 375, 262 P. 48, is not directly in point, but a statement of that case may add some light to the question before us. In the *Pennell* Case, the superior court, in an action for divorce, made an order or judgment for the payment of attorney's fees by the husband directly to the attorney for the wife. Said husband failed to make payment, and was cited for contempt. On the hearing he objected to the jurisdiction of the court on the ground that the order was in excess of the jurisdiction of the court and wholly void on its face. The objection was overruled, said husband was adjudged in contempt, and the matter of imposing sentence was postponed. In the interim between the hearing and the date set for sentence said husband applied for a writ of prohibition, and the District Court of Appeal granted the writ and held that said judgment to pay, being a judgment in favor of a person not a party

to the suit, was irregular and void, and that the court was without jurisdiction to punish the husband for contempt for failure to obey such void judgment or order. Said court therein held that, where contempt proceedings have been instituted, and it is manifest from previous orders or decisions of the court that it will proceed, notwithstanding the lack of jurisdiction, the trial proceedings will be stayed by writ of prohibition. A court cannot punish as a contempt the disobedience of an order made without or in excess of jurisdiction. 5 Cal. Jur. 918, and cases therein cited. Disobedience to a void order does not constitute contempt. 5 Cal. Jur. 919; *Maier v. Luce*, 61 Cal. App. 552, 558, 215 P. 399; *Pennell v. Superior Court*, supra. Surely, if the foregoing is true as to a void order, then where, as in this case, there is in fact no order for payment, the court cannot acquire jurisdiction to punish for contempt for disobedience of an alleged order (which in fact does not exist), and any such adjudication of contempt is a nullity.

In the case of *Tripp v. Superior Court*, 61 Cal. App. 64, 214 P. 252, the court, after setting forth the property settlement in full in the interlocutory judgment, ordered in said judgment "that said plaintiff shall take all of the community property as set forth in said property settlement and agreement as aforesaid." Therefore that case is not authority for the contention that a mere incorporation by reference of a property settlement (not set forth in any pleading) in an interlocutory judgment of divorce is equivalent to a direct order for payment in accordance with such property settlement.

[3, 4] The petition states that said superior court "has threatened and does now threaten to enforce that portion of the interlocutory judgment of divorce referring to a property settlement or alimony, and the subsequent orders based thereon of the 20th day of December, 1928, the 2d day of July, 1929, and the 29th day of July, 1929, and unless prohibited from so doing will on August 7, 1929, deprive your petitioner of his liberty and property without due process of law," and "that petitioner has no plain, speedy or adequate remedy in the ordinary course of law." Whether or not there is a plain, speedy and adequate remedy in the ordinary course of law is a question of fact depending upon the circumstances of the particular case. *Consolidated, etc., Co. v. Superior Court*, 189 Cal. 92, 96, 207 P. 552. If this were the first order to show cause in re contempt in the entire case, we might feel required to give merit to respondents' contention that it is entirely possible that, if petitioner allows the contempt proceeding to come up for hearing, the respondent court will agree entirely with the petitioner "that

that part of the interlocutory judgment complained of is improper and that the order of December 20, 1928, is likewise improper." Respondents further contend that a proceeding for a writ of prohibition should not be employed to anticipate the ruling of an inferior court. *Van Hoosear v. Railroad Commission*, 189 Cal. 228, 207 P. 903; *County of Sutter v. Superior Court*, 188 Cal. 292, 204 P. 849; *Athearn v. Nicol*, 187 Cal. 86; *Preston v. Superior Court*, 184 Cal. 658, 195 P. 916. We think that the order of December 20, 1928; the adjudication of contempt and order of July 2, 1929, and the issuance of the order to show cause on July 29, 1929, by respondent court clearly indicated otherwise than as respondents contend, and these prior matters show that petitioner is justified in his belief that, if the order to show cause is permitted to be heard in the superior court, he will again be adjudged in contempt and punished accordingly. From such adjudication of contempt of court, if made, there is no right of appeal. Code Civ. Proc., § 1222. Hence from all of the facts we conclude that petitioner has no plain, speedy, and adequate remedy in the ordinary course of law, and that the demurrer should be overruled and the peremptory writ of prohibition should be issued.

The demurrer is overruled, and the peremptory writ will issue in accordance with the foregoing decision.

We concur: CONREY, P. J.; HOUSER, J.

103 Cal. App. 188

BERNING et ux. v. COLODNY & COLODNY et al. (Civ. 7110.)★

District Court of Appeal, First District, Division 2, California. Jan. 16, 1930.

Rehearing Denied Feb. 14, 1930. Hearing Denied by Supreme Court March 17, 1930.

1. Judgment ⇨397—Court acquiring jurisdiction to vacate judgment, may enter judgment irrespective of prayer of moving party (Code Civ. Proc. § 663).

Court having acquired jurisdiction to pass on motion of defendants, under Code Civ. Proc. § 663, to vacate judgment for plaintiffs in action for damages for deceit, may grant motion to set aside judgment, amend conclusions of law by giving defendants credit due them on purchase price of land, and enter judgment in favor of plaintiffs for certain amount, irrespective of prayer of moving party.

2. Action ⇨27(1)—Cause of action arising from breach of promise is "ex contractu," and, if from breach of duty under contract, it is "ex delicto."

If a cause of action arises from a breach of promise, the action is "ex contractu," and, if it arises from breach of duty growing out of contract, it is "ex delicto," and tort or trespass is

none the less such because it incidentally involves breach of contract.

[Ed. Note.—For other definitions, see Words and Phrases, First Series, Ex Contractu; First, Second, and Third Series, Action Ex Delicto.]

3. Pleading ⚡49—In determining whether pleading states cause of action ex contractu or ex delicto, it is construed as whole, and special consideration given leading allegations.

In determining whether pleading is intended to state cause of action ex contractu or ex delicto, it should be construed according to its full scope and effect rather than according to single sentence or expression contained therein, and special consideration should be given to the leading allegations.

4. Fraud ⚡59(2)—Difference between purchase price of land and cost of improvements and their worth if false representations were true held proper measure of compensatory damages for vendor's deceit.

Award to purchasers suing for damages for deceit in executory contract for sale of land as compensatory damages, being difference between purchase price of land and cost of improvements and what they would have been worth if false representations of vendor had been true, held proper measure of damages.

5. Fraud ⚡47—Complaint alleging defendants fraudulently sold plaintiffs land representing improvements would be made and land had water right stated cause of action in tort, warranting exemplary damages (Civ. Code, § 3294).

Complaint alleging that defendants practiced deceit on plaintiffs in inducing them to purchase property on false representations as to character of improvements that were to be placed on tract of land by defendants, and also false representations that land had water right, held to state cause of action in tort, sustaining award of exemplary damages under Civ. Code, § 3294.

6. Appeal and error ⚡907(2)—In absence of evidence, appellate court must take findings as true.

In absence of evidence before Court of Appeal, findings must be taken as true.

7. Evidence ⚡434(11)—Contract providing no representations not set out shall bind vendor did not preclude inquiry into vendor's fraud under circumstances (Civ. Code, §§ 1565–1568, 1708–1710).

Cause in contract for sale of land, to effect that no representations, inducement of agreements made by any one not specifically set out therein, shall be binding against seller, held not to preclude inquiry into vendor's fraud, where contract had its inception in fraud, and trial court found written agreement did not contain all of representations, terms, inducements, or conditions, existing between parties when agreement was made, in view of Civ. Code, §§ 1565–1568, 1708–1710, relating to consent of parties to contract and deceit as grounds for damages.

Appeal from Superior Court, Los Angeles County; William Hazlett, Judge.

Action by Henry Berning and wife against Colodny & Colodny, a copartnership, and others. From an adverse judgment, defendants appeal. Affirmed.

Tanner, Odell & Taft, of Los Angeles, for appellants.

Charles G. Young and Charles P. Johnson, both of Los Angeles, for respondents.

BURROUGHS, Justice pro tem. The plaintiffs brought this action to recover damages for deceit alleged to have been practiced upon them by the defendants in the matter of an executory contract for the sale of land. The court awarded the plaintiffs the sum of \$200 compensatory damages and \$500 exemplary damages, and judgment was thereupon entered in favor of the plaintiffs in the sum of \$700. In due time the defendants made a motion under the provisions of section 663 of the Code of Civil Procedure to vacate said judgment, amend the conclusions of law on the ground that they were not consistent with nor supported by the findings of fact, and, as amended, to enter a judgment in favor of the defendants. The court granted the motion to set aside the judgment, amended its conclusions of law by giving defendants a credit of \$300 due them on the purchase price of the land, and entered a judgment in favor of the plaintiffs in the sum of \$400. The defendants appeal therefrom.

[1] It is contended by appellants that, in deciding a motion made in conformity with section 663, supra, the court's power is limited to either granting or denying the motion; that is, the court must either grant or deny the motion in toto. No authorities are cited in support of the claim, but, upon principle, it is clear that the court, having acquired jurisdiction to entertain and pass on the motion, may enter such order and judgment within the limits of the Code section as may be just, irrespective of the prayer of the moving party.

It is also contended that the amendment of the conclusions of law was in reality an amendment of the findings of fact. The complaint alleges that there was still due the defendants on the contract of purchase the sum of \$300. This is not denied by the answer, but, notwithstanding this state of the pleadings, the court, in its finding No. 3, found the allegation to be true.

We are satisfied that neither of the points thus presented are sound.

The court awarded plaintiffs \$500 exemplary damages. Appellants contend that this is an action upon contract, and therefore will not sustain such an award. Section 3294 of the Civil Code provides: "In an action for

the breach of an obligation not arising from contract, where the defendant has been guilty of oppression, fraud, or malice, express or implied, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant." In 8 California Jurisprudence, § 113, p. 872, it is said: "The rule as to damages in actions upon contract is the same whether the breach be by mistake, pure accident or inability to perform it, or whether it be willful and malicious; the motives of the party breaking the contract are not to be inquired into." Where, however, the action is not on the contract, but is based on the fraud by which it was induced, the fact that the contract fixes the compensation does not prevent recovery of exemplary damages."

In *Gorman v. S. P. Company*, 97 Cal. 1, 31 P. 1112, 33 Am. St. Rep. 157, it is held that the wrongful expulsion of a passenger from a railroad train on the theory that the fare had not been paid, if accompanied by undue violence and insult, is an action in tort and exemplary damages may be awarded.

In *Lyles v. Perrin*, 119 Cal. 264, 51 P. 332, it is held that, in an action for damages growing out of a wrongful transfer by the defendant of a water right, after he had sold it to plaintiff, but before the latter had recorded his deed, is not an action upon contract but a tort, and in such a case, in addition to compensatory damages, punitive damages are allowable.

In 12 American and English Encyclopedia of Law, p. 20, it is said: "Where a breach of contract also amounts to a tort, there may be recovery of exemplary damages upon proper allegations."

In *Jones et ux. v. Kelly* (Cal. Sup.) 280 P. 942, it is held that, whether a pleading is intended to state a cause of action *ex contractu* or *ex delicto*, it should be construed according to the full scope and effect rather than according to a single sentence or clause contained therein, and special consideration should be given to the prominent and leading allegations. If the cause of action arises from a breach of promise, the action is *ex contractu*, but, if it arises from a breach of duty growing out of the contract, it is *ex delicto*, and a tort and trespass is none the less such because it incidentally involves a breach of contract. The law imposes the obligation that every person is bound without contract to abstain from injuring the person or property of another, or infringing upon any of his rights, and this duty is independent of any contract and attaches over and above the terms thereof.

In the case last cited, the defendants leased real property together with a water right; the defendants agreeing to maintain said water right. The plaintiffs entered into the possession thereof, and, while in possession under said lease, the defendants entered up-

on said property and willfully, maliciously, and malevolently destroyed the water right. It was held by the court that the acts amounted to a breach of the contract, as well as a tort, and plaintiff was entitled to waive the breach and sue in tort.

[2, 3] From these decisions we are of the opinion that the rules applicable to this character of actions are as follows: If a cause of action arises from a breach of promise, the action is *ex contractu*; if it arises from a breach of duty growing out of the contract, it is *ex delicto*, and a tort or trespass is none the less such because it incidentally involves a breach of contract. In determining whether a pleading is intended to state a cause of action *ex contractu* or *ex delicto*, it should be construed according to its full scope and effect rather than according to a single sentence or expression contained therein, and special consideration should be given to the prominent and leading allegations.

In the light of these settled principles of law, it becomes necessary to examine the complaint in the instant case to determine the nature of the action. It alleges that the defendants are copartners; that on January 3, 1925, the said defendants with the intent of deceiving and defrauding the plaintiffs, represented to them that defendants were subdividing a certain tract of land in Los Angeles county, known as Independence Acres; that defendants had developed sufficient water on said premises with which to provide all the tenants or all the owners of said tract with sufficient water to irrigate the crops raised by the plaintiffs and sufficient water with which to water all chickens or other live stock which plaintiffs desired to raise or maintain on said premises; that at said time and place, with the intention of deceiving plaintiffs, the defendants fraudulently represented to them that said land would be provided with streets which would be graveled within six months from that date, and in addition thereto defendants had made arrangements to supply the said tract of land and plaintiffs with electricity for light and power purposes; that lot 5 of block 9 of said tract was worth \$500, and would be worth a much greater sum as soon as the streets were put in and graveled and as soon as the electricity was wired to said property; that the defendants knew at the time said representations were made that they were false, fraudulent, and untrue; that they were made by them with the intention and purpose of deceiving the plaintiffs into buying said land; that, believing and relying upon said false representations, the plaintiffs on January 3, 1925, entered into a written contract for the purchase of said lot for the sum of \$500, and by virtue thereof entered into the possession of said lot on March 25, 1929, and have paid on the purchase price the sum of \$200, and there is still due the defendants the balance of \$300.

It is further alleged that, believing and relying upon said false statements, and before discovering their falsity, plaintiffs expended \$2,675 in the construction of a dwelling house, garage, and chicken house upon said lot, and in addition thereto plaintiffs purchased chickens at a cost of \$1,073 and maintained said chickens on said premises until the 15th day of July, 1925, at which time the plaintiffs discovered that said statements made by defendants were wholly false and fraudulent, that the defendants had not developed sufficient water for the tenants upon said premises, that the defendants had refused to furnish the plaintiffs with any water whatsoever upon the premises, and had no intention of graveling the streets or furnishing electricity for light or power, and plaintiffs were forced to sell said chickens at a loss of \$373; that, prior to the discovery that said representations were fraudulent, plaintiffs also expended \$100 in planting crops. It is then alleged that the value of the lot is \$200, and that defendants falsely asserted it to be of the value of \$500. It is further alleged that, if said representations had been true, said lot would have been worth \$500 or more. The last paragraph of the complaint alleges that the lot cost plaintiffs \$200 in money; there is still due the defendants \$300 on the purchase price; \$2,675 expended for permanent improvement; \$373 in loss on sale of chickens; \$100 expended in planting crops that did not mature—a total of \$3,648—that such expenditures would not have been made except for said false and fraudulent statements, and, if said statements had been true, the property would have been worth \$4,000, but instead thereof its value was \$1,500, and plaintiffs were damaged in the sum of \$2,500 actual damages and \$5,000 exemplary damages.

The court found against the plaintiffs on some of the allegations of actual damages. One of said findings held that the lot was of the value of \$500, but did find that, if said false and fraudulent statements had been true, the said real estate and improvements thereon would have been worth not less than \$200 more than the purchase price. The court awarded the plaintiffs \$.200 compensatory damages, being the difference between the purchase price of the land and cost of the improvements and what they would have been worth if the false and fraudulent representations had been true.

[4, 5] We are of the opinion that this is the proper measure of the damage. *Spreckels v. Gorrill*, 152 Cal. 383, 92 P. 1011; *Hines v. Brode*, 168 Cal. 507, 143 P. 729. We are also of the opinion that the action is based upon the deceit practiced upon the plaintiffs in inducing them to purchase the property upon the false representations as to the character of the improvements that were to be placed

upon the tract of land by the defendants, and also the false representations that the land had a water right. The case falls within the rules promulgated in *Jones et ux. v. Kelly*, supra. Having reached the conclusion that the action is in tort, the findings are in accordance with the pleadings.

The contract contains the following clause: "No representations, inducement of agreements made by any one not specifically set out herein shall be binding against the seller."

[6, 7] Counsel for appellants say that they do not find any decisions concerning a clause such as this, but they see no reason why full weight and effect should not be given to it. The contract in the case at bar had its inception in fraud, and no doubt the clause quoted was placed there by the perpetrators of the fraud for the very purpose of preventing inquiry; furthermore the action is not upon the contract, but upon the fraud used to induce the plaintiffs to enter into the contract. The trial court also found that the written agreement did not contain all of the representations, terms, inducements, or conditions existing between the parties when the agreement was made. The evidence is not before us, so that the findings must be taken as true. We believe that the point is without merit. Sections 1565, 1566, 1567, 1568, 1708, 1709 and 1710, Civ. Code.

No good cause has been shown for disturbing the judgment, and it is therefore affirmed.

We concur: KOFORD, P. J.; NOURSE, J

ROGERS v. INTERSTATE TRANSIT CO.★
(Civ. 3946.)

District Court of Appeal, Third District, California. Jan. 23, 1930.

Rehearing Denied Feb. 21, 1930. Hearing Granted by Supreme Court March 20, 1930.

1. Automobiles ⇨244(12,44)—Evidence that stage occupied center of road, and, when plaintiff's car succeeded in passing, accelerated its speed and struck plaintiff's car from behind, held to sustain verdict for plaintiff on issues of negligence and contributory negligence (California Vehicle Act, § 126).

Evidence that stage occupied center of the road and refused to permit plaintiff's automobile to pass on left after repeated signals, in violation of California Vehicle Act, § 126 (St. 1923, p. 558), and that, after plaintiff's automobile had succeeded in passing, it was struck from rear by stage which had accelerated its rate of speed, held to sustain verdict for plaintiff on issues of negligence and contributory negligence.

2. Damages ⇨132(9)—\$20,000 for automobile collision injuries, plaintiff's left foot being amputated, held not excessive.

Award of \$20,000 for injuries in automobile collision, resulting in plaintiff's left foot being nearly torn off, necessitating amputation above

ankle and the wearing of cork foot and limb, held not excessive.

3. **Automobiles** ⇨246(48)—Instructions predicated negligence on bus driver's failure to give way to permit overtaking car to pass, if bus driver saw or heard or, by exercise of ordinary care could have seen or heard, plaintiff's attempt to pass, held not inapplicable to facts.

Instruction that defendant was liable for injuries to plaintiff, if plaintiff, while driving at lawful rate of speed, signaled his desire to pass bus, and if driver of bus heard, or by exercise of ordinary care could have heard, such signal, or if bus driver saw, or by exercise of ordinary care could have seen, that plaintiff's car was about to overtake bus, and if bus driver's negligence in that respect was proximate cause of plaintiff's injury, held not erroneous as inapplicable to facts of case.

4. **Automobiles** ⇨172(5)—Driver of motor vehicle refusing to move over to permit overtaking vehicle to pass is negligent, if in ordinary care he should have seen or heard overtaking vehicle (California Vehicle Act, § 126).

Driver of motor vehicle failing to comply with California Motor Vehicle Act, § 126 (St. 1923, p. 558), by moving over to right to permit overtaking vehicle to pass, is guilty of negligence if he in the exercise of ordinary care should have heard signals or should have seen overtaking vehicle.

5. **Automobiles** ⇨246(48)—**Trial** ⇨256(10)—Instruction that bus driver must give way to overtaking vehicle held not misleading as omitting qualification that he may safely do so, in view of evidence; no such qualification being requested (California Vehicle Act, § 126).

Instruction as to duty of bus driver to give way to overtaking vehicle under California Motor Vehicle Act, § 126 (St. 1923, p. 558), held not misleading as not including the provision that driver must give way only when he may safely do so; no such qualification being requested by either party, and the evidence showing ample room for both machines to pass on the highway.

6. **Automobiles** ⇨245(60)—Whether bus driver's failure to give way to overtaking vehicle was proximate cause of collision held for jury (California Vehicle Act, § 126).

Whether bus driver's failure to give way to plaintiff's overtaking vehicle, as required by California Vehicle Act, § 126 (St. 1923, p. 558), was proximate cause of collision between bus and plaintiff's vehicle, held question for jury.

7. **Automobiles** ⇨246(48)—Instruction as to statutory requirement of rear vision mirror held proper in collision case, where bus driver testified he did not know plaintiff was attempting to pass (California Vehicle Act, § 97).

In an action for injuries by collision of vehicle driven by plaintiff with defendant's bus, instruction as to presence of mirror in all vehicles in language of California Vehicle Act, § 97 (St. 1923, p. 546), was proper, in view of

bus driver's testimony that he did not know that plaintiff was trying to pass his stage.

8. **Automobiles** ⇨246(11)—In action for injuries by collision with defendant's bus, refusal to instruct as to carrier's duty to exercise utmost care for safety of passengers was not error (Civ. Code, § 2100).

In an action for injuries by collision of plaintiff's vehicle with defendant's bus, refusal to instruct jury as to defendant's duty as carrier of passengers to exercise utmost care and diligence for safety of passengers, in view of Civ. Code, § 2100, was not error, there being no rule of law that will justify carrier of passengers by motor vehicle in failing to exercise ordinary care and obey the ordinary traffic rules for the protection of other travelers.

9. **Trial** ⇨234(7)—Instructions as to burden of proof held not erroneous or misleading.

Instruction as to burden of proof urging jury to reconcile apparent contradictions where possible, and, in case the evidence is equally balanced in weight, directing a verdict against the party on whom rests the burden of proof, held not erroneous or misleading.

10. **Automobiles** ⇨246(26)—Instruction in automobile collision case that plaintiff presumably took ordinary care of his own concerns was not erroneous (Code Civ. Proc. § 1963, subd. 4; § 1957).

In automobile collision case instruction that the law presumes that plaintiff took ordinary care of his own concerns was not erroneous in view of Code Civ. Proc. § 1963, subd. 4, affirming such presumptions, and section 1957, declaring such presumptions to be evidence, such presumption being disputable and the question whether it had been rebutted being a problem for the jury.

11. **Negligence** ⇨136(12)—Whether disputable presumption that plaintiff exercised ordinary care was rebutted by other evidence is jury question (Code Civ. Proc. § 1963, subd. 4, and § 1957).

Whether the presumption that plaintiff exercised due care under Code Civ. Proc. § 1963, subd. 4, and section 1957 was rebutted by other evidence is a question for the jury.

12. **Negligence** ⇨83—"Last clear chance doctrine" defined.

The doctrine of last clear chance applies when one is in imminent peril, but, in the exercise of ordinary care, is ignorant of the danger, or, knowing of the danger, is unable to extricate himself, and, on the contrary, the accused is aware of the danger, and by ordinary care may avoid injuring him, but fails to do so.

[Ed. Note.—For other definitions, see Words and Phrases, First, Second, and Third Series, Last Clear Chance.]

13. **Automobiles** ⇨246(58)—Instruction on last clear chance doctrine held applicable to evidence that bus struck overtaking automobile in rear.

Instructions on last clear chance doctrine held not inapplicable to collision case in which

evidence tended to support plaintiff's theory that bus failed to give way to permit him to pass after repeated signals, and then, after he had succeeded in passing, bus accelerated speed and struck the rear of his car.

14. Trial ☞295(6)—Technical defects of last clear chance instruction held not reversible error in view of instruction as a whole.

Technical defects of instruction under last clear chance doctrine in omitting to state that defendant was able to avoid accident held not reversible error; such element being necessarily inferable from other language of instruction.

15. Trial ☞133(6)—Argument of counsel, if containing misstatements of facts and law, held not prejudicial misconduct, in view of court's instructions and caution to jury.

Theoretical argument of counsel, if objectionable as misstatements of facts and law, held not prejudicial misconduct, in view of court's instructions that statements of counsel are not evidence, and, unless borne out by evidence or instructions, are to be disregarded, and in view of jury findings under instructions clearly and specifically defining issues.

Appeal from Superior Court, Shasta County; Walter E. Herzinger, Judge.

Action by Norman Rogers against the Interstate Transit Company, a corporation. Judgment for plaintiff, and defendant appeals. Affirmed.

Jesse W. Carter, of Redding, and Annette Abbott Adams, of San Francisco (George Allan Smith, of Monterey, of counsel), for appellant.

Carr & Kennedy, of Redding, for respondent.

R. L. THOMPSON, J. This is an appeal from a judgment for damages for injuries sustained in an automobile collision.

At 1 o'clock p. m. on March 11, 1927, the defendant's auto stage was being driven southerly along a straight stretch of level highway in Shasta county between Anderson and Cottonwood. It was occupying more than half of the concrete portion of the roadway, and was traveling about 35 miles an hour. The plaintiff, who was an able-bodied man 30 years of age, and who had been employed by Mr. A. J. Loggie for 8 years as his auto mechanic and chauffeur, was driving his employer's Packard limousine in the same direction. The owner of the Packard with a companion occupied the rear seat. The concrete pavement was 15 feet wide with a 5-foot graveled shoulder sloping down to a shallow ditch on either side. At a point about 1 mile from Cottonwood the Packard car overtook the stage, and undertook to pass it on the proper side. The highway was unobstructed. No other machines were in sight. Several times

the horn of the Packard was blown, and the plaintiff attempted to pass the stage, which failed to yield any portion of its position on the highway. Finally the plaintiff drove to the extreme left side of the roadway with about half of the machine traveling upon the graveled shoulder, and repeatedly sounded the horn as a warning in passing the stage. As the Packard reached a point opposite the front of the stage, the latter appeared to increase its speed. The Packard, however, succeeded in passing the stage, and for a considerable distance continued to keep its position on the extreme left side of the roadway. The defendant testified in this regard: "I never attempted to turn in (front of the stage) at all. I kept going at the same rate of speed I was going while I was passing it." On redirect examination he said: "I turned slightly on the pavement, following the left side, driving straight ahead." The machines were running about 35 miles an hour.

There is a serious conflict of evidence as to just how the accident occurred. The appellant contends that the plaintiff cut in front of the stage, hooking his rear right fender over the left end of the stage bumper, and thus diverted the course of the Packard from the highway into the ditch upon the right. There is, however, ample testimony to support the plaintiff's theory that, after he had passed the stage and was proceeding along his proper side of the highway, the stage increased its speed and struck the Packard. The left angle of the stage bumper hit the rear right fender of the Packard, back of the wheel. The impact crumpled the mud guard, and shoved the rear end of the car violently to the left. The plaintiff lost control of the machine, and it pitched diagonally across the highway in front of the stage into a telephone pole on the right side of the highway, cutting down the pole, upsetting and wrecking the Packard, and hurling the plaintiff from the car to the ground. The plaintiff's left foot, which was caught between the clutch pedal and the brake lever, was nearly torn off. He was taken to the hospital at Cottonwood, where his foot was amputated above the ankle. He is now forced to wear a cork foot and limb, to his great inconvenience, discomfort, and humiliation. The jury rendered a verdict in his favor for the sum of \$20,000. A judgment was duly entered for this amount, from which an appeal was perfected.

The appellant asserts that: (1) The judgment is not supported by the evidence; (2) the plaintiff was guilty of contributory negligence; (3) the court erred in giving and refusing certain instructions; and (4) the amount of the judgment was excessive.

There is substantial evidence to support the judgment. Three witnesses testified to substantially the foregoing statement of facts.

The appellant contends that the plaintiff was guilty of contributory negligence in attempting to cut in ahead of the stage, and that in so doing the right rear fender of the Packard hooked over the left end of the front bumper of the stage, and caused the Packard to be shunted to the right diagonally across the highway in front of the stage. The implied finding of the jury that this was not true finds ample support in the evidence. A physical inspection of the fender in question discloses no evidence that the bumper was drawn out by such a forcible pull as would have resulted under such circumstances. On the contrary, it appears reasonable to conclude that the fender may have been indented by a severe blow from the bumper of the stage. This accords with other corroborating testimony. It is possible the indentation in the Packard fender may have been caused by its cutting in and striking the stage bumper. Either theory of the cause of the accident is reasonably possible. We are therefore bound by the findings of the jury in this regard.

The portion of the highway upon which the stage was traveling at the time of the accident is material in determining the question of defendant's negligence. Mr. Purdy testified in this regard: "The stage was right over, I would say, in the middle of the highway." On cross-examination he said: "I would say that there was probably five feet between the stage and gravel (on the left side). * * * I looked out and saw that we cleared the stage and were by the stage, and all at once this (stage) hit us."

Mr. Loggie testified regarding the same subject: "I would say that (the stage) had at least two-thirds of the pavement." The portion of the highway upon which the Packard traveled after it succeeded in passing the stage is also important in determining whether the plaintiff was guilty of contributory negligence. Reading the record as a whole, it seems improbable that the Packard passed to the right of the central line of the highway prior to the occurrence of the collision. At least there is ample testimony to support the theory that it did not do so, and upon the contrary that the stage continued to travel with a portion of the vehicle upon the wrong side of the highway.

Regarding the relative positions in which these two machines traveled upon the highway and the circumstances incident to the accident, Mr. Loggie testified: "We had two wheels on the gravel and two wheels on the right side of our car on the pavement. * * * We passed the whole stage. * * * As our car got up toward the front of the stage the stage seemed to me to speed up as though they didn't want us to go by. * * * Q. When the Packard (had) passed it * * * you say the stage struck the Packard in the rear?

A. Yes, sir. * * * The Packard had an impact and swerved to the right."

Mr. Purdy also testified: "The stage was right over, I would say in the middle of the highway. * * * Rogers pulled over on the dirt, with two wheels on the dirt and two wheels on the pavement, running close to the stage. * * * The stage seemed to speed up after we got right up * * * (to the) front of it. * * * I was sitting where I could see the whole proposition. * * * What I presume happened (was that) the stage driver attempted to go by. * * * This stage hit us in the rear of our car. * * * The minute it did the (Packard) car turned right straight across the road and over it went." The plaintiff testified: "I was following the stage for quite a ways there and we came to this straightaway and I blew my horn to pass the stage and he wouldn't move over to give me my half of the pavement, so there were good shoulders there and a straight road and no cars coming, so I attempted (to pass the stage). * * * I got up opposite the driver. He saw that I was passing him and he speeded up, so I speeded up then and got ahead of him, got in the clear and all of a sudden something seemed to push my car straight across the road in front of the stage and I had no control over it at all. * * * Q. Did they move over to the right to allow you to pass? A. No. * * * Q. You say that when the Packard passed the stage you felt as if there was a force turning your car to the right? A. Yes. * * * I know it wasn't hooked over or (on) the bumper (of the stage), or the fender would have been straightened out. * * * Q. After you passed the stage did the Packard stay on the left-hand side of the pavement? A. Yes, I never attempted to turn in at all. * * * I kept going at the same rate of speed that I was going while I was passing it."

[1] The foregoing testimony sustains the implied finding of the jury that the stage driver was guilty of negligence in violating the provisions of section 126 of the California Vehicle Act (St. 1923, p. 558), which proximately caused the accident. It is apparent that, if the stage was traveling with a portion of the vehicle on the left side of the concrete without changing its course after the Packard succeeded in passing it, and that its speed was then accelerated so that it overtook the Packard traveling on its proper side of the highway, and struck the fender with such force as to divert the course of the Packard, hurl it into the ditch, and cause the injuries sustained by the plaintiff, this conduct on the part of the stage driver would amount to actionable negligence and render the defendant liable for damages which resulted therefrom. The evidence will sustain this theory of the accident.

For the foregoing reasons, the evidence will also support the implied finding that the

plaintiff was not guilty of contributory negligence.

[2] Considering the pain, the discomfort, inconvenience, and humiliation on account of the loss of plaintiff's foot and the consequent necessity of going through life with an artificial limb, we are of the opinion that the amount of the judgment was not excessive.

[3] The appellant challenges the following instruction which was given to the jury at the request of the plaintiff as erroneous:

"It was the duty of both parties at all times to operate their machines with ordinary care and with due regard to other traffic upon the road; if the plaintiff, while driving at a lawful rate of speed, gave a signal of his desire to pass defendant's bus, and if the driver of defendant's bus heard, or *by the exercise of ordinary care could have heard* said signal, or if the driver of defendant's bus saw, or *by the exercise of ordinary care could have seen* that the car driven by the plaintiff was about to overtake his bus, then it was his duty to give way to the right in favor of said overtaking vehicle, and not to increase his speed until completely passed by the car driven by plaintiff, and also to exercise reasonable care not to injure the plaintiff; and if defendant was negligent in that respect and such negligence was the proximate cause of plaintiff's injuries and the plaintiff was not negligent, then the plaintiff is entitled to recover."

It is asserted this instruction is inapplicable to the facts of the present case; that upon the authority of *City of Sacramento v. Hunger*, 79 Cal. App. 234, 249 P. 223, the defendant is not liable for failure to give way to his right in favor of a passing vehicle, unless he has actual knowledge of the desire and effort on the part of the overtaking vehicle to pass, and that the defendant's failure in this regard was in no way the proximate cause of the accident.

[4] This instruction is not erroneous. If by the exercise of reasonable care the driver of a vehicle should see or hear the approach of an overtaking machine which lawfully undertakes to pass, the driver of the former vehicle would be just as guilty of negligence which resulted in his failure to comply with the provisions of section 126 of the California Vehicle Act as though he actually saw or heard the approaching machine and deliberately failed to comply with the law. One may not shut his eyes or close his ears to the dangers of traffic on a public highway and thus excuse the result of carelessness or inattention. The dangers attending the use of motor vehicles on a public highway demand constant vigil, great caution, and the alert exercise of one's senses of sight and hearing. In the present case it appears that the driver of the stage had actual knowledge of the presence and desire of the plaintiff to pass his vehicle, at least when the Packard reached a

point opposite the driver of the stage. Yet the stage driver, instead of complying with the statute, then increased his speed, and evidently attempted to prevent the Packard from passing.

[5, 6] It is claimed the foregoing instruction is defective and misleading, for the reason that it does not include the provision that the driver of a vehicle must give way to a passing vehicle only when he may *safely* do so, and that this exception to the general rule was a necessary element under the circumstances of the present case, since there was a culvert and concrete railings bordering the roadway, a distance of 20 feet on either side, near where the accident occurred, which increased the danger of turning out for the Packard to pass.

It was not error to omit this qualification. It was not requested by either party. The evidence shows there was a clear space of 20 feet on the highway between these railings. This was ample room for the machines to pass. Moreover, the culvert was not reached until after the Packard had passed the stage. The plaintiff testified in this regard: "I was passing the stage before we got to the viaduct and just before we went over the viaduct I was in the clear. * * * Q. How far did you travel after that before the stage came in contact with you? A. Well, I should judge about 100 to 150 feet the other side of the viaduct." It was 185 feet from the culvert to the telephone pole which wrecked the Packard machine. Moreover, the jury was charged that all persons must drive a motor vehicle on the public highway with "due regard to the traffic, surface and width of the highway," and that a judgment could not be rendered against the defendant, unless its negligence was the proximate cause of the accident. Fairly construed in the light of the evidence, this challenged instruction must be understood to mean that it was not only unlawful for the driver of a vehicle on a public highway to fail or refuse to permit another machine operating lawfully to pass upon the giving of proper signals for that purpose, but also that it was equally unlawful for the driver of the first vehicle to increase its speed until the passing vehicle was completely and safely by. Two distinct offenses are included in this section of the statute. Either may become the basis of an action for damages, provided its violation becomes the proximate cause of the injuries sustained. In the present case it was the violation of the latter portion of this section which caused the accident. The defendant's failure to give way to the right and upon the contrary holding the position of the stage which was traveling partially on the left side of the pavement while he increased the speed of the stage so as to cause a collision with the Packard car would clearly be a violation of the statute which would create a liability for damages result-

ing therefrom. It was solely the province of the jury to determine whether the conduct of the driver of the stage was the proximate cause of the accident. There is nothing in the case of *City of Sacramento v. Hunger*, supra, in conflict with the foregoing statement of the law.

[7] An instruction was given regarding the presence of a mirror in all vehicles which are operated upon the highway. It was given to the jury in the language of section 97 of the California Vehicle Act, and was applicable to the facts of this case, since the stage driver asserted he did not know the plaintiff was trying to pass the stage. The requirement that all machines be equipped with a mirror is for the purpose of imparting knowledge to the driver of the condition of the traffic in the rear of his machine. This instruction was not erroneous.

[8] The appellant also charges error in refusing to instruct the jury pursuant to section 2100 of the Civil Code that the defendant as a carrier of passengers for hire was required to exercise the utmost care and diligence for the safety of its passengers. It is claimed this statute should be considered in determining whether the driver of the stage was negligent in failing to turn out for the Packard to pass. This refusal was not error. We are unable to see the application of this principle to the facts of the present case. A carrier of passengers for hire may not be permitted to plead extraordinary care due to one class of persons as a defense to a charge of a lack of ordinary care which is due to another class. The utmost care for the safety of the passengers of a common carrier will not justify a lack of ordinary care toward others. Nor will it justify the violation of a statute governing the uniform operation of all motor vehicles on the public highway. The highway was level, straight, unobstructed by traffic, and 25 feet in width, including the gravel shoulders, which were in good condition and safe to travel upon. There was ample room for the stage to travel on its proper side of the highway without danger to its passengers. This instruction was therefore inapplicable.

[9] Plaintiff's instruction regarding the burden of proof, when taken as a whole, is not erroneous or misleading. The appellant complains of the first paragraph thereof, which reads: "If the evidence is contradictory, your decision must be in accordance with the preponderance thereof." This instruction continues by charging the jury that the apparent contradictions in the evidence should be reconciled, if possible, and concludes by saying: "When the evidence * * * is so equally balanced in weight * * * that the scales of proof hang even, your verdict should be against the party upon whom rests the burden of proof." The jury was also correctly charged that the affirmative allegations of

negligence in this case were made by the plaintiff, who must therefore assume the burden of proof.

[10, 11] It is insisted that it was error to instruct the jury as follows: "The burden is upon the defendant to prove the negligence of plaintiff by a preponderance of the evidence, and in considering the evidence upon this point you will keep in mind that the law presumes that plaintiff, at the time in question here, *took ordinary care of his own concerns.*" This amounted to a charge to the effect that the jury could take into consideration with all the other evidence adduced, in determining whether the plaintiff was guilty of contributory negligence, the presumption created by the provisions of subdivision 4 of section 1963 of the Code of Civil Procedure that "a person takes ordinary care of his own concerns." This is held by statute to be a disputable presumption. Presumptions are declared by section 1957 of the same Code to be evidence. This presumption is therefore entitled to be weighed and considered by the jury, together with all other evidence upon the subject in determining that issue. The question as to whether this presumption has been rebutted by other evidence is a problem for the jury to determine. *Davis v. Tanner*, 88 Cal. App. 67, 262 P. 1106; *Olsen v. Standard Oil Co.*, 188 Cal. 20, 25, 204 P. 393. This instruction was therefore not erroneous. This construction is statutory. We are cited to no case where similar statutes have been otherwise construed. Weighed against actual testimony which is adduced upon the same subject, disputable presumptions are of slight value. Since our statute makes all presumptions evidence, it would be inconsistent to hold that it could be considered as such only in the absence of all other evidence.

[12] The only instruction offered on the doctrine of the last clear chance to avoid an accident is assailed as inapplicable to the facts of this case and as erroneous, for the reason that two necessary elements are omitted from the hypothesis of the charge, to wit, that the plaintiff was unable to extricate himself from the peril, and, upon the contrary, that the defendant was aware of plaintiff's danger; that he was able to prevent the accident, and failed to do so. This instruction reads:

"As the court has already stated, the claim is made by defendant that plaintiff was guilty of contributory negligence. The court instructs you that although it appears to you that the contributory negligence of plaintiff was one of the proximate causes of his injuries, yet if the defendant's agent having charge of the stage, perceived that the plaintiff, by his own negligence, had placed himself in a position of peril from which he probably could not escape, and if perceiving plaintiff's perilous condition (he) failed to exercise or-

ordinary care and prudence to avoid injuring the plaintiff and such neglect was also a proximate cause of plaintiff's injuries, he is entitled to recover."

The doctrine of the last clear chance applies when one is in imminent peril, but in the exercise of ordinary care is ignorant of the danger (*Hoy v. Tornich*, 199 Cal. 545, 553, 250 P. 565), or, knowing of the danger, is unable to extricate himself, and, upon the contrary, the accused is aware of the danger to the complainant and by the use of ordinary care may avoid injuring him, but fails to do so (*Basham v. Southern Pacific Co.*, 176 Cal. 320, 168 P. 359; *Chappell v. San Diego & A. Ry. Co.*, 201 Cal. 560, 258 P. 73).

[13, 14] On plaintiff's theory of the cause of the accident in the present case, the doctrine of the last clear chance does apply. Traveling on his proper side of the highway at the same rate of speed employed in passing the stage, the plaintiff was proceeding on his way ignorant of his danger, and with no reason to suppose the driver of the stage would retain his position partly over on the left side of the pavement and increase his speed so as to overtake and collide with the Packard car. Upon the contrary, the evidence seems conclusive of the fact that the stage driver must have known of the presence and the danger of the plaintiff who had just passed and was driving the Packard directly ahead of the stage. The driver of the stage certainly should have seen the Packard, and could have so regulated the speed or diverted the course of his machine as to avoid the collision. The stage driver excused this failure by testifying he did not see the Packard in time to prevent the accident. Discussing this same claim of ignorance of the peril on the part of the accused tort-feasor in a similar case, the court says in *Hoy v. Tornich*, supra, in effect that the jury was not bound to accept the defendant's statement as true, but had a right to decide from all the facts of the case whether he actually had knowledge of the complainant's predicament and danger, or not. The instruction does state that the plaintiff was "in a position of peril from which he probably could not escape." This was apparently true, for he did not realize his peril, and was therefore not likely to attempt to escape from an unknown danger. The instruction is technically defective in omitting to specifically state that the defendant was able to avoid the accident. This necessary element is, however, inferred by the language employed as follows: "Perceiving plaintiff's perilous condition (he) failed to exercise ordinary care and prudence to avoid injuring the plaintiff." It can scarcely

be reasonably argued upon the facts of this case that the stage driver did not have the ability to prevent the collision. The speed and location of the stage were within the control of the driver. The jury must have understood from the language used that his ability to avoid the accident was a condition upon which his liability depended. *Thompson on Trials*, § 2431, is authority for the declaration that instructions which are merely faulty or technically inaccurate will not require the reversal of a judgment, unless the defects are serious enough to have misled the jury and to have caused a miscarriage of justice. We are of the opinion the defect of this instruction is not reversible error.

Other instructions are complained of. Although some defects exist, the faults do not seem serious. The jury was very fully and, we think, fairly instructed. Upon an examination of the entire charge, we are of the opinion that it contains no reversible error.

[15] Finally, the appellant assigns as prejudicial misconduct certain alleged misstatements of facts and law made by plaintiff's attorney in the course of his argument to the jury. The substance of this objectionable argument was to the effect that the defendant claimed that, because the stage company had a schedule requiring it, and that the stage was actually traveling 35 miles an hour, it was not compelled by law to turn out for a passing machine, since the statute required one to give way for a passing machine only when it was traveling "at a lawful rate of speed." There was some evidence that the stage was traveling 37 miles an hour. The jury was specifically instructed that, if they found that the plaintiff was exceeding 35 miles an hour, he could not recover. It was also instructed that, if the stage was traveling 35 miles an hour, it was unlawful for the driver of the Packard to attempt to pass it. The finding of the jury was favorable to the plaintiff on these issues. This objectionable language appears to have been mere theoretical argument. Conceding that the statements were the result of excessive zeal and were unwarranted, upon objection on the part of the defendant, the court promptly charged the jury that "any statement of counsel is not evidence in the case and that unless such statements are borne out by the evidence or by the instructions of the court * * * they are to be disregarded." We are of the opinion that the argument of counsel does not amount to misconduct, and that it was not prejudicial.

The judgment is affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

**CYPRESS LAWN CEMETERY ASS'N v.
CITY AND COUNTY OF SAN FRAN-
CISCO. (Civ. 6873.)★**

District Court of Appeal, First District, Division 1, California. Jan. 14, 1930.

Rehearing Denied Feb. 13, 1930. Hearing Granted by Supreme Court March 13, 1930.

- 1. Constitutional law** ⇨14—Where language of constitutional provision is plain, meaning thereof must be gathered solely from language used, giving words their ordinary meaning.

If language of constitutional provision is plain and unambiguous, meaning and intent thereof must be gathered from the language used alone, giving words meaning which they bear in ordinary use.

- 2. Constitutional law** ⇨14—Words repeatedly used in Constitution will generally bear same meaning.

A word repeatedly used in a Constitution will bear the same meaning throughout the instrument, unless it is apparent that another meaning was intended.

- 3. Taxation** ⇨251—Cemetery association seeking to have property declared free from taxation had burden to prove facts bringing property within limitation and outside exception of applicable constitutional provision (Const. art. 13, § 1b).

Constitutional provisions exempting private property from taxation are strictly construed, and grants of exemptions will not be allowed unless intention to do so was expressed in direct terms or is fairly inferable, and therefore cemetery association seeking to compel exemption of its property had burden to plead sufficient facts to bring its property within the limitation and outside the exception of Const. art. 13, § 1b, providing that property used or held exclusively for burial purposes or for care, maintenance, or upkeep of such property or such dead, except as used or held for profit, shall be free from taxation.

- 4. Taxation** ⇨245—Hotel purchased by cemetery association, income from which was used exclusively for improvement and preservation of cemetery, held not exempt from taxation; "use;" "held;" "care" (Civ. Code, §§ 610, 611, 616, 617; Const. art. 13, § 1b).

Hotel purchased by cemetery association pursuant to Civ. Code, §§ 616 and 617, with money held in trust for improvement of cemetery under requirements of sections 610 and 611, income from which hotel was used exclusively for improvement and preservation of cemetery, held not exempt from taxation under Const. art. 13, § 1b, providing that all property used or held exclusively for burial purposes or for care, maintenance, or upkeep of such property or such dead, except as used or held for profit, shall be free from taxation, in view of section 1, since the hotel itself was not used for the care, maintenance, and upkeep of the cemetery, but only the income, and the hotel was used and owned for profit; "use" meaning to employ, to put to a purpose, while "held" as used in statute means own, and "care" may mean safe-keeping, preservation, and security.

[Ed. Note.—For other definitions, see Words and Phrases, First, Second, and Third Series, Care; Held; Use; Used.]

- 5. Taxation** ⇨245—That investment of cemetery funds was limited in part to tax exempt bonds and mortgages did not require exemption from taxation of real property holdings (Civ. Code, §§ 608–617; Const. art. 13, § 1b).

That investment of funds of cemetery association incorporated under Civ. Code, §§ 608–617, was limited to government bonds, first mortgages, and centrally located income-producing real estate, and that first two classes of investment are tax exempt, did not make third class exempt under Const. art. 13, § 1b, relative to exemption of cemetery property from taxation.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Suit by the Cypress Lawn Cemetery Association against the City and County of San Francisco. Judgment for plaintiff, and defendant appeals. Reversed, with instructions.

John J. O'Toole, City Atty., and Walter A. Dold, Chief Deputy City Atty., both of San Francisco, for appellant.

Brittain & Weise, of San Francisco, for respondent.

Everett W. Mattoon, Co. Counsel, and W. Sumner Holbrook, Jr., Deputy Co. Counsel, both of Los Angeles, amici curiae.

GRAY, Justice pro tem. This appeal from a judgment, rendered after the overruling of a general demurrer, presents for decision the single legal question as to whether or not the properties described in the complaint are, under its allegations, exempt from taxation by the provisions of article 13, section 1b of the state Constitution.

The complaint alleges that the defendant was and is a municipal corporation; that the plaintiff was and is a cemetery association incorporated under sections 608 to 617, both inclusive, of the Civil Code, and has been and is maintaining a cemetery in the county of San Mateo wherein it has sold and granted the perpetual right of burial to many thousands of persons and the bodies of many thousands of human dead have been buried; that said plaintiff has received a surplus from the sale of lots which under sections 610 and 611 of the Civil Code can only be used for the improvement, embellishment, and preservation of said cemetery and not for dividends; that said plaintiff, under section 616 of the same Code, has received trust moneys, and under section 617 has contracted for the perpetual care of certain lots in said cemetery for which it holds trust moneys; that at the time of the assessment it was the owner, by the investment of such trust moneys in accordance with said sections 616 and 617, of

land, improved with a hotel then operated by it for peculiar reasons set forth, located in the city of San Francisco; that "said cemetery is used and held exclusively for the burial or other disposition of the human dead and the said trust funds with the proceeds thereof, and the entire net proceeds and income from the whole of said trust fund is used exclusively for the care, maintenance and upkeep of said cemetery and the care of said dead; and, no part of said trust fund, nor of the proceeds or income thereof ever has been, or lawfully can be used or held for profit of said plaintiff, or its members." Then, appropriately, the taking of the various steps required by law for the assessment and levying of taxes against such property and the payment of such taxes under protest is alleged. Plaintiff seeks recovery of the amount of such taxes so paid under protest and their cancellation.

The constitutional provision here involved and decisive of the present dispute reads as follows: "All property used or held exclusively for the burial or other permanent deposit of the human dead or for the care, maintenance or upkeep of such property or such dead, except as used or held for profit, shall be free from taxation and local assessment."

Subject to the exception, this provision exempts from taxation and local assessment two kinds of property, classified on the basis of its use, but without consideration of the status or character of its owner or possessor, to wit: (1) That "used or held exclusively for the burial or other permanent deposit of the human dead"; and (2) that "used or held exclusively * * * for the care, maintenance or upkeep of such property" (i. e., the first class) "or such dead" (i. e., human dead so deposited or buried). The exception "except as used or held for profit" qualifies the phrase "all property" and therefore restricts or limits both classes of property. We are here concerned only with the second class as affected by the exception.

[1, 2] If the language of this provision is plain and unambiguous, that language is mandatory and its meaning and intent is solely to be gathered therefrom, without consideration of the argument in favor of its adoption, or the mischiefs arising from the administration of pre-existing laws or the public policy towards the institution involved. *San Francisco v. McGovern*, 28 Cal. App. 491, 152 P. 980. The words employed must be given the meaning which they bear in ordinary use. *Shay v. Roth*, 64 Cal. App. 314, 221 P. 967. A word repeatedly used in a constitution will bear the same meaning throughout the instrument, unless it is apparent that another meaning was intended. *Miller v. Dunn*, 72 Cal. 462, 14 P. 27, 1 Am. St. Rep. 67. Section 1 of article 13 declares what is to be included in the word "property." The phrase "exclu-

sively used" appeared, prior to the adoption of section 1b, in section 1, relative to the exemption of public schools, in section 1½, relative to exemption of churches (see *Havens v. County of Alameda*, 30 Cal. App. 206, 157 P. 821), and in section 14a, relative to the taxation of public utilities (see *Lake Tahoe Ry., etc., Co. v. Roberts*, 163 Cal. 551, 143 P. 786, Ann. Cas. 1916E, 1196; *Southern Pacific Co. v. Richardson*, 181 Cal. 280, 184 P. 3). The frequency of the occurrence of the verb "use" in the same article shows that it has a definite, fixed, and well-understood meaning. "The verb 'to use' means to employ; to put to a purpose; to employ for the attainment of some purpose or end; to avail one's self of. 39 Cyc. 846." *Whitaker v. Regents etc.*, 39 Cal. App. 111, 115, 178 P. 308, 310. Webster defines "hold" as "to own or possess." See, also, 29 C. J. 758. "The statute exempting property of the board has exempted 'all property, real or personal, held by the board of education.' The word 'held,' as used in the statute, means owned. *State v. South Penn. Oil Co.*, 42 W. Va. 80, 24 S. E. 688." *Wey v. Salt Lake City*, 35 Utah, 504, 508, 101 P. 381, 382.

According to Webster, "care" means "charge, oversight or management." Of the same word, 9 C. J. 1286, says: "As a noun, a relative term and a broad comprehension, meaning responsibility, charge or oversight; watchful regard and attention. The term may mean also safekeeping, preservation and security. Furthermore, it has been used synonymously with custody, diligence, maintenance, possession and protection." Webster defines "maintenance" as "support" or "sustenance," and "upkeep" as "maintenance" or "repair." "Maintenance" has been defined as meaning "the act of maintaining, keeping up, * * * preservation, subsistence, supply of necessities and conveniences." 38 C. J. 338. "Now, the operation of a business or property includes payment for labor and materials which go into the actual operation thereof, while maintenance means the upkeep or preserving the condition of the property to be operated. * * *" *San Francisco & P. S. S. Co. v. Scott (D. C.)* 253 F. 854, 855.

"Profit" is defined by Webster as "the excess of income over expenditure" and as synonymous with "benefit." "The word 'profits' signifies an excess of the value of returns over the value of advances. * * * The 'rents and profits' of an estate; the 'income' or 'net income' of it,—are all equivalent expressions. *Andrews v. Boyd*, 5 Me. [5 Greenl.] 202; *Earl v. Rowe*, 35 Me. 420 [58 Am. Dec. 714]. * * * In *People v. Board Supr's Niagara Co.*, 4 Hill [N. Y.] 20, Bronson, J., said: 'It is undoubtedly true that "profits" and "income" are sometimes used as synonymous terms; but, strictly speaking, "income" means that which comes in or is received from any business or investment of capital, without

reference to the outgoing expenditures: while "profits" generally means the gain which is made upon any business or investment, when both receipts and payments are taken into the account." *People v. Saving Union*, 72 Cal. 199, 202, 13 P. 498, 499. See, also, *Bates v. Porter*, 74 Cal. 224, 15 P. 732; *Cuneo v. Giannini*, 40 Cal. App. 348, 180 P. 633. The term "profit" has a larger meaning than "dividends" and covers benefits of any kind, excess of value over cost, acquisition beyond expenditure, gain, or advance. *Simcoke v. Sayre*, 148 Iowa, 132, 126 N. W. 816. "Profits" and "dividends" are not necessarily synonymous terms. *City of Allegheny v. Pittsburgh, A. & M. P. R. Co.*, 179 Pa. 414, 36 A. 161." *Boothe v. Summit Coal Min. Co.*, 55 Wash. 167, 104 P. 207, 212, 19 Ann. Cas. 1255. Since the determinative words in the above-quoted constitutional provision are in frequent, common, and everyday use and have definite, fixed, and unambiguous meanings, readily understood by the voter of ordinary intelligence, it is apparent that the provision means just what it says and needs no interpretation by use of extrinsic aids. Paraphrasing the section, by substituting definitions for original words, it reads as follows: All moneys and things, real, personal, and mixed, employed or owned, not for income, but solely for the oversight, preservation or repair of the burial places, is exempt from taxation. The grouping of the various words creates no ambiguity when so read.

[3, 4] It is apparent from a reading of the section that property to be exempt must possess two characteristics, i. e., it must fall within the limitation that it be used or held exclusively for the care, maintenance or upkeep of burial grounds, and it must also fall without the exception that it be used or held for profit. Since constitutional provisions exempting private property from taxation are strictly construed, and grants of exemptions cannot be allowed unless the intention to do so is expressed in direct terms or is fairly inferable from the language of the provision, it was incumbent upon plaintiff to plead sufficient facts to bring its property within the limitation and without the exception. 24 Cal. Jur. 89. The complaint alleges that plaintiff's hotel is "centrally located income producing improved real estate" in the city and county of San Francisco, purchased, pursuant to sections 616 and 617 of the Civil Code, with moneys held in trust, in accordance with said sections, for the improvement of its cemetery, located in San Mateo county. While due attention has been given to adjudications from other states, construing similar laws, cited by respective counsel and obtained by research, no material assistance in solving the present question is thereby gained because of the different wording of such laws (*Hallidie v. Enginger*, 175 Cal. 505, 166 P. 1), and so no discussion of those cases will be here given.

Obviously, since there is no physical connection between the hotel and the cemetery, located in different counties, it cannot be said that the direct and primary use or ownership of the hotel is exclusively for the care, maintenance or upkeep of the cemetery. But plaintiff urges that, since the income from the hotel is so used, the hotel itself is therefore so used and owned. Stated another way, plaintiff admits that the corpus of the trust is not directly so used or owned, but contends that, since the income derived from the corpus is so applied, such income is exempt and can pass its exemption back to its corpus. However, such reasoning inserts in the provision language not there present, for the exemption is given to the property itself without consideration as to whether it is income producing or as to the disposition of such income. Had it been the intention to grant the exemption upon the basis of the use of the income from the property rather than upon the use of the property itself, such intention would have been directly and positively expressed.

[5] Plaintiff further argues that since a cemetery's investment is limited by such sections of the Civil Code to (1) government bonds, (2) first mortgages, and (3) centrally located income producing real estate, and the first two classes of investment are exempt, it must have been the intention to extend this exemption to the third class. Three answers readily occur to meet this argument, to wit: (1) There being no ambiguity, questions of policy cannot be considered; (2) the exemptions of the first two classes are granted to them and not to their owners; and (3) a constitutional provision as to taxation cannot be construed with reference to a statute regulating investment of trust funds by cemeteries. The mere fact that the disposition of the income is beneficial to the burial grounds, which are exempt, does not extend that exemption through the income back to the property, from which the income is derived. *Hart v. Plum*, 14 Cal. 149.

The complaint, in order to negative that the property falls within the exception, further alleges that the income from the hotel cannot be used or held for the benefit of the plaintiff corporation or its members. From the foregoing definitions of the word "profit" it is seen that it is here used as synonymous with "income" and not "dividends." Restriction upon the use to which plaintiff, as trustee, can put such income under such sections of the Civil Code, does not make such income, so far as the use and ownership of the hotel is concerned, any less a profit. Since it is alleged that an income is derived from the hotel, it is apparent that the hotel itself is used and owned for profit. The exception denies exemption, if profit is received from the property, and does not limit itself to such profit, by which the owner may benefit. Were consideration given to policy, it might well be doubted

whether it was intended to give such broad exemption, which, in practice, by exempting considerable holdings of developed business property, would increase the burden on property not exempted.

For the foregoing reasons, the judgment is reversed with instructions to the trial court to sustain the demurrer without leave to amend the complaint and thereupon render judgment in favor of the defendant.

We concur: KNIGHT, Acting P. J.; CASHIN, J.

MT. OLIVET CEMETERY ASSOCIATION (a Corporation), Plaintiff and Respondent, v. **CITY AND COUNTY OF SAN FRANCISCO** (a Municipal Corporation), Defendant and Appellant. (Civ. 6874.)★

District Court of Appeal, First District, Division 1, California. Jan. 14, 1930.

Rehearing Denied Feb. 13, 1930.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

John J. O'Toole, City Atty., and Walter A. Dold, Chief Deputy City Atty., both of San Francisco, for appellant.

Brittain & Weise, of San Francisco, for respondent.

Everett W. Mattoon, Co. Counsel, and W. Sumner Holbrook, Jr., Deputy Co. Counsel, both of Los Angeles, as amici curiæ.

GRAY, Justice pro tem. The facts involved in this appeal differ from those involved in the case of Cypress Lawn Cemetery Association, Plaintiff and Respondent, v. City and County of San Francisco, Defendant and Appellant (No. 6873), this day decided (Cal. App.) 284 P. 506, only as to the party plaintiff and the property owned by it. For the reasons stated in that decision, judgment is reversed with the same instructions to the trial court.

We concur: KNIGHT, Acting P. J.; CASHIN, J.

103 Cal. App. 315

Ex parte HUBER. (Cr. 1111.)

District Court of Appeal, Third District, California. Jan. 21, 1930.

1. Criminal law §564(4)—Reviewing court could not take judicial notice of location of ranch where alleged offense was committed.

Where nothing in testimony taken before magistrate on preliminary hearing showed location of ranch on which alleged offense of taking bathtub was committed, reviewing court could not take judicial notice of location of ranch.

2. Habeas corpus §27—Petitioner held entitled to habeas corpus where testimony before magistrate did not show where offense was committed (Pen. Code, §§ 777, 811, 827, 828, 1487).

Where there was nothing in testimony taken before magistrate showing where alleged offense of taking bathtub was committed, petitioner held entitled to writ of habeas corpus under Pen. Code, § 1487; facts being insufficient to show that magistrate had jurisdiction under sections 777, 811, 827, 828.

Application for writ of habeas corpus by John Huber to be directed to the Sheriff of Calaveras County to secure the release of petitioner from custody. Writ granted.

Joseph R. Huberty, of San Andreas, for petitioner.

Virgil M. Airola, of San Andreas, for respondent.

PLUMMER, J. On the 9th day of December, 1929, the above-named petitioner was bound over to appear before the superior court of the county of Calaveras to answer a charge of burglary, and prosecutes this application to be discharged on the various grounds set out in section 1487 of the Penal Code, and particularly on the seventh subdivision thereof, that the defendant was held to answer without reasonable or probable cause. Upon this application it is urged that the hearing before the magistrate must establish the following, to wit: (1) That a crime has been committed; (2) that it has been committed within the county over which the committing magistrate has jurisdiction; (3) that there is reasonable and probable cause to believe that the defendant is guilty of the crime charged.

[1] Section 777 of the Penal Code specifies that the jurisdiction is vested in the courts of the county where the offense was committed. Section 811 of the Penal Code reads as follows: "When an information is laid before a magistrate of the commission of a public offense, triable within the county, he must examine on oath the informant or prosecutor, and any witnesses he may produce, and take their depositions in writing, and cause them to be subscribed by the parties making them," then that a warrant shall be issued and a preliminary examination held. Sections 827 and 828 of the same Code provide the procedure when the offense is triable in some other county. While it was strongly urged upon the hearing of this application that the magistrate's jurisdiction was not limited to the jurisdiction of the same officer when acting as a justice of the peace, it does appear from section 811, supra, that jurisdiction is limited to the county, and this is true as applied to the instant case, unless the recent amendments to the Codes relative to the jurisdiction of justices of the peace impose a further limi-

tation, which we need not here consider by reason of what is hereafter stated. There is nothing in the testimony taken before the magistrate in this case, and which is before us upon the transcript presented with the petitioner's application, showing where the alleged offense was committed. All that the testimony shows is that a certain bathtub was taken from a house situate on Mitchell's ranch south of Copperopolis. In addition to this, the petitioner strongly urges that there is nothing in the transcript from which it can be either reasonably or otherwise inferred that the defendant probably participated in the taking of such bathtub. Whether this is true or not is immaterial, by reason of the fact that there is nothing in the record warranting the committing magistrate in holding the petitioner to appear for trial before the superior court of Calaveras county. The Mitchell ranch, south of Copperopolis, may be in Calaveras county, but we cannot take judicial notice of where the Mitchell ranch is located.

[2] In the case of *Ex parte Cook*, 4 Cal. Unrep. Cas. 969, 39 P. 16, it is directly held that a magistrate in one county has no jurisdiction to issue a commitment for an offense committed in another county. In that case it was a justice of the peace acting as a committing magistrate.

Again, in the matter of the Application of Hartwell, 128 Cal. App. 627, 153 P. 730, 731, this court had before it an application for discharge, in which the same question was presented. In the opinion in that case we find the following: "The evidence was that he 'held up' the Plumbago mill, but there is no evidence that this mill belonged to the Croesus Gold Mining & Milling Company, nor is this mill shown by the evidence to be in Sierra county; the only evidence being that it is about three miles from Alleghany, which latter place is in Sierra county." While it does not appear that the petitioner was discharged in that case for this defect alone in the testimony, it would seem that the court had this defect in mind; otherwise the above language would not have been used.

The case of *State of North Carolina v. Jones*, 113 N. C. 669, 18 S. E. 249, 22 L. R. A. 678, relied upon by the respondent, is not an authority contrary to the cases just cited. In the *Jones* Case, it appears that the petitioner relied solely upon the mittimus, which is a similar instrument to the commitment in the instant case. It was there held that, the mittimus appearing regular upon its face, and the petitioner declining to present anything more, the writ of habeas corpus should be denied.

Nor is the case of *People v. More*, 68 Cal. 500, 9 P. 461, in conflict with the *Cook* and *Hartwell* Cases. In the *More* Case, the pro-

ceeding was before the court upon motion to set aside the information, and not upon habeas corpus, and it was there held that the question of jurisdiction should be raised under the plea of "not guilty," while under section 1487 of the Penal Code, upon habeas corpus, it is provided that the question of jurisdiction may be considered, and, if it is found that the magistrate has exceeded his jurisdiction, the petitioner may be discharged.

In view of what we have stated, it is unnecessary to consider the contention of the petitioner that the testimony fails to show any reasonable or probable cause that he committed the offense charged, irrespective of the county in which it may have been committed.

The writ of habeas corpus applied for is hereby granted, and the petitioner discharged from the custody of the sheriff of Calaveras county.

We concur: FINCH, P. J.; R. L. THOMPSON, J.

103 Cal. App. 234

GILL et al. v. JOHNSON, State Treasurer.
(Civ. 269.)

District Court of Appeal, Fourth District,
California. Jan. 16, 1930.

1. States $\S$ 191(1)—Absent statutory authority, citizen cannot bring suit against state, and state, if permitting such suit, may prescribe terms and conditions thereof.

In absence of statutory authority, citizen cannot maintain suit against state, and state, in permitting such suits, may prescribe terms and conditions under which and manner in which, they may be conducted.

2. States $\S$ 191(1)—Statutes permitting suits against state must be strictly construed.

Statutes permitting suits against state must be strictly construed.

3. States $\S$ 191(1)—General statute authorizing suits against state and regulating procedure therein held to authorize only suits coming within its provisions (St. 1893, p. 57).

St. 1893, p. 57, authorizing suits against state and regulating procedure therein, held not to authorize bringing of any possible suit, but only those coming within its provisions.

4. States $\S$ 200—Statute authorizing change of venue in suit against state to Sacramento county applies only to suits filed under authority of act authorizing such suits (St. 1893, p. 57, $\S$ 1, 4).

St. 1893, p. 57, $\S$ 4, providing for change of venue to Sacramento county in suits against state, held applicable only to suits filed under authority of section 1 providing that any person having claim against state on contract or for negligence not allowed by state board of examiners may bring suit thereon in any court of proper jurisdiction; suit authorized being

general claim against state in which recovery is sought from public funds in state treasury, and not special suit seeking recovery out of particular fund created for specific purpose.

5. States $\S$ 200—Action against state treasurer to recover part of assurance fund under Torrens Law held not controlled by venue provisions of general statute, authorizing suits against state (Torrens Land Title Act, $\S$ 105, subd. 2; St. 1893, p. 57, $\S$ 4; Code Civ. Proc. $\S$ 1858).

Action against state treasurer to recover part of assurance fund under Torrens Land Title Act, $\S$ 105, subd. 2 (St. 1915, p. 1932, Deering's Gen. Laws 1923, Act 8589), authorizing suit in superior court of county in which land or part thereof is situated held not controlled by St. 1893, p. 57, $\S$ 4, providing for change of venue to Sacramento county in suit against state, in view of Code Civ. Proc. $\S$ 1858, requiring statute to be so construed, if possible, as to give effect to all its provisions.

6. States $\S$ 200—Action to recover part of Torrens assurance fund held not within statute requiring action for money damages to land to be tried where defendants reside (Torrens Land Title Act, $\S$ 105, subd. 2; Code Civ. Proc. $\S$ 395).

Action against state treasurer to recover part of assurance fund under Torrens Land Title Act, $\S$ 105, subd. 2 (St. 1915, p. 1932, Deering's Gen. Laws 1923, Act 8589), authorizing action in county where land or part thereof is situated, held not within Code Civ. Proc. $\S$ 395, requiring action for money damages and not for recovery of land itself, to be tried in county where defendants reside.

7. States $\S$ 200—Provisions of Torrens Law regulating procedure in actions against assurance fund, when conflicting with other general statutory venue provisions, control (Torrens Land Title Act, $\S$ 105, subd. 2; St. 1893, p. 57; Code Civ. Proc. $\S$ 395).

Provisions of Torrens Land Title Act, $\S$ 105, subd. 2 (St. 1915, p. 1932, Deering's Gen. Laws 1923, Act 8589), authorizing suits to recover part of assurance fund to be brought in county where land or part thereof is situated, when in conflict with venue provisions of St. 1893, p. 57, authorizing suits against the state or Code Civ. Proc. $\S$ 395, are controlling in respect to matters of procedure, since provisions of special act control those of general.

Appeal from Superior Court, Imperial County; A. C. Finney, Judge.

Action by Edwin Gill and another against C. G. Johnson, as treasurer of the State of California. From an order denying motion for change of venue, defendant appeals. Affirmed.

U. S. Webb, Atty. Gen., and James S. Howie and Louis G. Campbell, Deputy Attys. Gen., for appellant.

Barker & Keithly, of Los Angeles, for respondent.

BARNARD, J. This is an action brought under the provisions of the so-called Torrens Land Title Act. St. 1915, p. 1932; Deering's Gen. Laws, 1923, Act 8589, pp. 3611 to 3644. For the sake of brevity, this law will be hereinafter referred to as the Torrens Law. Subdivision 2 of section 105 of this act reads in part as follows:

"Any person who, without fraud or negligence on his part, is deprived of any interest or estate in land through the operation of any provision of this act or by reason of the fraud, forgery, negligence, omission, mistake or misfeasance of any person, and who is precluded from recovering such interest or estate, *may commence an action* in the superior court of the county in which the land or a part thereof is situated, to recover not over the fair market value of the interest or estate of which he has been so deprived." (Italics ours.)

The real property which forms the basis of this action is located in Imperial county, and the complaint was filed in the superior court of that county. The plaintiffs reside in that county, but the defendant is the state treasurer, in his official capacity. The defendant filed in the superior court of Imperial county a motion for change of place of trial, a demand for change of venue, an affidavit of merits, and an affidavit of residence. This is an appeal from an order denying defendant's motion for a change of venue.

Appellant's first contention is that this is a suit against the state, that it is based upon an implied contract, and that therefore the provisions of the act to authorize suits against the state, and regulating the procedure therein (St. 1893, p. 57), are controlling here. The material portions of the act of 1893 are as follows:

"1. All persons who have, or shall hereafter have, claims on contract or for negligence against the state not allowed by the state board of examiners, are hereby authorized, on the terms and conditions herein contained, to bring suit thereon against the state in any of the courts of this state of competent jurisdiction, and prosecute the same to final judgment. The rules of practice in civil cases shall apply to such suits, except as herein otherwise provided."

"4. Service of summons in such suits shall be made on the Governor and Attorney General. It shall be the duty of the Attorney General to defend all such suits; *and upon his written demand, made at or before the time of answering, the place of trial of any such suit must be changed to the county of Sacramento.*" (Italics ours.)

The Torrens Law provides that a suit of this nature shall be brought against the state treasurer, in his official capacity; that, whenever land is registered under the terms of the

law, a percentage of the value thereof shall be paid to the state treasurer and held by him in a separate fund, "as and for an assurance fund"; that, where judgment is rendered against the treasurer alone, the order of the court shall constitute the warrant, and the state controller shall audit and certify the amount of such claim in the same manner as other claims against the state are audited, and the state treasurer shall thereupon pay the claim out of the assurance fund. It is also provided that the Attorney General shall defend the state treasurer in all actions brought under the provisions of the act. It is argued that in view of these provisions, such an action is one against the state; that under the terms of the act, the state is, in effect, the guarantor of the title; and that a suit seeking recovery from the particular fund established by the act is, in effect, a suit against the state.

It is also urged that the action is one based upon an implied contract. As authority for this, appellant cites the following cases: *McCord v. Slavin*, 143 Cal. 325, 76 P. 1104; *Miller & Lux v. Batz*, 131 Cal. 402, 63 P. 680; *Miller & Lux v. Batz*, 142 Cal. 447, 76 P. 42; *San Luis Obispo County v. Gage*, 139 Cal. 398, 73 P. 174, 177. In this last case, in commenting on the provisions of the act of 1893, the court said: "There might be strong reasons in favor of the proposition that the Legislature, in referring to 'claims on contract,' meant real contracts, not fictitious ones."

[1-4] However, if we assume for the purposes of this case, that this is an action on contract, and that it may be considered to be a suit against the state, it does not follow that the provisions of the act of 1893 must, or do, control. In the absence of statutory authority, a citizen may not maintain a suit against the state. It is equally true that the state, in permitting such suits, may prescribe the terms and conditions under which, and the manner in which, they may be conducted. And statutes permitting suits against the state must be strictly construed. *Miller v. Pillsbury*, 164 Cal. 199, 128 P. 327, Ann. Cas. 1914B, 886. The act of 1893 is a general statute authorizing suits against the state, and regulating the procedure therein. But it does not authorize the bringing of any possible suit, but only those coming within its provisions. Section 4 of the act, upon which appellant here relies, specifically states that the place of trial of any "such suit" shall, on demand of the Attorney General be changed to the county of Sacramento. "Such suit" refers to those filed under authority of section 1 of the act. This section provides that any person who has a claim against the state, on contract or for negligence, "not allowed by the state board of examiners," may bring suit thereon in any court of proper jurisdiction in the state.

It would seem reasonable that the kind of claim contemplated by this act is a general claim against the state, in which recovery is sought out of public funds in the state treasury and not a special suit of this nature, seeking recovery out of a particular fund created for a specific purpose. In any event, a plaintiff in an action brought under authority of that statute, would have to show that his claim was not allowed by the state board of examiners. Nothing appears in this act to show that section 4 thereof is intended to apply to any suits permitted against the state, other than those coming within the provision of that act itself. And nothing appears therein, purporting to make that act exclusive, or providing that it shall be the only way in which an action against the state, or an official thereof, may be allowed. The Legislature, or the people, could authorize a suit against the state, and regulate the procedure therein, in a class of cases not contemplated by the act of 1893, and not provided for therein. This they have done in this particular case, in the Torrens Law.

[5] The Torrens Law not only provides a machinery for registering land titles, but it provides for a fund to be built up in the hands of the state treasurer, "as and for an assurance fund," for the protection of those availing themselves of the use of the law. And, in authorizing such a suit, in a proper case, against the state treasurer, it provides that this suit may be commenced in the superior court of the county where the land is situated, and, further, that "such court" shall have jurisdiction to render judgment. It also provides that the order of "such court" shall constitute a warrant, which shall be audited and certified by the state controller, and paid by the state treasurer out of the assurance fund.

The authority to bring this action is given in the Torrens Law, and does not depend upon the act of 1893. There are a number of differences in the procedure provided for in this act, which show it was not intended that the act of 1893 should apply to the action authorized by the act here involved. Under the former, judgment is against the state, while under the latter it is against the state treasurer, but payable only out of the special fund created by this act. Under the former, there is a limitation of two years, and under the latter one of four years. Under the former, summons must be served on the Governor and the Attorney General, and, under the latter, summons is served on the state treasurer. Under the former, only claims not allowed by the state board of examiners may be prosecuted, while under the latter no authority, other than the superior court passes upon the claims, prior to judgment. Under the former, suits may be filed in any county in the state, but must be removed to Sacramento county, on the request of the Attorney General;

while under the latter, it is specifically provided that suits may be filed in the county where the land is situated, and no provision is made for their removal, at the request of the Attorney General, or otherwise. On the other hand, the act specifically confers jurisdiction on the court in which the suit is filed, and authorizes that court to enter judgment, making its order a warrant, payable out of the special fund created by the act. In our opinion the provisions of the act of 1893 do not control in this action, but the Torrens Law creates a special venue in the superior court of the county where the land is situated, which is not subject to change upon demand of the Attorney General.

It is elementary that a statute should, if possible, be so construed as to give effect to all of its provisions. Code Civ. Proc. § 1858. The provision in the Torrens Law that the party aggrieved may commence an action in the county where the land is situated, would be an idle provision, if the right of removal given to the Attorney General in the act of 1893 is to govern, for even under that act, an action therein permitted, may be brought in any county in the state. The inclusion of such a provision in the Torrens Law indicates that something more is meant than the giving of a right already provided for in another law. And this interpretation is strengthened by the inclusion in the act of the specific provisions giving jurisdiction and the power to enter judgment, above referred to.

That the place of trial of such an action as is here involved should be in the county where the land is situated, is supported also by reason and logic. Appellant says in his brief: "The reason exclusive jurisdiction is placed by the law in the court of a county in which property is situated until title is registered is the same as that for exclusive jurisdiction in land title matters under section 392 of the Code of Civil Procedure. That reason is that the action is in rem and an action in rem from the very nature of it should be in the county that is the locus of the rem. The thing is there, the title papers are there, and hence the action should be there."

While the instant case is not an action in rem, it is one based upon an interest in real property, and certain transactions connected therewith. The thing is in the county where the action was brought; the title papers are there; the original record and files in the

registration proceeding are there; the files and records in the office of the registrar are there; whatever may have occurred as a foundation for the claim has arisen there; and "hence the action should be there." In addition, it may be observed that no state funds are in jeopardy, and the interests of the state are not affected by the action.

[6] Appellant further contends that this is an action for money damages and not for the recovery of the land itself, and, therefore, under section 395 of the Code of Civil Procedure, it should be tried in the county where the defendant resides. Section 395 of the Code of Civil Procedure has been held not to govern, where a suit is authorized to be filed against a corporation in the place where the action arose, although the legal domicile of the corporation is elsewhere. *Trezevant v. Strong Co.*, 102 Cal. 47, 36 P. 395; *Lakeside Ditch Co. v. Packwood C. Co.*, 50 Cal. App. 302, 195 P. 284; *McFarland v. Martin*, 144 Cal. 771, 78 P. 239. The same principle applies in this case. The Torrens Law gives the right to commence the action in the superior court of the county where the land is situated, and gives that court jurisdiction to render judgment, and the place of trial may be changed only for some sufficient reason, other than the residence of the defendant.

[7] The Torrens Law is a special act, setting up a comprehensive plan, for a specific purpose. If the act of 1893, and section 395 of the Code of Civil Procedure, be deemed to be in conflict in any particular with the Torrens Law, in respect to matters of procedure, under the general rules of construction, the provision of the special act control those of the general. *People v. Pacific Implement Co.*, 130 Cal. 442, 62 P. 739; *McNeil v. Kingsbury*, 190 Cal. 406, 213 P. 50; *Riley v. Forbes*, 193 Cal. 740, 227 P. 768.

We are of the opinion, therefore, that even though this be construed an action on contract, and regardless of whether or not it is, in effect, a suit against the state, it is neither the sort of action contemplated by the act of 1893, nor one that is governed by section 4 of that act.

No sufficient reason being shown why the action should not remain in the court in which it was filed, the order appealed from is affirmed.

We concur: SLOANE, P. J.; MARKS, J.

103 Cal. App. 221

PEOPLE'S DITCH CO. et al. v. FOOTHILL IRRIGATION DIST. et al. (Civ. 201.)★

District Court of Appeal, Fourth District, California. Jan. 21, 1930.

Rehearing Denied Feb. 17, 1930. Hearing Denied by Supreme Court March 20, 1930.

1. Appeal and error ⇨66—Appeal will lie only from final, but not from interlocutory, judgment, except when specially permitted by statute (Code Civ. Proc. § 963).

Under Code Civ. Proc. § 963, appeal will lie only from final, but not from interlocutory, judgment, except when specially permitted by statute.

2. Appeal and error ⇨77(1)—Judgment in action involving water rights, denying relief and reserving jurisdiction on proper showing to protect plaintiffs' water rights, held appealable as final judgment.

In action to restrain interference with water rights, judgment refusing injunction and denying plaintiffs relief in premises, but reserving power and jurisdiction on plaintiffs making proper showing in future to grant such relief as may be necessary to protect plaintiffs' water rights against interference by defendants, *held* a final judgment from which an appeal would lie.

3. Injunction ⇨158—Injunction pendente lite remains in force only until rendition of final judgment.

Injunction pendente lite remains in force only until rendition of final judgment, since, when granted, it is provisional remedy that is merged in perpetual injunction, and thereupon ceases to have any force or effect.

4. Appeal and error ⇨790(3)—Appeal from order denying injunction pendente lite was dismissed, where final judgment had been entered determining all issues presented and denying permanent injunction.

In action involving determination of water rights, plaintiffs' appeal from order denying preliminary injunction was dismissed, where final judgment had been entered determining all issues presented and denying permanent injunction.

Appeal from Superior Court, Kings County; J. T. B. Warne, Judge.

Action by the People's Ditch Company and others against the Foothill Irrigation District and others. From an order denying an application for a preliminary injunction, plaintiffs appeal. Appeal dismissed.

H. Scott Jacobs, of Hanford, and W. R. Bailey, of Visalia, for appellants.

Sidney J. W. Sharp, of Hanford, Guy Knupp, of Porterville, R. C. Leit, and A. E. Chandler, of San Francisco, for respondents.

MARKS, J. On July 2, 1928, appellants filed this action in the court below, seeking, among other things, to restrain respondents, and particularly the Foothill irrigation district, from taking, appropriating, or divert-

ing from the Kings river any of the waters thereof, and, further, to restrain respondents from drilling wells upon a tract of land known as the Conejo Well Field, and from pumping and removing from a designated tract of land any of the underground water underlying the same for transportation or use off of said tract, or from lessening or diminishing in any manner the underground body of water beneath or adjacent to the channel of Kings river or beneath or adjacent to the ditches, canals, or lands of appellants or their stockholders, upstream from the head of the canal of the Lemoore Canal & Irrigation Company.

On July 2, 1928, an order to show cause was issued, directed to respondents, in which they were required to show cause why they should not be "enjoined and restrained, pending the trial and final determination of this action, from taking, appropriating or diverting from said Kings river any of the water thereof, or from pumping or removing from the tract of land described in paragraph IX of the second cause of action of said plaintiffs' complaint any of the underground water underlying the same, for transportation from or use of said tract, or from lessening or diminishing in any manner the underground body of water beneath or adjacent to the channel of said Kings river, above and upstream from the head of the canal of the plaintiff Lemoore Canal and Irrigation Company, as described in said complaint, or beneath or adjacent to any of the ditches or canals of any of said plaintiffs, or beneath the lands of the respective stockholders of the said plaintiffs, or from lessening and diminishing in any manner the quantity of water flowing or to flow in said Kings river, above and upstream from the head of the canal of the plaintiff Lemoore Canal and Irrigation Company, as described in plaintiffs' complaint, or from lessening and diminishing in any manner the quantity of water flowing or to flow in the respective canals or ditches of said respective plaintiffs." The motion for the injunction pendente lite was denied on October 19, 1928, after a full hearing thereon, and appellants took this appeal to the Supreme Court from such order, and which appeal has been transferred to this court.

A trial of the action on its merits was had in the superior court of Kings county, which was concluded on April 3, 1929; findings of facts and conclusions of law were filed on August 26, 1929; and judgment was rendered in favor of defendants below and respondents here on the same date. An appeal from this judgment was also taken.

[1] Respondents in the case under consideration are moving to dismiss the appeal from the order denying the injunction pendente

lite upon the ground that the issues in this appeal have become moot, for the reason that the action has been tried and determined upon its merits, and a judgment entered after trial denying an injunction to appellants. Appellants are resisting the motion to dismiss upon the ground that the trial court attempted to reserve to itself the right to make such further order as may be necessary to protect the rights of appellants in the event that the pumping operations of respondents should deprive appellants of any water to which they were entitled. If we should agree with appellants, we would have to conclude that the judgment was not final, but interlocutory only. Appellants did not take this view of the case when they took an appeal from the judgment, because an appeal will lie from a final, but not from an interlocutory, judgment (section 963, Code Civ. Proc.; *Pomper v. Superior Court*, 191 Cal. 494, 216 P. 577), except when specially permitted by statute.

[2] The findings of fact and conclusions of law are very full and complete. The wells proposed by respondents were not drilled at the time of the trial, and the court found that it could not determine from the evidence that the completion of the wells and pumping water therefrom would in any way interfere with or lessen the water to which appellants asserted a prior right. The effect of this portion of the findings and judgment was holding by the court below that the alleged injury to appellants was not proven. The court further found and adjudged that the respondents were entitled to drill their wells in the Conejo Well fields, pump water therefrom, and conduct it to, and use it on, the lands within their districts. The injunction sought by the appellants was denied. This portion of the judgment is conclusive, and determined the rights of the parties under the facts existing at the time of the trial. The court continued in its judgment as follows: "Provided, however, that such right of said defendants, or either or any of them is and shall be without prejudice to the right of the plaintiffs in this action, or either of them, to file such action or to take such proceedings as to them shall seem necessary in this action, in the event that the pumping and carrying away of said waters from said tract of land shall result in injury or damage to said plaintiffs, and the court reserves to itself the power and jurisdiction, upon a showing made herein by plaintiffs, or any of them, after reasonable notice to defendants, to find and determine the facts as to the result of such operations as may be conducted in said Well field, together with the right to grant to plaintiffs such relief by way of injunction as may be necessary to fully protect the water rights of plaintiffs against interference, damage or invasion by defendants by their said opera-

tions." Under this portion of the judgment appellants seek to defeat respondents' motion to dismiss this appeal.

It is not easy to see how we can escape the conclusion that the judgment rendered was final. It determined all of the issues raised by the pleadings under the facts as they then existed which gives it the characteristics of a final judgment. *Zappettini v. Buckles*, 167 Cal. 27, 138 P. 696; *Gianelli v. Briscoe*, 40 Cal. App. 532, 181 P. 105; *Howe v. Key System Transit Co.*, 198 Cal. 525, 246 P. 39. The proviso contained in the judgment which we have quoted seems to have been inserted out of an abundance of caution, so that the judgment might not be pleaded in bar of a future action should the pumping operations, when commenced, actually interfere with the water belonging to appellants. Should such a condition arise in the future after the wells were drilled, appellants could bring an appropriate action to protect their rights. Such an action would of necessity be based on the conditions then existing, and they should not be hampered by the judgment in this case in protecting their ownership of the water. We do not believe that this proviso affects the finality of the judgment rendered, and that its only result is to protect appellants in future litigation should such arise. The judgment already rendered is based on a complaint which alleges a future or expected injury. Any future proceeding would have to be based upon allegations of actual and existing damage, which would in all probability require the filing of a new complaint in another action, as it would be based on facts and conditions arising after the trial of the present case.

It appears from the record before us that the hearing on the motion for an injunction pendente lite was most carefully conducted by counsel for both sides, and that the trial judge was fully informed on all phases of the issues presented. The record consists of many hundred pages of transcript. If the findings and judgment are any indication of the record made at the trial of the case, every question presented at the first hearing was again presented at the trial. The court below reached the same conclusions at both hearings.

[3, 4] It is well settled that an injunction pendente lite remains in force only until rendition of the final judgment in the case. When granted, it is a provisional remedy that is merged in a perpetual injunction, and thereupon the injunction pendente lite ceases to have any force or effect. *Doudell v. Shoo*, 159 Cal. 448, 114 P. 579; *Webber v. Wilcox*, 45 Cal. 301; *Harris v. McGregor*, 29 Cal. 125. "An injunction by order is a provisional remedy, and temporary in its character. It assumes a pending litigation in which all questions are to be settled by a judgment, and op-

erates only until that judgment is rendered. If by that a permanent injunction is granted the temporary one is of course ended, and equally so if a permanent injunction is * * * denied." *Jackson v. Bunnell*, 113 N. Y. 220, 21 N. E. 79, 80.

The case of *Sheward v. Citizens' Water Co.*, 90 Cal. 635, 27 P. 439, 440, presents a somewhat similar state of facts to the one we are considering. In this case the plaintiff secured an injunction pendente lite, and at the trial was given a permanent injunction against the defendant. The Supreme Court uses the following language: "On the 8th of November, 1890, the defendant appealed from the judgment, and on the 19th of November, 1890, from the order of injunction. The plaintiff has moved to dismiss the latter appeal upon the ground that, the final judgment awarding the plaintiff a perpetual injunction having been entered before such appeal was taken, no appeal could thereafter be taken from the order. The order of injunction made October 20, 1890, was a provisional remedy, which by its terms was limited 'until further order in the premises.' Upon the entry of the final decree this provisional remedy was merged in the perpetual injunction thereby granted to the plaintiff, and ceased to have any operative effect upon the defendant. Its functions having thus terminated, there was thereafter no existing 'order' granting an injunction from which an appeal could be taken. *Webber v. Wilcox*, 45 Cal. 301; *Lambert v. Haskell*, 80 Cal. 611, 22 P. 327; *Gardner v. Gardner*, 87 N. Y. 14; *Jackson v. Bunnell*, 113 N. Y. 220, 21 N. E. 79. It follows that the motion to dismiss the appeal from the provisional order of injunction must be granted."

For the reasons and upon the authorities hereinbefore cited, respondents' motion to dismiss the appeal from the order denying an injunction pendente lite is granted, and such appeal is dismissed.

We concur: SLOANE, P. J.; BARNARD, J.

103 Cal. App. 318

PEOPLE v. DAVIS. (Cr. 14.)

District Court of Appeal, Fourth District, California. Jan. 21, 1930.

Criminal law §1071—Failure to file and present application stating grounds of appeal and portions of reporter's notes to be transcribed required dismissing appeal (Rules of Judicial Council for Supreme and District Courts of Appeal, adopted June 1, 1928, rule 2, subd. 7).

Failure of defendant, on appeal from conviction, to file with clerk and present to trial court, within five days after notice of appeal, application stating grounds of appeal and points

on which he relied, and designating portions of notes which should be transcribed, as required by Rules of Judicial Council for Supreme and District Courts of Appeal, adopted June 1, 1928, rule 2, subd. 7, held to require dismissal of appeal, where rules had been in force for 17 months prior to time of filing notice of appeal.

Appeal from Superior Court, Kings County; K. Van Zante, Judge.

Eugene Davis was convicted of grand theft, and he appeals. Appeal dismissed.

J. C. C. Russell, of Hanford, for appellant.

U. S. Webb, Atty. Gen., and John L. Flynn, Deputy Atty. Gen., for the People.

MARKS, J. Appellant was convicted of the crime of grand theft and sentenced to serve the term prescribed by law in the state penitentiary at Folsom. He appealed from the judgment and order denying his motion for new trial, but failed to file with the clerk and present to the trial court the application required under subdivision 7, rule 2, of the Rules of the Judicial Council for Supreme and District Courts of Appeal, adopted June 1, 1928. Judgment was pronounced on defendant on October 28, 1929. An oral notice of appeal was given by him the same day, which was followed by a written notice of appeal filed on November 1, 1929. On the same day he filed a written request for a transcript.

The Attorney General has moved for a dismissal of the appeal because of appellant's failure to conform to the requirements of subdivision 7 of said rule 2, which reads as follows: "Upon an appeal by the defendant from a judgment of conviction or from an order denying his motion for a new trial, or from an order made after judgment, or upon an appeal by the people from an order granting a new trial, or from an order setting aside an indictment, information or accusation, or from an order made after judgment, the appellant must, within five days after giving notice of appeal, file with the clerk and present an application to the trial court, stating in general terms the grounds of the appeal and the points upon which the appellant relies, and designate what portions of the phonographic reporter's notes it will be necessary to have transcribed to fairly present the points relied upon. If such application is not filed within said time, the appeal shall be dismissed; provided, that the appeal shall not be dismissed for any defect in the statement of such grounds or points which does not affect the substantial rights of the respondent. The court shall, within two days after the filing of such application make an order directing the phonographic reporter who reported the case to transcribe such portions of his notes as in the opinion

of the court may be necessary to fairly and fully present the points relied upon by the appellant. If the court fails to make the order within two days after the application is filed, the notes requested in the application shall be transcribed without such order. The phonographic reporter shall, within twenty days after the filing of such application, file with the clerk an original transcription and three clearly legible copies of the portions of the notes so required to be transcribed, excluding therefrom all statements and opinions of the court not constituting rulings and all arguments of counsel, unless such statements, opinions or arguments were objected to or assigned as error or misconduct at the time they were made. Whenever such statements, opinions or arguments were made in response to any statement made by or on behalf of the defendant, such latter statement shall also be transcribed. Such transcript shall be typewritten on opaque paper and prepared in the manner and form required by section 2 of rule 7. Said reporter shall append to the original and to each copy an original affidavit that it is correct."

In the cases of *People v. McClellan*, 88 Cal. App. 415, 263 P. 841; *People v. Pierce*, 89 Cal. App. 290, 264 P. 519, and *People v. Pietri*, 90 Cal. App. 69, 265 P. 508, the appeals were all dismissed because of the failure of the respective appellants to present applications to the trial court stating in general terms the grounds of appeal and the points upon which the appellants relied. In each of these cases petitions to have them heard in the Supreme Court, after judgment in the District Courts of Appeal, were denied.

In the case of *People v. Bryant*, 278 P. 1025, the Supreme Court held that an appeal taken subsequent to the repeal of section 1247 of the Penal Code, and before the adoption of the rules for the Supreme and District Courts of Appeal by the Judicial Council, should be heard on its merits, because the legislation on the subject was of recent date and of such a character and in such form as might easily mislead members of the bar.

The case before us is easily distinguished from the case of *People v. Bryant*. The rules of the Judicial Council had been in force for 17 months prior to the time of the filing the notice of appeal in this case. Further, in appellant's written request for a transcript, he twice referred to "rule 2 of Rules of the Supreme Court and District Courts of Appeal of the State of California," showing that he had knowledge of this rule. He should have had its requirements in mind in preparing his appeal.

Upon the circumstances of this case, we feel it incumbent upon us to follow the mandate of the rule in question. The motion of

the Attorney General is therefore granted, and the appeal dismissed.

We concur: SLOANE, P. J.; BARNARD, J.

103 Cal. App. 347

CHRISTMAN v. GUARANTY MORTGAGE CO. OF CALIFORNIA. (Civ. 6606.)

District Court of Appeal, First District, Division 1, California. Jan. 23, 1930.

1. Brokers $\S$ 82(1)—Complaint in action for compensation for sale of realty, which failed to allege that broker was duly licensed, held defective (St. 1919, p. 1259, $\S$ 20).

In an action to recover compensation for sale or exchange of real estate, complaint which failed to state that individual acting as broker was duly licensed, as prescribed by St. 1919, p. 1259, $\S$ 20, held defective.

2. Appeal and error $\S$ 1039(13)—Failure to allege that broker was licensed held not ground for reversal, where fact was matter of public record and was proved without objection.

In action to recover compensation for sale of realty that complaint failed to allege that broker was licensed, as required by St. 1919, p. 1259, $\S$ 20, held not ground for reversal, where fact which complaint failed to allege was matter of public record, and was proved at trial without objection.

Appeal from Superior Court, City and County of San Francisco; Walter Perry Johnson, Judge.

Action by M. Christman against the Guaranty Mortgage Company of California. Judgment for plaintiff, and defendant appeals. Affirmed.

Donald Scott and Rudolph J. Scholz, both of San Francisco, for appellant.

Rothchild & Golden, of San Francisco, for respondent.

PER CURIAM. This action was brought to recover on a promissory note executed by defendant corporation to Jack Baltor and by him assigned to the plaintiff. As a defense to the action defendant alleged that the amount of the note was the compensation which it agreed to pay Baltor, a real estate broker, for his services in an exchange of certain real estate; that the complaint failed to allege that Baltor was a duly licensed broker at the time the cause of action arose, and consequently, under the provisions of section 20 of the Real Estate Brokers' Act (Stats. 1919, p. 1252), the action could not be maintained.

The case was tried, and the proofs show that Baltor, for an agreed commission represented by the note, and pursuant to a written authorization, exchanged certain real estate owned by defendant, and also that, when

the exchange was made and the cause of action arose, he was a duly licensed real estate broker. The court found accordingly and a judgment was entered for the plaintiff, from which the defendant has appealed.

[1, 2] In an action to recover compensation for the sale or exchange of real estate, a complaint which fails to allege that the person acting as a broker in the transaction was duly licensed as prescribed by section 20 of the act is defective. *Beebe v. Kistler*, 52 Cal. App. 494, 199 P. 537; *Wise v. Radis*, 74 Cal. App. 765, 242 P. 90. Where, however, as was the case here, the fact which the complaint failed to allege was a matter of public record, was proved without objection at the trial, and it is manifest that the defendant was not misled by the defective pleading, the case is within the constitutional inhibition that no judgment shall be set aside for any error as to any matter of pleading unless, after an examination of the entire case, including the evidence, the court shall be of the opinion that the error complained of resulted in a miscarriage of justice. *Baker v. Miller*, 190 Cal. 263, 212 P. 11. The evidence shows beyond dispute all the facts necessary to entitle the plaintiff to recover, and the defect complained of furnishes no ground for the conclusion that the result was a miscarriage of justice.

The judgment is affirmed.

103 Cal. App. 380

Ex parte REID. (Cr. 18.)★

District Court of Appeal, Fourth District.
California. Jan. 23, 1930.

Rehearing Denied Feb. 5, 1930.

1. *Automobiles* Ⓒ353—In order to constitute killing of pedestrian manslaughter, burden was on people to show act was result of motorist's negligence.

In order to constitute killing of pedestrian on highway manslaughter, burden was on people to show that act was result of automobile driver's negligence, since doctrine of *res ipsa loquitur* did not apply.

2. *Automobiles* Ⓒ355(8)—Circumstances held to warrant commitment of motorist striking pedestrian and failing to stop to render assistance.

Where license number corresponding with one missing from defendant's automobile and broken glass corresponding with glass of headlights of defendant's automobile were found at scene of accident, and shortly after accident defendant drove his automobile into garage showing condition referred to, such circumstances unexplained, with others, were sufficient to establish probable cause for finding automobile striking pedestrian was being driven by defendant, and that he failed to stop to render assistance after tragedy and were sufficient to show probable cause for order of commitment for failure to stop and render assistance to injured party.

Application by James A. Reid for writ of habeas corpus under which applicant seeks discharge from commitment of examining magistrate under a complaint charging defendant with manslaughter, and failure to stop and render assistance after an automobile accident. Discharge denied.

B. M. Benson, of Fresno, for petitioner.

Ray B. Carter, Deputy Dist. Atty., of Fresno, for respondent.

SLOANE, P. J. The defendant in the above-entitled matter seeks discharge, under a writ of habeas corpus, from a commitment of the examining magistrate on preliminary examination in the justice's court of the third township of the county of Fresno, under a complaint charging defendant with manslaughter, and failure to stop and render assistance after an automobile accident.

It is the claim of petitioner that the evidence introduced on the preliminary hearing is insufficient to show probable cause for the order of commitment.

The transcript of the evidence taken on the examination is before us. It sufficiently appears that one Clarence Linstrum was, on the night of November 18, 1929, killed by being run into by an automobile. He was apparently walking in a westerly direction on Tulare avenue, a highway near the city of Fresno. There were no eyewitnesses of the tragedy, and the connection of the defendant therewith rests wholly upon circumstantial evidence.

[1] We think, however, the evidence is sufficient to show probable cause for a finding that the deceased was struck and killed by an automobile driven by the defendant. There is, however, nothing to support the conclusion that the accident was occasioned by the criminal negligence of the driver. The automobile was being driven in its legitimate operation on the highway. The doctrine of *res ipsa loquitur* does not apply, and, in order to constitute the killing of Mr. Linstrum manslaughter, the burden is on the people to show that the act was the result of the driver's negligence. If the only basis for the commitment was the charge of manslaughter, we might be justified in holding that the proof was insufficient to establish probable cause. The order of commitment, however, is based upon the further complaint that after the accident the driver of the car failed to stop and render assistance. The evidence in the record sustains the proposition that this was the fact, and, if the identity of the defendant as the driver of the car is sufficiently shown, the commitment must be sustained on the charge of failing to stop and render assistance.

The evidence indicates that the deceased was walking along the highway after dark,

in a westerly direction; that the car which ran into him approached him from behind. The body was found on the southerly or left-hand side of the pavement. It does not appear, however, just the location of the parties when the impact occurred, and it cannot therefore be inferred that the automobile was being driven on the wrong side of the street.

[2] The identity of the car, however, is sufficiently established by the finding at the scene of the accident a license number corresponding with one missing from defendant's automobile, and from broken glass corresponding with the glass of headlights of defendant's automobile, and the fact that shortly after the accident the defendant drove his car into a garage in Fresno, showing the condition just referred to. It also appears that the radiator was mashed in and had been leaking at the scene of the accident. There was evidence on the pavement of rusty water dripping westerly from the scene of the accident, accumulating in a pool where the car had apparently been slacked up, and then continuing on in the direction of Fresno. There also appears in evidence the statement of the defendant that he had been driving the car in the country to the east of Fresno that evening, and that it had not been in the possession of any other person. He denied, however, that he had been driving on Tulare avenue, but stated that he came into Fresno on Blackstone avenue. The circumstances, however, unexplained, are sufficient to establish probable cause for finding that the death car was being driven by defendant and that he failed to stop to render assistance after the tragedy. The body was found lying near a ranch house, where notice would naturally have been given to the people residing there, had there been any attempt to render assistance.

For the reasons stated the discharge of defendant is denied.

We concur: BARNARD, J.; MARKS, J.

103 Cal. App. 241

PETERSEN v. KLITGAARD et al.
(Civ. 7079.)

District Court of Appeal, First District, Division 1, California. Jan. 17, 1930.

Appeal and error ⇐418—Notice of appeal from judgment for plaintiff did not operate as appeal from judgment for other defendant sued as joint tort-feasor.

Notice of appeal by defendant in action for negligence, to effect that appeal was taken from judgment in favor of plaintiff and against defendant and from the whole of such judgment, referred solely to judgment against such defendant, and did not operate as an appeal from

judgment in favor of other defendant sued as a joint tort-feasor.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by Henry Petersen against C. F. Klitgaard and the Naknek Packing Company. Judgment for plaintiff against defendant last named and in favor of defendant first named, and defendant last named appeals. On motion to dismiss appeal. Motion denied.

F. V. Keesling and C. A. S. Frost, both of San Francisco, for appellant.

Daniel A. Ryan, of San Francisco, for respondent Petersen.

Bronson, Bronson & Slaven, of San Francisco, for respondent Klitgaard.

TYLER, P. J. Motion to dismiss appeal. The action was one for negligence brought against defendant and respondent C. F. Klitgaard and defendant and appellant Naknek Packing Company as joint tort-feasors. A verdict was rendered in favor of plaintiff and against defendant Naknek Packing Company for the sum of \$15,000 and in favor of defendant C. F. Klitgaard and against plaintiff.

Defendant and respondent Klitgaard moves to dismiss the appeal as to him on the ground that a joint tort-feasor against whom a judgment is taken cannot raise the point on his appeal that the judgment from which the appeal is taken exonerates the other joint tort-feasors, citing *Blackwell v. Am. Film Co.*, 189 Cal. 689, 209 P. 999; *Sickles v. Mt. Whitney Power & Elec. Co.*, 177 Cal. 278, 170 P. 599. It is unnecessary to discuss this question, as reference to the notice of appeal shows that no appeal has been taken from the judgment in favor of Klitgaard. The notice of appeal reads, in substance, as follows: "You and each of you are hereby notified that Naknek Packing Company, a corporation, defendant in the above-entitled action, hereby appeals to the Supreme Court of the State of California, from the judgment made, given and entered in the above-entitled action in the above-named Superior Court on the 27th day of November, 1928, in favor of said plaintiff, and against said defendant, Naknek Packing Company, for the sum of \$15,000.00, together with plaintiff's costs amounting to \$227.00 and from the whole of said judgment."

By reference to the notice of appeal it will be seen that the phrase "and from the whole of said judgment" contained in the notice refers solely to the judgment against the appellant Naknek Packing Company. There are two judgments in the case, one in favor of the plaintiff and against the packing company and the other in favor of Klitgaard and

against plaintiff. Nothing whatever is said in the notice of appeal as to the judgment in favor of Klitgaard. No appeal having been taken from the latter judgment, there is nothing to dismiss.

The motion is therefore denied.

We concur: KNIGHT, J.; CASHIN, J.

103 Cal. App. 326

VARNI v. ANGLO-AMERICAN LAND CO. et al. (Civ. 6973.)

District Court of Appeal, First District, Division 1, California. Jan. 22, 1930.

1. Appeal and error ⇨1011(1)—Findings of fact as to terms of contract and value of services based on conflicting evidence cannot be disturbed.

Trial court's findings of fact, as to terms of contract and reasonable value of plaintiff's services, based on conflicting evidence, cannot be disturbed on appeal.

2. Corporations ⇨1—Where corporation was but instrumentality for transaction of business of individual defendants, evidence sustaining judgment against corporation will sustain judgment against such individuals.

Where evidence shows that defendant corporation was but instrumentality for transaction of business of individual defendants, such defendants are held to same rules of accountability as corporation, and evidence sustaining judgments against corporation will sustain judgment against individual defendants.

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action by Edward J. Varni against the Anglo-American Land Company and others. Judgment for plaintiff, and defendants appeal. Affirmed.

B. S. Gregory, of San Francisco, for appellants.

Melvyn I. Cronin, of San Francisco, for respondent.

PER CURIAM. This action was brought to recover for services alleged to have been performed by plaintiff's assignor at the request of the defendants. The court found for the plaintiff. The defendants have appealed from the judgment, and contend that the findings are not supported by the evidence.

The evidence shows without dispute that the corporation defendant was controlled by the individual defendants, who are its officers,

and that the title to certain real property, upon which was situated a dwelling house, stood in its name. According to the testimony of A. W. Wronski, plaintiff's assignor, who was by trade a decorator, he applied to defendants for employment. He was told that the house mentioned was to be remodeled, and it was then suggested that he purchase the property for \$32,000, subject to certain incumbrances thereon. This offer he declined, but after some negotiations it was agreed that he should superintend the work to be done at a daily wage of \$10; that his wages should be retained by defendants until he decided whether he would purchase the property, in which event they were to be applied on the purchase price. When the work of remodeling, with the exception of the installment of the electric fixtures, was finished he decided not to purchase and demanded his wages. His claim was admitted, and he was then offered certain lots in payment, which he refused. The defendants denied that they promised to pay for the work as alleged, but asserted that Wronski agreed to purchase the property; that the expense of remodeling was to be advanced by them and charged to Wronski, whose work in that connection was done on his own account and not otherwise. Defendants further testified in effect that they were ready, willing, and able to convey as agreed, but that Wronski refused to complete the deal. The latter's testimony as to his agreement with the defendants, the admission that his claim for wages was correct, and the offer to convey certain lots in payment was corroborated by other witnesses.

[1] The court impliedly found that the contract was as testified to by Wronski, and it was also found that the agreed and reasonable value of his services was \$10 per day, aggregating the sum of \$1,770. The testimony which the court believed was sufficient to support these findings, and, the evidence being conflicting, the findings cannot be disturbed on appeal.

[2] Defendants insist that the evidence does not sustain the judgment against the individual defendants. It sufficiently shows that the corporation was but an instrumentality for the transaction of the business of these defendants. Under such circumstances they are held to the same rules of accountability as the corporation. *Minifie v. Rowley*, 187 Cal. 481, 202 P. 673; *Williamson v. Marshall*, 54 Cal. App. 24, 200 P. 1058; *Campbell v. Hanford*, 67 Cal. App. 155, 227 P. 234.

We find no merit in the appeal, and the judgment is accordingly affirmed.

The second amended complaint and amendment thereto, together with demurrers, were as follows:

Amended Complaint for Accounting and Restitution as Trustees.

The plaintiff complains of the defendants, and alleges as follows:

I. Plaintiff is a resident of the City and County of San Francisco, State of California and a tax-payer on real estate therein, duly and regularly assessed to him, and that the defendant, Thomas F. Boyle, is the duly elected, qualified and acting Auditor of said City and County of San Francisco, and that the defendant, Ralph McLeran, is one of the duly elected, qualified and acting Supervisors of said City and County of San Francisco, and also is the duly appointed, qualified and acting Mayor of said City and County of San Francisco, in the absence of the regularly elected, qualified and acting Mayor, during all the time mentioned herein, and both were Trustees of said City and County of San Francisco, and of the money and property of said City and County.

II. That the City Charter of said City and County (Secs. 3, 4, 5, Chap. II of Article IV) provides that the Treasurer shall not pay any money, except upon demand approved by the Auditor, and such demands must show the number, date, amount, name of the original holder, on what account allowed, against what appropriation drawn, out of what fund payable, and if previously approved or allowed, by what officer, department or Board it has been so approved or allowed, and prohibits the said Auditor approving, or delivering with his approval, any demand unless it has been allowed by every officer, Board, department and committee required to act thereon.

That said Charter (Sec. 7, Chap. III, Art. IV), further provides that "said Auditor shall not approve any demand, unless the money is legally due, and its payment authorized by law, and payable out of some appropriation and fund specifically and lawfully provided therefor", and that said demand must "specify each special item, date, and amount composing it, and refer by Chapter and Section to the provisions of this Charter authorizing the same."

That said Charter of said City and County further provides (Sec. 6, Chap. III, Article IV), that "No demand shall be paid by the Treasurer, unless it specify each several item, date and amount composing it, and refer by title, date and section to the law, or ordinance or provision of this Charter authorizing the same * * * and must upon its face appear to have been expressly made payable out of the funds to be charged therewith."

Section 11 of Article XVI of said Charter provides that "Every officer who shall approve, allow, or pay any demand on the treasury not authorized by law, ordinance, or this

Charter, shall be liable to the City and County individually and on his official bond for the amount of the demand so illegally approved, allowed, or paid."

III. That said Charter further provides (Secs. 6, 7, Chap. I, Art. III), that no money shall be drawn from the Treasury unless in consequence of appropriations made by the Supervisors and upon warrants duly drawn thereon by the Auditor, and no warrant shall be drawn except upon an unexhausted specific appropriation, and that such specific appropriations must be made by the Board of Supervisors before the first Monday of June, in each year.

IV. That during all the times herein mentioned and for more than four years last past, said McLeran, Rolph, Dailey, Searles and Eckart mentioned herein have been officers of said City and County of San Francisco, and did continue to be until January 1st, 1926, said McLeran as a member of the Board of Supervisors, said Rolph as Mayor, said Dailey as an Assistant City Attorney, said Searles as an Attorney of the Board of Public Works, and said Eckart as an Assistant City Engineer; and said Charter provides that their salaries shall be in full for all services and claims against said City and County.

V. There was presented to said Auditor of said City and County, for his approval as such Auditor for payment by said Treasurer out of the funds of said City and County of San Francisco, demand No. 1113, dated November 9, 1925, drawn in favor of said defendant, Ralph McLeran, for the sum of Three Thousand Four Hundred and Sixty-nine Dollars and Thirty-seven Cents (\$3,469.37), "for the payment of expenses of James Rolph, Jr., Mayor of said City and County, Attorney J. Dailey, Attorney R. Searles, and Assistant City Engineer N. Eckart, incurred on their trip to Washington, D. C., and return, covering a period of six weeks, in connection with Hetch-Hetchy Water and Power Matters" and that it is "to be paid out of the 'Hetch-Hetchy Construction Fund,'" and these are the only matters alleged on the face of said demand, and therefore do not comply with the said provisions of said Charter.

VI. That said demand cannot be lawfully approved by said Auditor, or lawfully paid by said Treasurer, because of the following decisive objections thereto:

1. Because of the said defects on the face of the demand.

2. If the said "expense, price or consideration" is payable from the Treasury of the said City and County, then Sections 5 and 6 of Article XVI of said Charter prohibits the payment of this demand, in that a Supervisor, and officers and employees of said City and County have become directly and indirectly interested in the performance of the contract, work, business, expense, price and consideration embraced in said demand, and said in-

terest was acquired during the time for which they were elected and appointed to said offices and employment, and the said interest and the acquisition of said interest did not devolve upon them, or any of them, by law.

3. That said demand does not specify any law, or ordinance, or provision of the City Charter, by title, date, section, or otherwise, authorizing the approval or payment of said demand; nor upon its face does it appear that it was expressly made payable out of the Hetch-Hetchy Construction Fund.

4. That the said claim is barred under Section 1, of Chapter IV of Article III of said Charter, in that "if valid, it accrued and was due and payable in June, 1925, and must be presented within one month thereafter," and it was not presented until November 9, 1925, more than six months thereafter.

5. That the said Supervisor, McLeran, and the other officers and employees mentioned in said claim, have neglected and refused to comply with the provisions of said Charter and Laws regulating their duties toward public ownership and operation of public utilities, as is hereinafter more specifically set forth, and have also absented themselves without legal cause, from the duties of their offices during the said six weeks in Washington, D. C.

6. That payment from said funds for the board, lodging and travelling expenses of said officials in addition to their salaries cannot lawfully be done, as it is not for a municipal use, or for municipal purposes, and is entirely different from furnishing board, lodging and travelling expenses as a part, or all, compensation for services rendered, and is an increase of the said salaries of said persons.

7. That said demand is an attempt by said Ralph McLeran to reimburse himself and these other persons, for moneys which they paid out for their own personal travelling expenses during said trip to and from Washington, D. C., and not on any business of or for the said City and County of San Francisco, and that said defendant, Ralph McLeran, as such Supervisor, sat in with the said Board of Supervisors as a member, when the payment of said claim was so voted and ordered by the said Board of Supervisors.

8. That no appropriation whatever was ever made of any fund whatever out of which to pay said claim, or any part thereof, and the money in the "Hetch-Hetchy Construction Fund" is expended entirely under the supervision of the Board of Public Works, and that there never was any contract for said board, lodging, travelling expenses, or items, constituting such demands, and that the expenditure of such money by defendants was no part of the official duties of said officers.

9. That said money cannot be paid out of the "Hetch-Hetchy Construction Fund," as the money in said fund comes entirely from the sale of an issue of bonds voted by the people of San Francisco, for the construction

of Hetch-Hetchy Project, and such construction is not yet fully accomplished, and Section 10 of Article XII of said City Charter expressly provides that the proceeds of such sale "shall be applied exclusively to the purposes and objects mentioned in the ordinance authorizing such issue, until such objects are fully accomplished," and that all surplus earnings from the operation of such utility must first be applied to the payment of interest and sinking funds for the redemption of said bonds" and there is not, and has not been, any word or words in said ordinance, mentioning, or including any of such items of said demand, and there has not been any, and there is no surplus earnings from the operation of said utility. And that Section 16 of said Article XII, also minutely specifies what disposition shall be made of the earnings of all public utilities, and said demand does not come within any of said specifications.

VII. The Charter of said City and County of San Francisco has declared it to be the purpose and intention of the people of said City and County, that its public utilities shall be gradually acquired and ultimately owned by said City and County, and also that said City and County shall operate all such public utilities, and for several years past the said City and County has been in the actual construction and operation of such public utilities, among which is the collecting and bringing water, and the making and bringing of electric and other power from certain parts of California into said City and County of San Francisco, for the use and benefit of said City and County, and its inhabitants, and for that purpose said City and County obtained from the Government of the United States of America a grant of certain territory and properties commonly known as the "Hetch-Hetchy Grant" and "Hetch-Hetchy Project" which was accepted by said City and County of San Francisco, as Trustee, to carry out the purposes expressed in said grant by the Act of Congress of the United States among which purposes was that said grant, and the results and products thereof should not be sold in any way for any private purpose, or to any private corporation but was for the exclusive use and benefit of said City and County, and its inhabitants and that said City and County alone should distribute such benefits; and that in carrying out said purposes said City and County raised by the sale of bonds of said City and County, more than Forty-five Million Dollars (\$45,000,000.00) and has expended about \$45,000,000.00 thereof in constructing various reservoirs and power plants and other works to carry out said purposes, which various constructed units are called the "Hetch-Hetchy Project."

Said provisions of said Charter specifically provide that any official, employee, servant or agent of said City and County who in any way interferes with, or fails to carry

out the letter and spirit of said provisions, shall thereby forfeit his office or said position.

VIII. The said Board of Supervisors of the City and County of San Francisco, and all the defendants herein, well knew all the foregoing facts and obligations, and also that in violation thereof a majority of the said Board of Supervisors contemplated selling to a private corporation, and thereafter did make with and to said corporation a contract for the sale, of a part of the electric power and other products of said "Hetch-Hetchy Project," which contract was in absolute violation of the conditions of said grant from the United States and of the laws of the United States and of the laws of the State of California, and of the Charter of said City and County and a violation of the said trust with the United States, and of the duties of said Board of Supervisors, as Trustees for the benefit of said City and County, and its inhabitants.

IX. But before said contract of sale was made, a controversy arose among said Board of Supervisors, and throughout said City and County with the people thereof, as to the legality, expediency, benefit or wisdom of said contemplated contract, and the said Board of Supervisors of said City and County created a special tribunal, called an Advisory Committee, and conferred upon said Committee jurisdiction to determine whether it was legal, or wise, or for the best interests of said City and County, or against the interests of said City and County to make said contract, and to hear all parties discuss the same, and finally and conclusively determine for said City and County, whether said contract of sale was against the best interests of said City and County, or violated said grant, and said tribunal did so hear all parties and evidence, and did finally and conclusively determine and report to said Board of Supervisors and the defendants, that said contemplated contract and sale was against the best interests of said City and County, and illegal, in violation of said Charter, and grant, and trust, and that said Board of Supervisors, and said City and County had no power or jurisdiction or authority, to enter into any such contract, or to make any such sale, and that said contract was unwise and against the best interests of said City and County and the taxpayers and inhabitants thereof, and would cause the forfeiture and loss of said \$45,000,000.00 so invested by said City and County, and said determination of said Advisory Committee was duly and regularly entered upon the records of said Board of Supervisors and is and was, conclusive on said Boards and defendants.

X. The said Board of Supervisors and the defendants were and are estopped and barred by said judgment and decisions of said Advisory Committee from voting that said demand be paid out of the funds of said City

and County, or approving said demand, in that the illegality, expediency, wisdom and against the best interests of said City and County and the taxpayers and inhabitants of said City and County has been determined against said demand and becomes res judicata by the said solemn judgment of said Advisory Committee given as aforesaid full jurisdiction to hear and determine said issues and such decisions were and are binding, final and conclusive on said Board of Supervisors and all said persons named in said demand, and on said defendants.

XI. Nevertheless, after said decision and judgment, with full knowledge of all the facts alleged herein and the force and effect of said decisions of said Advisory Committee, said persons named in said demand deliberately, in bad faith to said City and County and the interests of said City and County and the taxpayers and inhabitants thereof, although no part of the duties, or authorities of their offices or employments, and without any leave or authority from said City and County, and in direct violation of the said Charter and the duties of their offices and employments, went to the City of Washington, D. C., and endeavored to override and disregard the said judgment of said Advisory Committee and to secure the approval of the Secretary of the Interior and other officers of the United States of the said contract of sale to said private corporation which said board of supervisors—or a majority thereof—had voted to make with said private corporation after the said decision of said Committee in direct violation of said charter, said grant, said laws of the United States and the duties of said defendants and all officials as trustees of the said City and County, and the people thereof, of said United States and of the said grant, which vote of said board of supervisors the persons named in said demand did all in their power to secure, and each and all of said acts being against the interests of said city and county and the inhabitants thereof, but for the benefit of said private corporation as all the defendants and persons herein mentioned well knew; but the said Secretary of the Interior and all said national officials refused to in any way approve said contract, or proceedings, and now said persons seek to compel the said city and county and the taxpayers thereof to pay in addition to their salaries for the said time so devoted against the interests and to the injury of said city and county, also for the board, rooms, lodgings, and other expenses and money paid for the entertainment of the persons named in said demand during the time they were absent from their work in the city and county for which they were hired to give their personal attention in said city and county and for which they were paid by said city and county, and the payment of which demand is prohibited by said charter.

XII. There was no necessity or good reason whatever, for any of said persons going to said city of Washington, D. C., as aforesaid, or expending any money whatever for traveling, or other expenses to secure the approval of said contract as it was in plain violation of said section 13 of Article XII of said charter; and also as the beneficiary of said contract of sale, said private corporation, was already represented in said Washington before the various officials there endeavoring to have said contract of sale approved by said officials of the nation and the attorneys and persons so representing said private corporation were far abler, and had more influence there, than any of said persons named in said demand, and every argument in favor of the approval of said contract could be, and was there presented by them; and every legitimate argument could be, and was also presented to said officials of the nation by mail, and there was no reason or justification whatever for the persons named in said demand, or any of them, going to said Washington; and their going to Washington was futile, useless, unlawful, against the interests of said city and county and injurious to said city and county and an indefensible attempt to so violate the said grant to, and contract with, and trust to said city and county and the inhabitants thereof, from the United States, leading lawfully to, a loss of more than \$45,000,000, of the money of said city and county and of said grant from the United States, and by the said conduct of the persons mentioned in said demand the city and county and the inhabitants thereof are now liable to have a judgment of forfeiture of said grant and all said money entered in the United States Court as soon as the government of the United States commences action for said judgment of forfeiture, and for producing such damage to the said city and county and the inhabitants thereof is the money called for in said demand to be paid, and it was paid on December 16, 1925.

XIII. On November 3rd, 1925, there was directly submitted by said defendants and those interested in said contract, to the voters of said city and county of San Francisco, at an election held therein on said day, the approval or disapproval of the conduct of the officials and persons who made said contract, and the said contract, for the reasons hereinbefore stated which were then and there submitted to said voters, and said contract and the conduct of said persons who made said contract was overwhelmingly disapproved, and said McLeran overwhelmingly defeated for re-election as supervisor, and said vote was then, and is now, binding and conclusive on all the persons named in said demand and said defendants and every official of said city and county that said conduct and contract were repudiated by said voters and that said contract was against the interests of said city

and county and the taxpayers and inhabitants thereof, and illegal, and in direct violation of the intents, purposes, language, and spirit, and actually destructive of said intents and purposes and their accomplishment, of said charter, and in direct violation of the laws of California, of the United States, and of said grant.

XIV. Notwithstanding all these facts known to all the defendants, the defendant Boyle as said auditor, on December 16, 1925, at the request and solicitation of the said McLeran approved and delivered said demand to said McLeran for the purpose of having him draw said money from said treasury of the city and county, and on the same day said McLeran presented said approved demand to the treasurer at said treasury, and received in cash from said treasury the full amount of said demand and at said time the taxes paid by plaintiff were in said treasury, and the said conduct of said defendants was in direct violation of their duties as trustees of said city and county and of and for the taxpayers thereof, and said defendants are liable for the amount of said demand with interest thereon to be by them returned to said treasury at once.

XV. A demand upon the city attorney, or mayor, or board of supervisors, or other officials of said city and county to bring this, or any other suit to compel the return of said money would be futile and useless as the payment was by their direct approval and orders, and they would refuse to bring any such suit as said city attorney stated December 15, 1925.

Wherefore, plaintiff prays, that said defendants be decreed trustees of the amount of said demand, so approved and paid, and that they be ordered forthwith to pay the amount thereof with compound interest thereon, into the said treasury of said city and county forthwith, and that such other orders and decrees be made and entered as the circumstances of the case and the interests of said city and county and taxpayers thereof require.

Demurrer to Second Amended Complaint.

Come now the defendants above named and demurring to the second amended complaint of plaintiff on file herein, for grounds of demurrer state:

That said second amended complaint does not state facts sufficient to constitute a cause of action against these defendants.

Wherefore, defendants pray that this demurrer be sustained without leave to amend, and that defendants be hence dismissed with their costs of suit.

Plaintiff's Amendment to Second Amended Complaint.

Leave of court having been first obtained, the plaintiff hereby amends his second amend-

ed complaint in the above entitled action by adding to paragraph V of said second amended complaint the following:

The foregoing statement of said demand was as given to the plaintiff by said auditor in the private office of said auditor he reading said demand from a paper in the hands of said auditor which he declared to plaintiff was the demand, and plaintiff took said reading down in writing as read to him by said auditor, and all that was so read to him by said auditor was incorporated in said complaint, which plaintiff assumes was all that the said auditor considered a part of said demand, and which on the face of the paper is said to be the demand. But since the commencement of this action and at the argument of the demurrer the attorney for said McLeran presents to plaintiff a photostatic copy of a paper-writing which he says is the demand and requests that it be incorporated in the amendment to said second amended complaint, and it is as follows:

"City and County of San Francisco. Hetch-Hetchy Operative Revenue Fund 1925 appropriation demand No. ——— (Department). The Board of Supervisors hereby requests that the warrants listed hereon, constituting this demand be approved by the board of supervisors; allowed by the auditor and paid by the treasurer. 48276 Date Nov., 9, payee Ralph McLeran amount 3469.37 Warrant No. 1113 for expenses of self, mayor Rolph, attorneys Dailey and Searls & asst. City Engineer Eckert to and from Washington, D. C. covering period of six weeks in connection with Hetch Hetchy Water & Power Matter Resolution No. 24848 (New Series). Resolved that the sum of \$3469.37 be and the same is hereby set aside and appropriated out of Hetch Hetchy Operative Revenue Fund, and authorized in payment to Ralph McLeran, being expenses for account of self, mayor Rolph, attorney J. Dailey, attorney R. Searls and assistant city engineer N. Eckert to Washington, D. C. and return, covering a period of six weeks; in connection with Hetch Hetchy Water and Power matter. Finally passed board of supervisors December 7, 1925: Ayes: Supervisors Badaracco * * * Excused supervisor Ralph McLeran. * * * passed to print board of supervisors December 7, 1925. Approved December 11, 1925, James Rolph, mayor. Allowed December 11, 1925, Thomas

F. Boyle, Auditor. Approved by Department Items No. ——— to No. ———. George Lull, City Attorney. Dec. 12, It."

Plaintiff alleges that there was no such fund appropriated out of which said demand could be lawfully paid, and that said Searls mentioned therein was the attorney for said Hetch-Hetchy Project, and the said Lull had nothing to do with it and it was not a part of, or connected with his department and he could not approve the same and it was not approved by the head of the department having charge of said Hetch-Hetchy Operative Revenue Fund and its disbursement, and it was not advertised the number of times and in the manner required by the said charter before it could be lawfully approved, or paid, and the foregoing resolutions, proceedings and actions of said officials as set forth in said paper writing were, and are of no legal effect, or authority whatever for the payment of any of said money from the said public treasury.

Demurrer to Second Amended Complaint as Amended.

Come now the defendants above named and demurring to the second amended complaint as amended of plaintiff on file herein, for grounds of demurrer state:

That said second amended complaint as amended does not state facts sufficient to constitute a cause of action against these defendants.

Wherefore, defendants pray that this demurrer be sustained without leave to amend, and that defendants be hence dismissed with their costs of suit.

Daniel O'Connell, of San Francisco, for appellant.

Edward F. Moran, of San Francisco, for respondent Boyle.

Robert M. Searls, of San Francisco, for respondent McLeran.

PER CURIAM. Upon a careful examination of the record herein, we are satisfied that the plaintiff's complaint failed to state a cause of action, that the demurrer thereto was properly sustained, and that the judgment in favor of the defendants thereon was correctly given and made, and that this appeal is without merit. The judgment is affirmed.

208 Cal. 715

GLOBE INDEMNITY CO. et al. v. INDUSTRIAL ACCIDENT COMMISSION OF STATE OF CALIFORNIA et al. (S. F. 13638.)

Supreme Court of California. Jan. 27, 1930.

1. Master and servant §405(2)—Evidence sustained finding that newsboy, at time of injury, was "employee" of publisher; "independent contractor."

Evidence showing right of publisher to discharge newsboy at any time, and right of control in publisher, *held* to sustain finding of Industrial Accident Commission that newsboy, at time of injury, was an employee of publisher, rather than an independent contractor dealing with publisher relative to distribution of newspapers.

[Ed. Note.—For other definitions, see Words and Phrases, First, Second, and Third Series, *Employé; Independent Contractor.*]

2. Master and servant §367—Best test to determine whether relation is that of "independent contractor," or employer and "employee," is right of control.

One of the best tests in determining whether relation is that of an "independent contractor," or that of employer and "employee," is the right of control, irrespective of fact of actual interference in conduct of work.

3. Master and servant §375(1)—Injury to newsboy falling from bicycle in railroad station, when about to procure newspapers for distribution, occurred in "course of employment."

Injury to newsboy by reason of falling from his bicycle, while within precincts of railroad station and about to procure bundle of newspapers for distribution, *held* in "course of employment," regardless of the "going and coming" rule.

[Ed. Note.—For other definitions, see Words and Phrases, First and Third Series, *Course of Employment.*]

In Bank.

Certiorari to order of Industrial Accident Commission.

Certiorari by the Globe Indemnity Company and another to review and annul an award of the Industrial Accident Commission of the State of California, in favor of Jack Clemmer. Award affirmed.

Treadwell, Van Fleet & Laughlin, of San Francisco, for petitioners.

Edward O. Allen, of San Francisco, for respondents.

PER CURIAM. Certiorari to review and annul an award of the Industrial Accident Commission.

The application was made by Jack Clemmer, a 12 year old newsboy, against Fred Johansen, Independent Publishing Company, publisher of the San Rafael Independent, and the Tribune Publishing Company, the pub-

lisher of the Oakland Tribune. The boy was injured by falling from his bicycle while within the precincts of the railroad station at San Rafael, when he was about to procure his bundle of newspapers for distribution. Hearings were had, and the commission found that Jack, at the time of the accident which caused the injury, was in the employ of the Tribune Publishing Company, and that the injury arose out of and occurred in the course of that employment; that, though he was at the same time employed by the San Rafael Independent, he was not acting in the course of that employment, but was engaged in a material detour therefrom at the time the injuries were sustained. As to that employer the application was therefore dismissed.

The Tribune Publishing Company and its insurance carrier, Globe Indemnity Company, after proceedings duly had, petitioned this court for a writ of review and to annul the award consequently ordered on the findings of the commission, on the grounds (1) that the evidence does not sustain the finding that Jack Clemmer was an employee of the petitioner, the Tribune Publishing Company, but in fact was an employee of Fred Johansen, who was an independent contractor; and (2) that, if this court should be of a different opinion, nevertheless the injury did not occur in the course of the employment. Under the second ground, the "going and coming" rule is invoked. The findings as to the San Rafael Independent are not seriously questioned by the petitioners.

Fred Johansen, also a minor at that time of about 15 years, with the assistance of his mother, carried on an agency to distribute the Oakland Tribune to subscribers in San Rafael. The record shows without dispute that he paid to the Tribune Publishing Company \$1.50 per 100 for the newspapers and collected 85 cents per month from each subscriber, which he retained and for which he receipted on printed forms furnished by the Tribune Publishing Company. He was also paid \$3 a month additional, which was intended to compensate him for the extra expense of distribution because of the large and scattered territory. He was furnished a list of the subscribers by the company, which was, of course, changed as new subscribers were added or old subscriptions were canceled. Notification of such changes was sent by the company. Complaints of poor service received by the company were also forwarded by it to Fred. A representative of the Tribune Publishing Company occasionally called to see if everything was all right, if more receipt forms were required, etc., but who gave no instructions on such visits.

It is conceded that at no time did the publishing company instruct Fred as to the

means he should use in distributing the papers, the route that should be taken, or whom, if any one, he should employ to assist him. The publishing company knew that Fred was employing assistance in his work and made no objection thereto. His only instructions were that deliveries of papers should be made as early as practicable after their arrival at the San Rafael railroad station. A "bond and guaranty" was signed by Fred's father to guarantee to the Tribune Publishing Company payment of its bills rendered to Fred. The guaranty also provided that the company required 30 days' notice of any termination of the agreement by Fred, but reserved the right and privilege "to change agents at any time without question." It was testified by a representative of the Tribune Publishing Company that the oral agreement with Fred was that he would be discharged only if his services were deemed unsatisfactory.

The petitioners claim that the evidence is insufficient to sustain the commission's finding as to the employment within the meaning of the compensation act, and that it supports only a conclusion that Fred Johansen was purchasing newspapers at wholesale and selling them at retail, and was therefore, an independent contractor. If Fred Johansen was not an independent contractor, but was an employee within the meaning of the Workmen's Compensation Act, then the finding of the commission on the question of the employment of Jack Clemmer is correct.

[1, 2] We are of the opinion that the evidence fairly and sufficiently sustains the finding of the commission in that respect. The relationship between Fred Johansen and the Tribune Publishing Company comes within the tests stated in recent cases. It is unquestionably well settled that "one of the best tests to determine whether the relation is that of an independent contractor or that of employer and employee, is the right of control. It is not the fact of actual interference with the control, but the right to interfere, that makes the difference between an independent contractor and a servant or agent. * * * It is not a question of interference, or noninterference, not a question of whether there have been suggestions, or even orders, as to the conduct of the work, but a question of the right to act, as distinguished from the act itself or the failure to act. * * *" Hillen v. Industrial Acc. Commission, 199 Cal. 577, 581, 582, 250 P. 570, 571. In Press Publishing Co. v. Ind. Acc. Commission, 190 Cal. 114, 121, 210 P. 820, 823, it was said: "One of the means of ascertaining whether or not this right to control exists is the determination of whether or not, if instructions were given, they would have to be obeyed." As was also stated in the case of Hillen v. Ind. Acc. Commission, *supra*, page 581 of 199

Cal., 250 P. 571. "Wages may be measured by time, by the piece, or by any other standard."

A case in which evidence closely resembling the facts here was held sufficient to sustain the finding of employment is *Call Publishing Co. v. Ind. Acc. Commission*, 89 Cal. App. 194, 264 P. 300. In that case, however, the agent received \$22.50 a week additional, instead of \$3 per month. But we are not basing our conclusions on the method or amount of payment, but rather on the existing elements of personal relationship and right of control. It is clear from the record in the present case that the evidence sustains the conclusion that the Tribune Publishing Company could discharge Fred at any time, and that, if given any instructions, they would have to be followed by Fred, at the risk of being discharged if he refused or failed to comply with them, and that, therefore, the right of control existed within the meaning of the tests stated by the authorities cited.

Petitioners make the contention that, if the decision in the *Call Publishing Co.* Case be extended to include the present case, then there will be nothing to prevent the payment of compensation by the publisher of a San Francisco newspaper to the employee of a newsdealer in a distant city, who purchased the company's newspapers at wholesale and sold them at retail. Such a case, however, is not tested by the terms by which the parties designate the relationship, but the conclusion, regardless of distance or locality, must be drawn from the facts and the application thereto of the appropriate rules of law.

[3] We are also of the opinion that the so-called "going and coming" rule does not apply to the facts shown by the record. It is not questioned that Jack Clemmer, if it be determined that he was an employee of the Tribune Publishing Company, was still in its employment when the injury occurred. The rule is invoked because it is contended that Jack and another lad to whom he was going to teach the Tribune route had not yet arrived at their destination, which was the railroad station at San Rafael, where it was their duty to pick up the papers for delivery. But the record sustains the conclusion that the boys collided, and Jack was hurt, within two or three feet of the station platform upon which the papers were lying, and just about as the boys were about to alight from their bicycles, and that the occurrence took place within the precincts of the station. We think the facts on this phase of the case are concluded by *Makins v. Ind. Acc. Commission*, 198 Cal. 698, 701, 247 P. 202, 203, 49 A. L. R. 411, wherein it was said: "The rule is well settled that an employee, in going to work, comes under the protection of the act when he enters the employer's premises or upon the means provided for access thereto, though the premises and such means of access are

not wholly under the employer's control or management. * * *

We conclude that the findings of the commission are sufficiently supported by the record presented, and that the award must be affirmed.

It is so ordered.

208 Cal. 677

PIONEER EXPRESS CO. v. RILEY, Controller. (S. F. 13603.)

Supreme Court of California. Jan. 18, 1930.

1. Carriers ⇨11—Business of transportation company conveying freightage between fixed termini is not inseparable from drayage business at terminals.

Business of a public transportation company in conveying freightage from one of its fixed terminal stations to another is not, in nature of things, inseparable from pick-up and delivery business, which has to do with collection of freightage at its terminal depots at one end and distribution thereof at the other end of fixed termini, which it is bound to establish and maintain in conformity with law.

2. Corporations ⇨5—Persons, though belonging to one family, without fraudulent design maintain separate corporate entities conducting several lines of separable business in some degree connected.

Group of persons, whether belonging to one family or not, may form themselves into one or more corporate entities for convenient conduct of business as they may see fit to undertake in good faith and without fraudulent design, and maintain such separate corporate entities for purpose of conducting several lines of business which, while in some degree connected, are not in nature of things inseparable.

3. Taxation ⇨57—Citizen or citizens seeking to engage in single line or several allied lines of business may adopt lawful means existing for lessening taxes.

Any citizen or group of citizens seeking to engage in any single line or in several allied lines of business endeavor by which property is accumulated and profits derived may adopt whatever lawful means may exist for the lessening of the burden of taxes which in one form or other may be laid on such properties or profits.

4. Statutes ⇨245—Statutes levying taxes are not extended by implication beyond clear import of language or their operations enlarged to embrace matters not specified.

In every case involving the interpretation of statutes levying taxes, it is established rule not to extend provisions of statutes by implication, beyond the clear import of language used, or to enlarge their operations so as to embrace matters not specifically pointed out.

5. Statutes ⇨245—When doubt exists, statutes levying taxes are construed most strongly against government.

In case of doubt, statutes levying taxes are construed most strongly against the government and in favor of the citizen.

6. Taxation ⇨469—Neither state equalization board nor controller could go behind corporate entities conducting transportation business between fixed termini and drayage business within cities to show ownership by one family to increase tax burden of one (Const. art. 13, § 15; Pol. Code § 3664aa, as added by St. 1927, p. 17).

In absence of showing of want of good faith or any fraudulent intent by family of persons dominating allied corporations to accomplish evasion of tax burdens by having one corporation for conducting transportation business between fixed termini and another for drayage business within cities at termini, neither state board of equalization of taxes nor state controller could, to increase tax burden of one legally assessed by virtue of Const. art. 13, § 15, and Pol. Code, § 3664aa, as added by St. 1927, p. 17, go behind corporate entities engaged in conducting severable lines of business to show that capital stock of entities was owned or controlled by one family engaged in doing that which in absence of alliances they would have lawful right to do.

In Bank.

Application by the Pioneer Express Company for writ of mandate prayed to be directed against Ray L. Riley, as Controller of the State, to compel respondent to issue an official receipt showing payment in full of all taxes due by or assessed against petitioner. Writ granted.

Thelen & Marrin, of San Francisco, for petitioner.

U. S. Webb, Atty. Gen., and R. L. Chamberlain, Deputy Atty. Gen. (Dixwell L. Pierce, of Sacramento, of counsel), for respondent.

RICHARDS, J. The petitioner applies to this court for a writ of mandate to be directed against Ray L. Riley, as controller of the state of California, and having for its purpose that of compelling him to issue to the petitioner his official receipt showing that the petitioner has paid in full all taxes which are due and payable to the state of California or that may be legally assessed against the petitioner, its franchises or property for the fiscal year 1929-1930, under and by virtue of the provisions of section 15, article 13 of the Constitution, and section 3664aa of the Political Code of the state of California as added by St. 1927, p. 17. By the aforesaid provisions of the Constitution and Political Code the state board of equalization is organized and empowered to act in the matter of the levy and collection of state taxes upon such transportation companies as are common carriers and are engaged in doing business as such

upon the public highways between fixed termini within said state. The amount of the tax thus to be imposed and collected is 5 per cent. of the gross receipts of such transportation carrier, whether an individual, a partnership, or a corporation, and such tax is assessed and required to be paid to the state controller upon and after a report by such carrier to the equalization board, and upon an audit, if necessary, of the books and accounts of such carrier, in order to verify or qualify such report. The petitioner is, and for several years has been, a corporation duly organized as a highway transportation company, doing business along the public highways of this state between San Francisco and San Jose, with fixed terminals in each of said cities and in the intermediate towns and cities. Prior to March 24, 1929, the petitioner, as such transportation company, and in compliance with the foregoing provisions of the Constitution and Political Code, filed with the state board of equalization its report in conformity with the requirements of law and the regulations of said board, wherein the total gross receipts of said transportation company from the carrying of freight along said route for the year ending December 31, 1928, amounted to \$45,926.85. Thereafter the board of equalization caused an audit to be made of the books and records of the petitioner and also of the books and records of another corporation known as Gibson's Express Incorporated, and from which latter audit it appeared that the gross receipts of Gibson's Express Incorporated from the operation of its business, which is hereinafter more particularly described, for the year ending December 31, 1928, was \$58,557.31.

Upon receiving said audit, the board of equalization proceeded to add the gross receipts of Gibson's Express Incorporated, which had theretofore made to it no report, to the gross receipts of the petitioner herein, which had not included or mentioned the gross receipts of Gibson's Express Incorporated in its aforesaid report, and thereupon notified petitioner that its assessment as a highway transportation company would be based upon the added gross receipts of both corporations, amounting to \$104,484.16, and that the amount of the state tax to be levied and collected thereon was to be 5 per cent. thereof. The petitioner protested before said board against its increase in taxes. The board, after a hearing upon the protest, refused to modify its tax levy, and accordingly made and entered an order fixing the petitioner's tax for the fiscal year 1929-1930 at the sum of \$5,224.20, and, having done so, reported its assessment to the state controller as provided by law, and the state controller thereafter proceeded with the collection of the same in the manner provided by law. Thereupon the petitioner made payment to the controller of the amount of its tax which would have been leviable and collectible upon

its reported and audited amount of its gross receipts of the aforesaid fiscal year, exclusive of the amount of tax sought to be imposed upon it based upon the gross receipts of Gibson's Express Incorporated, for which latter sum it claimed it was not liable. It is conceded that, if this claim of the petitioner is well founded, it became by its aforesaid payment entitled to receive from the state controller the receipt which has been sought through the issuance of this writ.

The foregoing facts, together with certain other averments relating to the organization, stock ownership, and method of business of these two corporations, have been fully set forth in the petition filed herein, and, the order to show cause having been issued thereon, the respondent appeared and answered the petition, and in so doing made such admissions and denials as seemed to this court to require a reference for the purpose of ascertaining the truth of the disputed issues of fact. Such reference was made, B. Grant Taylor being appointed as referee to take such testimony, and said referee, after such hearings as were required, has made and filed his report herein. This matter coming on for hearing after the making and filing of said report, counsel for the respective parties have presented their oral argument and extended briefs in support and in opposition to the demand of the petitioner for the issuance of said writ, and, the matter having been submitted to this court for decision, it has thus become necessary to find the facts as developed by the report of the referee and by the admissions of the respective parties to this proceeding. The facts thus to be ascertained are in the main based upon either the undisputed evidence before the referee or the admissions of the parties hereto in their arguments and briefs, and which facts may be summarized and stated in their chronological sequence as follows:

The petitioner is, and ever since 1924 has been, a corporation duly organized under the laws of the state of California for the purpose of conducting the business of a public transportation company upon the public highways between San Francisco and San Jose and intermediate points. Prior to its corporate organization, and since about 1917, it had existed in the form of a copartnership, comprised of S. B. McLenegan, now deceased, and his son C. S. McLenegan, and which copartnership during the period of its existence conducted said business as such. During those years it had a rival in business known as Gibson's Express Incorporated, and which conducted up to 1919 a competing business with said partnership between said points, operating from separate termini. In 1919 these competing companies entered into an agreement to co-operate and to do a combined business from the same termini, and they accordingly in that year applied for, and received, permission so to do from the State

Railroad Commission. The two companies were not, however, merged thereby, but they continued to operate as separate institutions, maintaining their separate identities and equipment, as well as their separate partnership interests, stock ownership, and control. In 1924, as we have seen, said partnership became a corporation, and its stock ownership therein was divided as to practically the whole thereof between the two members of the said former copartnership. After such organization the two corporations continued as before to co-operate in business, but to maintain otherwise their separate entities. The business which both of these institutions were then conducting and thereafter continued to conduct co-operatively until January 1, 1927, was one which included, not only the transporting of freight of various kinds along the public highways between said fixed termini, but also what is known as a "pick-up and delivery service," which consisted in the collection of articles in the cities and towns within which they had their combined termini and the delivery thereof to such termini, whereupon such freight was transported to its several destinations, and, reaching there, was conveyed from such termini to the local address of the consignee.

On or about January 1, 1927, however, Gibson's Express Incorporated concluded to discontinue its intercity service as a transportation company and confine its operations to a local drayage business in the larger cities. At or about the same date the petitioner concluded to discontinue its pick-up and delivery service in such cities, and confine its activities solely to that of a common carrier, conducting a transportation business between its designated termini. It accordingly, on or about May 21, 1928, filed an application with the Railroad Commission for permission to eliminate from its former transportation service the pick-up and delivery feature thereof, and to discontinue such service within the corporate limits of San Francisco, Burlingame, San Mateo, Redwood City, Palo Alto, and San Jose, and to thereafter confine its operation and tariff schedule to its transportation business between its fixed termini in said cities. The Railroad Commission, after a hearing thereon, granted said application, and permitted the petitioner to file with said commission a tariff schedule from which all provisions and charges relating to a pick-up and delivery service in said cities were eliminated, and the tariff schedules of the petitioner were confined to its aforesaid transportation service between said termini. At or about the same time Gibson's Express Incorporated, having abandoned its transportation service formerly maintained between said termini in said cities, applied to the Railroad Commission for permission to formally abandon such service and all rights, privileges, or franchises theretofore possessed and operated under prior orders of the commis-

sion, and to confine its operations strictly to a pick-up and delivery service, or, in other words, a draying business in said cities. The Railroad Commission also granted this application, and on or about October 31, 1928, made and entered its order canceling all of the existing tariffs of Gibson's Express Incorporated, with the result that said corporation has not since said date had any tariff on file with said commission, nor have its operations in its said draying business been subject to the jurisdiction of said commission.

The foregoing conditions and limitations of the respective business conducted by each of said corporations as thus established under the respective orders of the Railroad Commission still continue to exist, and neither of said corporations since the making and entry of such orders has undertaken to conduct any business other than that to which its respective operation was thus confined. Upon the organization of Pioneer Express Company as a corporation, the stock of said corporation then issued and ever since outstanding amounted to 2,500 shares of common stock, the whole of which, with the exception of a share or two, was divided between S. B. McLenegan and his son C. S. McLenegan, the members of the preceding copartnership. The duly elected officers of said corporation were: President S. B. McLenegan, during his lifetime, Vice President C. S. McLenegan, Secretary E. M. Hays, a daughter of S. B. McLenegan. The board of directors thereof were the aforesaid persons and Walter Robinson, the attorney for the corporation. Just prior to the death of S. B. McLenegan in 1927, his son C. S. McLenegan acquired by gift from his father practically all of the stock of Pioneer Express Company, and has since been the owner thereof. The incorporators of Gibson's Express Incorporated were originally J. R. Gibson, Bertha Ross, and H. F. William Brockman, who were the owners of practically all of its issued stock, and so continued to be down to the early part of 1928, when, one of its incorporators having died, the remaining two concluded to go out of business, and as a result thereof the entire stock of said corporation was offered for sale, and about one-half thereof was purchased by Carrie C. McLenegan, the wife of S. B. McLenegan, with funds belonging to her as her separate property. Not having sufficient money on hand from that source to purchase all of the stock of the aforesaid incorporators of Gibson's Express Incorporated, her husband, S. B. McLenegan, purchased the balance thereof for the purpose of holding the same until Carrie C. McLenegan might be in funds to take over the same, which she did shortly thereafter, repaying her husband the purchase price thereof out of her separate property, and she has ever since said time been the owner of practically all of the corporate stock of Gibson's Express Incorporated as her sole and separate estate, and has been

since her purchase of the stock the president of the corporation.

Upon the acquisition of the entire stock ownership of Gibson's Express Incorporated by his mother, C. S. McLenegan, who had already by the death of his father become the owner of the larger portion of the corporate stock of Pioneer Express Company, became manager of both corporations, and managed and operated the same and the business thereof from the same office, but keeping the books and accounts of each of said corporations entirely separate from the other, and distributing the net earnings and dividends of each periodically to those persons who appear upon such books to be the owners respectively of the corporate stock thereof. It would be natural under such circumstances that a large part of the pick-up and delivery business, consisting of the bringing of packages of freight to the office and terminal of the Pioneer Express Company in any of said cities for the purpose of its transportation by the latter to its office and terminal in the city to which such freight had been consigned, would be done through the medium of Gibson's Express Incorporated. The charges, however, for such pick-up and delivery service were kept separate on the books of said corporation, and, on the other hand, the cost and charges for the transportation of said freight to the terminal in each of said cities to which said freight was destined to go were in every instance separately kept upon the books of Pioneer Express Company.

The evidence taken herein discloses that Gibson's Express Incorporated did a considerable amount of drayage in each of said cities wherein it had headquarters independently of its pick-up and delivery service with relation to packages destined to its respective termini by the Pioneer Express Company, and that, in so far as said separate drayage business was being conducted, the Pioneer Express Company had no interest or concern therein, and was entitled to receive, and did receive, no part of the profit derived therefrom by Gibson's Express Incorporated. Under the combined management of these corporations by C. S. McLenegan after the death of his father, the clerical work of the combined offices of both was, in the main, performed in such offices by the employees of Gibson's Express Incorporated, which paid the salaries of these employees for such service, making no charge therefor against the other corporation. C. S. McLenegan, however, the manager of both corporations, was paid a fixed and separate salary for his service as such to each, and as to all the other employees of each of said corporations they were paid in each and every instance by the corporation to which their services as the employees thereof were rendered, and, as we have seen, the net earnings of each corporation were strictly and separately kept upon the books thereof, and were periodically distributed to

the stockholders of each of said corporations according to their respective stock ownership therein as shown upon the books of each. The evidence taken before the referee further shows that about the time when these two entities ceased their rivalry a third corporation, known as Peninsula Terminal Company, was organized, for the purpose of owning and maintaining terminal offices in each of the said cities, together with automotive equipment in the way of trucks and cars for the use of each of the aforesaid corporations in and about the cities where such terminals were maintained. The stock of this latter corporation was divided between the other two corporations, and is now held separately by each. As to the automotive equipment owned by the Peninsula Terminal Company, it rents the motor vehicles constituting such equipment to each of said corporations according to the daily needs thereof, being paid by each a fixed rental for such use, and distributing the net earnings of the latter corporation periodically among the stockholders thereof.

The foregoing facts with reference to the development, stock ownership, and operations of these three corporations have been established by practically undisputed evidence, and in fact are in the main admitted by the showing made and the briefs submitted by the counsel for the respondent. It is, for example, admitted "that Pioneer Express Company and Gibson's Express Incorporated have each its own set of stockholders and officers and maintain a separate corporate existence." It is contended, however, by the respondent that there is such an interlocking of control and ownership in the McLenegan family as binds these corporations together in an inseparable whole. It is nowhere, however, shown, and it is not contended by the respondent, that in the creation and maintenance of each of these corporations there was any fraudulent purpose or intent on the part of the members of the McLenegan family, and at the last analysis the respondent concedes "that it is the nature of the business conducted that determines its tax classification and not its ownership."

[1] The aforesaid concessions made on behalf of the respondent would seem to reduce the problems before us for determination in this proceeding to two in number, the first of which is whether the nature and conduct of the two lines of business, as conducted by the three foregoing corporate entities, are in their nature and essence inseparable. The answer to this problem seems to us to be found in the history and development of freight transportation between different and distant termini. It is a matter of common knowledge that, prior to the recent development of transportation along the public highways of this and other states by means of motor vehicles, such transportation was, in the main, conducted by the railroads, and that during such period,

and even up to the present time, the business of pick-up and delivery of freightage was one which was carried on by trucking companies or individuals, and was entirely separate and severable from the main business of the railroads, which was that of transporting such freightage as was brought by such individuals or trucking companies to its established depots to the point of destination thereof which was at an established depot of the carrier, and that the matter of bringing such freightage to the carrier's depot at the one end, or of delivering the same freightage from the carrier's depot at the other end to the consignee thereof at his home or place of business, was a matter with which the railroad carrier had no concern. There is nothing in the recent development of highway transportation by means of motor trucks or vehicles which would render the collection and carriage and delivery of freightage any more inseparable than it was formerly or than it is now when the consignor seeks to choose a railroad for the carrier of his wares. It may be an inducement to a consignor to have his goods picked up at his doorstep, but it is not an inseparable condition that this should be done by a single transportation company, nor is it an inseparable condition that a consignee must have his delivery made at his doorstep by a single concern, and we are of the opinion as a matter of common observation that there are still many consignors who make use of the almost numberless expressmen to convey their goods to the fixed terminal of the transportation company, and many consignees who so receive delivery of such goods at the other fixed terminal of the transporter thereof. We conclude, therefore, that the business of a public transportation company in conveying freightage from one of its fixed terminal stations to another is not, in the nature of things, inseparable from the pick-up and delivery business which has to do with the collection of freightage at its terminal depots at the one end and the distribution thereof at the other end of the fixed termini which it is bound to establish and maintain in conformity with law.

[2-5] The second problem is as to whether a group of persons, whether belonging to one family or not, who may choose to form themselves into one or more corporate entities for the convenient conduct of such business as they may see fit to undertake, may not in good faith and without fraudulent design adopt and maintain such separate corporate entities for the purpose of conducting several lines of business which, while in some degree connected, are not in the nature of things inseparable. We are satisfied, without going

into further detail, that common knowledge and observation would serve to supply an answer to this problem which would also be adverse to the contention which the respondent makes in opposition to the issuance of this writ. The authorities which have been cited on both sides of this controversy are of little aid or value in the determination of the two foregoing problems. But we think it may be stated as a reasonable conclusion of this whole matter that any citizen or group of citizens seeking to engage in any single line or in several allied lines of business endeavor by which property is accumulated and profits derived may adopt whatever lawful means may exist for the lessening of the burden of taxes which in one form or other may be laid upon such properties or profits. In every case involving "the interpretation of statutes levying taxes it is the established rule not to extend their provisions, by implication, beyond the clear import of the language used, or to enlarge their operations so as to embrace matters not specifically pointed out. In case of doubt they are construed most strongly against the government, and in favor of the citizen." *Gould v. Gould*, 245 U. S. 151, 38 S. Ct. 53, 62 L. Ed. 211; *Estate of Potter*, 188 Cal. 55, 64, 204 P. 826.

[6] We are of the opinion that the foregoing principle should be given full application to the powers and duties of the state board of equalization and of the state controller with regard to such situations as are presented by the practically uncontradicted evidence and the admissions of the parties in the instant case, in the absence of any showing of a want of good faith or of any fraudulent intent on the part of the McLenegan family to accomplish an evasion of tax burdens which the state under the foregoing provisions of the Constitution and statutes may lawfully impose. It would not seem just or reasonable to permit such officials to go behind the corporate entities which may be engaged in conducting certain severable lines of business in an endeavor to show that the capital stock of such corporate entities is owned or controlled by a few or many persons, whether such persons may happen to be allied in family or in social or in business relationships while engaged in doing that which, in the absence of such alliances, they have a lawful right to do.

Let the writ issue as prayed for.

We concur: WASTE, C. J.; SHENK, J.; CURTIS, J.; PRESTON, J.; LANGDON, J.; SEAWELL, J.

208 Cal. 661

**RECLAMATION BOARD OF CALIFORNIA
et al. v. RILEY, State Controller, et al.
(S. F. 13663.)★**

Supreme Court of California. Jan. 17, 1930.

Rehearing Denied Feb. 13, 1930.

1. States ⇨119—Payment of drainage district warrants outstanding before passage of act authorizing payment held not invalid as gift of public money (St. 1911, Ex. Sess. p. 117, as amended, § 37a, subd. 3, added by St. 1929, p. 714, § 5; Const. art. 4, §§ 31, 32).

Payment of drainage district warrants from joint navigation and flood control project fund, with consent of reclamation board, as authorized by St. 1911, Ex. Sess. p. 117, as amended, § 37a, subd. 3, added by St. 1929, p. 714, § 5, where warrant was outstanding prior to enactment of act authorizing payment, at which time state was under no legal obligation to assume or pay warrant, held not invalid as gift of public money prohibited by Const. art. 4, §§ 31, 32.

2. Constitutional law ⇨103—Drains ⇨18—Holders of drainage district warrants held to have no vested right to money appropriated by Legislature to purchase warrants, and, in absence thereof, to have no right to control allocation of appropriation.

Holders of drainage district warrants, primarily payable only through process of assessment provided for in various acts of Legislature, have no vested right to application of money appropriated by Legislature to aid public purpose and project of reclamation and flood control by purchasing outstanding warrants, and, in absence of such interest, holders of warrants have no right to control allocation of legislative appropriation.

In Bank.

Original application by the Reclamation Board of the State of California and another for writ of mandate prayed to be directed to Ray L. Riley, State Controller, to issue warrant as purchase price of certain drainage warrant purchased by the state department of finance, in which proceedings the Western Land & Reclamation Company intervened. Writ granted.

Stephen W. Downey, Downey, Brand & Seymour, and F. R. Pierce, all of Sacramento, for petitioners.

Devlin & Devlin & Diepenbrock, of Sacramento, and Brobeck, Phleger & Harrison, of San Francisco, amici curiæ, for petitioners.

U. S. Webb, Atty. Gen., and Robert W. Harrison, Deputy Atty. Gen., for respondent.

Theodore Chester, of Sacramento, and Eddy Knapp, of San Francisco, for intervener.

RICHARDS, J. The petitioners have applied to this court for a peremptory writ of mandate commanding the respondent, as controller of the state of California, to issue his official warrant in the sum of \$3,661.93, payable out of that certain fund known as "Joint

Navigation and Flood Control Project", as the purchase price of a certain warrant purchased by the state department of finance of one W. McWilliam with the consent of the reclamation board of the state of California, one of the petitioners herein, on September 3, 1929, which warrant so purchased had theretofore been drawn on and based upon "Sutter-Butte By-pass Assessment Number Six" and which warrant had been so purchased in alleged conformity with the provisions of section 5 (section 37a of the Reclamation Board Act, as amended) of that certain act of the Legislature approved May 21, 1929, and which became effective on August 14, 1929. St. 1929, p. 707. The respondent in his answer and return to said application has demurred thereto upon the ground that the same does not state facts sufficient to constitute a cause of action against the respondent or to entitle the petitioners to the relief prayed for therein or to any relief. The act of the Legislature above referred to is entitled: "An act to amend sections 14, 15 and 19 of the 'Reclamation board act,' approved December 24, 1911, as amended, and adding two new sections thereto to be numbered 15a and 37a, respectively, relating to the auditing of canceled warrants and providing for the application of moneys released, reimbursed, or appropriated under and pursuant to chapter one hundred seventy-six, California statutes of 1925 and the war department appropriations act of congress of the United States for the fiscal year ending June 30, 1930, being public law number eight hundred forty-three, seventieth congress, approved February 28, 1929, and providing for the repeal of all laws in conflict herewith." Section 37a of the act, after reciting that the purpose thereof was to further the provisions of certain previous acts of the State Legislature providing plans for the control of the flood waters of the Sacramento and San Joaquin rivers and their tributaries and for the improvement and preservation of navigation and for the reclamation and protection of lands susceptible of overflow from said rivers and their tributaries, and after reciting that certain moneys amounting to somewhat over \$4,000,000 had been made available for such purposes pursuant to an act of Congress approved February 28, 1929 (45 Stat. 1381) by which act said sum had been appropriated by the United States government and directed to be paid over to the state of California for the purposes above set forth, provided that said sum was to be deposited in a fund to be known as the "Joint Navigation and Flood Control Project Fund" and which fund was to be expended and disbursed by the reclamation board for the uses and purposes and subject to the conditions thereafter in said act to be set forth and at such times and in such manner as said reclamation board in its discretion

should deem necessary or proper, and directing the state controller to issue his warrants upon said fund upon order by the reclamation board, and directing the state treasurer to pay the same. Section 37a of said act then proceeded to prescribe the uses and purposes to which the moneys thus accumulated in said fund should be expended and which uses and purposes were set forth in said section in three subdivisions thereof. The first of these related to new construction done or required to be done and to lands, rights of way, or easements necessary to be acquired by the state of California in carrying forward said work of reclamation and flood control pursuant to the previous legislation upon the subject and to the work of reclamation and flood control which had theretofore been done thereunder. The second division of said section authorized the Reclamation Board to draw upon said fund in a limited amount for administration purposes, but limited the amount to be thus expended to \$25,000 in any one fiscal year, and also limited the amount to be expended under the first and second subdivisions of said section to the sum of \$200,000 during the current fiscal year. Subdivision 3 of said section provided that with the balance of said money thus allocated to said fund the state department of finance, with the consent of the reclamation board, was authorized "from time to time and in such manner as it in its discretion shall determine to purchase, retire and cause to be canceled, at such price or prices as it may deem advisable, but not to exceed par plus the accrued interest thereon, all or any warrants or bonds of the Sacramento and San Joaquin drainage district heretofore or hereafter issued as provided in the reclamation board act or in chapter five hundred twenty, statutes of California 1919 and drawn on or based upon or secured by Sutter-Butte by-pass assessment number six, Feather river assessment number seven or Sacramento river outlet assessment number two," and which balance of said fund is allocated to each of said purposes for the fiscal years 1929 and 1930 in certain percentages in said subdivision set forth. The amount of money for which the petitioner herein seeks to have the respondent draw his warrant is within such allocation. It is with the provisions of subdivision 3 of said section that we are solely concerned in the instant proceeding, the respondent having by the briefs and argument presented on his behalf through the office of the Attorney General confined his assault upon said act of the Legislature to the provisions of subdivision 3 of section 37a thereof.

[1] The sole question which the respondent has thus presented for our consideration relates to the expenditure of any portion of said fund, under the provisions thereof for the purchase, retirement, and cancellation of any warrants or bonds of the Sacramento and

San Joaquin Drainage District which had been issued and were outstanding for work in the direction of reclamation and flood control done prior to the enactment of said act of the Legislature, and which warrants or bonds the state of California was theretofore under no legal obligation to assume or pay. It is the sole contention of the respondent that the assuming to purchase, pay, or retire said warrants or bonds in the manner and to the extent required by the terms and provisions of subdivision 3 of section 37a of said act of the Legislature would amount to a gift of public money, such as is prohibited by the provisions of sections 31 and 32 of article 4 of the state Constitution. An examination of the record herein, and particularly of the briefs and arguments presented on behalf of the respondent, discloses that the same precise objection which has thus been made by the respondent to the aforesaid provisions of the act of the Legislature above referred to were presented and urged before this court by the same respondent against the validity of the act of the Legislature approved May 27, 1919, and which became effective July 27, 1919, and by the terms of which act the sum of \$3,000,000 had been appropriated by the state Legislature for certain uses by the reclamation board in connection with Sutter-Butte by-pass project No. 6 of the Sacramento and San Joaquin drainage district, and which uses as in said act provided were urged by the respondent as being violative of the aforesaid provisions of the state Constitution relating to gifts of public money. In the case of *Sacramento, etc., Drainage District v. Riley*, 199 Cal. 668, 251 P. 207, the aforesaid objections of the respondent to the act of the Legislature then under review were considered by this court upon the original hearing thereon and also upon a further and very full consideration of the subject upon rehearing, and in the decision this court, upon such hearing and rehearing, in an exhaustive opinion, disposed of the aforesaid objections of this respondent to the act of the Legislature then under review adverse to his contention. Counsel for the respondent in fact frankly admitted, both upon oral argument and in his later briefs, that, unless this court was prepared to overrule the decision in 199 Cal., this writ must issue. We are not prepared to overrule or modify in any respect our former opinion, but, on the contrary, we hereby fully affirm and approve the same.

We can perceive no present advantage to be gained by a review of the history of the great public undertaking of flood control, drainage, and reclamation along the upper reaches of the Sacramento river and its tributaries which resulted in the several enactments of the state Legislature since the inception of that undertaking up to and including both the act of 1919, which was considered and upheld in *Sacramento, etc., Drainage District v. Riley*, supra, and the act of 1929 and the

particular section and subdivision thereof here under review, since we are satisfied that the reasoning and conclusion of this court in its aforesaid decision has full and exact application to the contention which the respondent herein makes in opposition to the issuance of said writ. We therefore conclude that the aforesaid opposition of the respondent to the issuance of the writ is without merit, and that in so far as the respondent is concerned, the writ should issue.

[2] During the progress of the instant proceeding the Western Land & Reclamation Company, a corporation, by leave of this court, filed its complaint in intervention herein, wherein it was set forth that said intervenor was the owner of warrant number 9420 issued by the state of California on or about October 7, 1919, directing and authorizing the treasurer of the state to pay to the intervenor out of the Sacramento and San Joaquin drainage district, Sacramento river outlet assessment two fund the sum of \$5,000 and which warrant having been presented to the treasurer for payment and which payment was refused on account of lack of funds, the warrant was then and there registered by the treasurer, and the same registration thereof has since been renewed and extended from time to time until such time as there was money in the treasury belonging to said assessment fund with which to pay the same. It is the contention of the intervenor that, since the state Legislature by the adoption of the act of 1929, and particularly by the provisions of section 37a thereof, has appropriated the sums of money provided therein for the purchase, retirement, and cancellation of outstanding warrants and bonds, the intervenor is entitled to have its particular warrant and bond purchased, retired, and canceled in priority to the warrant which the petitioners herein seek to have ordered approved and paid. The application of the intervenor we hold, without an extended review of the long and involved history of the outstanding warrants and bonds of the Sacramento and San Joaquin drainage district, to be without merit, since, under the authority of the previous decisions of this court, as well as of the District Court of Appeal, holders of warrants, such as that of the intervenor, and which primarily were payable through, and only through, the process of assessment provided for in various previous acts of the state Legislature, had no vested right to the application of whatever sums of money the state Legislature might otherwise see fit to appropriate in furtherance and aid of the aforesaid public purpose and project of reclamation and flood control, and that, in the absence of such vested interest in the moneys so appropriated, the holders of such warrants had and have no right to control the allocation of such legislative appropriation. The

authorities which completely cover and fully and finally determine this phase of the instant proceeding are to be found in the following cases: San Joaquin Drainage District v. Johnson, 192 Cal. 211, 219 P. 442; Sacramento and San Joaquin Drainage District v. Riley, 194 Cal. 624, 229 P. 957; Sacramento, etc., Drainage District v. Riley, 199 Cal. 668, 251 P. 207; Reclamation Board v. Chambers, 46 Cal. App. 476, 189 P. 479. On the authority of the foregoing cases we hold that the intervenor is not to be heard in opposition to the issuance of this writ.

Let the writ issue as prayed for.

We concur: WASTE, C. J.; SHENK, J.; SEAWELL, J.; CURTIS, J.; LANGDON, J.; PRESTON, J.

208 Cal. 738

In re STAFFORD. (S. F. 13391.) ★

Supreme Court of California. Jan. 29, 1930.

Rehearing Denied Feb. 27, 1930.

1. Attorney and client ⇄57—Supreme Court, on review of decision of disbarment, will examine record anew to ascertain whether any charge merits disbarment.

Supreme Court, on review of decision of disbarment by the Board of Governors of the State Bar is not bound by findings or recommendations made by local administrative committee, nor their adoption by Board of Governors, and will examine record anew to ascertain whether or not any charge has been proven which merits disbarment.

2. Attorney and client ⇄53(2)—Evidence relative to attorney signing name of another to note and deed of trust and release of homestead warranted disbarment.

Evidence in disbarment proceeding relative to attorney having signed name of another to a note and deed of trust and to release of homestead without knowledge or consent of such person held to warrant disbarment.

In Bank.

Petition by W. F. Stafford to review a decision of disbarment by the Board of Governors of the State Bar of California. Petitioner debarred from practicing as attorney and counsellor.

J. J. Dunne, of San Francisco, for petitioner.

Grover O'Connor, of San Francisco, for respondent.

LANGDON, J. This is a petition to review a decision of disbarment by the Board of Governors of the State Bar of California.

The record discloses that petitioner was charged with improper conduct in five distinct transactions, referred to in the pro-

ceedings as the Carl Smith transaction, the Hohenstein transaction, the Timbrell transaction, the Shewbridge transaction, and the Prince transaction. Evidence was heard upon all of these charges, and the local administrative committee found against the petitioner upon each of these charges and recommended his disbarment. At the hearing before the Board of Governors, counsel for petitioner urged as an objection to the findings and recommendation of the said local administrative committee that a quorum of the members of the committee that joined in the report did not participate in all of the hearings of the committee. The Board of Governors found that no such objection was made by petitioner at the time of the hearings before the said committee or at any of them, and that no injustice or prejudice was suffered by petitioner by reason of the irregularities mentioned. However, in deference to petitioner's contention, the judgment of disbarment was based upon the findings with reference to the Hohenstein transaction and the Prince transaction, and it was found that upon the hearings with reference to these transactions a quorum consisting of the same members of said committee was present at and participated in all the hearings thereon and joined in the findings and report in relation thereto, and that the misconduct of the accused in relation to said transactions, irrespective of any misconduct in relation to the other transactions, justifies and necessitates a judgment of disbarment.

[1] While the foregoing action of the Board of Governors satisfactorily disposes of the objection of petitioner, there is another reason why it is of no controlling force in this proceeding. This court is not bound by the findings or recommendations made by the local administrative committee, nor their adoption by the Board of Governors, and will examine the record anew to ascertain whether or not any charge has been proven against petitioner which merits disbarment.

[2] We have carefully read the transcript of the testimony and find with reference to the Prince transaction that it is admitted that the petitioner signed the name of Harry Prince to a note and deed of trust and to a release of homestead without the knowledge and consent of said Harry Prince, and that by so doing he secured for his own use the proceeds of a second mortgage upon community property of Harry Prince and his wife, Ruth Prince. It is true there is some conflict in the testimony as to the circumstances leading up to this action by petitioner, and it is his contention that, because of a close relationship between himself and Ruth Prince, his niece, and because of her knowledge and consent, he felt justified in signing Harry Prince's name to these documents

without authorization. Ruth Prince denies that she ever gave her consent, but we think this is immaterial. Her consent would not validate or justify the acts of petitioner, and we think the testimony in the record regarding this transaction, and all the facts and circumstances surrounding it, warrant and necessitate the disbarment of petitioner.

It is ordered that the name of petitioner be stricken from the roll of attorneys and counsellors of the court and that he be debarred from practicing as such attorney and counsellor in any of the courts of the state.

We concur: SHENK, J.; RICHARDS, J.; SEAWELL, J.; PRESTON, J.; CURTIS, J.

208 Cal. 723

KRUCÉ v. PARLIER WINERY.
(S. F. 13173.)

Supreme Court of California. Jan. 28, 1930.

1. Corporations ⇨432(12)—Evidence held to show that notes were authorized and ratified by corporation.

In action against corporation on notes, evidence showing that notes were properly signed by president, who was also general manager, and by secretary under seal of corporation, and that corporation directed several communications to plaintiff, acknowledging existence of notes, their validity, and promising payment, *held* to show that notes were authorized and ratified by corporation.

2. Bills and notes ⇨489(3)—Defense that notes were without consideration cannot be relied on, where not pleaded.

Contention in action on notes that notes were without consideration cannot be relied on, where such defense was not pleaded.

3. Bills and notes ⇨518(1)—Evidence held to show that money advanced by plaintiff to defendant, together with interest, made up consideration for notes sued on.

In action against corporation on notes, evidence showing that on behalf of defendant plaintiff advanced rents, freight, money for revenue stamps, and other items for maintenance of bonded warehouse, *held* to show that such items, together with interest, made up consideration for notes sued on.

In Bank.

Appeal from Superior Court, Fresno County; Denver S. Church, Judge.

Action by E. J. Krucé against the Parlier Winery, a corporation. Judgment for defendant, and plaintiff appeals. Reversed.

Frank F. Oster, of Los Angeles, for appellant.

L. L. Cory, of Fresno, for respondent.

PRESTON, J. This cause is submitted to us solely upon the transcript and appellant's brief. Respondent refused, upon inquiry by the clerk of the court, to file a brief, and expressed utter indifference as to the result of this litigation, due to its bankruptcy and death of its president.

Plaintiff seeks by the action to collect some \$4,000, together with interest and also attorney fees, upon two promissory notes, for \$4,000 each, signed by the president and general manager of the corporation and by the secretary, the seal of the corporation being attached thereto. These notes are set up in the complaint and admittedly the second note was to be a substitution for the first note, which was continued in the case only for the purpose of collecting interest. The answer is simply a denial of the due execution of the notes. Judgment went for defendant. Plaintiff appealed.

[1] The evidence shows, however, as above noted, that the notes were properly signed by the president, who was also general manager, and by the secretary, under the seal of the corporation, these persons being two of the three members of the board of directors thereof. Evidence is also abundant that knowledge of execution of the notes was brought home to the corporation at that time and their execution was impliedly, if not expressly, ratified. In fact, the corporation directed several communications to plaintiff acknowledging the existence of the notes, their validity, and promising payment. There is, therefore, no ground whatsoever upon which to rest the contention that the notes were not either authorized or ratified by the corporation.

[2, 3] The contention was also made in the court below that the notes were without consideration, but this defense was not pleaded, and respondent, therefore, may not rely upon it. *Pastene v. Pardini*, 135 Cal. 431, 67 P. 681; *Yellow Jacket, etc., Co. v. Holbrook*, 24 Cal. App. 687, 142 P. 128; *Flint v. Giguere*, 50 Cal. App. 314, 318, 195 P. 85. Moreover, the evidence shows that a written contract existed between plaintiff and respondent respecting the sale and disposition of wines manufactured by respondent, and also shows that on behalf of respondent, plaintiff advanced rents, freight, money for revenue stamps, and other items for the maintenance of a bonded warehouse in the city of Detroit. The evidence shows that these items aggregated the sum of \$3,800, which, together with interest of \$200, made up the \$4,000 consideration for the notes. We are pointed to no evidence to overthrow this showing made by appellant in his brief, which exhaustively treats the evidence. This being true, there is no

foundation whatever upon which to justify the judgment in favor of defendant.

Accordingly, it is reversed.

We concur: LANGDON, J.; CURTIS, J.; SHENK, J.; RICHARDS, J.; SEAWELL, J.

103 Cal. App. 346

MATHEWS v. DAVISON et al. (Civ. 7214.)

District Court of Appeal, First District, Division 1, California. Jan. 23, 1930.

Appeal and error $\S$ 345(1)—Filing notice of intention to move for new trial extends time of appeal, although motion is not presented 60 days after judgment (Code Civ. Proc. § 939).

Where notice of intention to move for new trial is served and filed within statutory time, it extends time within which an appeal may be taken, even though motion is not presented within 60 days after service of notice of entry of judgment, and notice of appeal filed within statutory time after denial of such motion by operation of law is within time, since, under Code Civ. Proc. § 939, filing of notice of intention to move for new trial is commencement of new proceeding, which remains pending until disposed of by court or by operation of law.

Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Action by B. A. Mathews against Robert Davison, the Home Fire & Marine Insurance Company of California, and others. Judgment for plaintiff. On motion to dismiss the appeal of defendant Insurance Company. Motion denied.

Albert J. O'Brien, of San Francisco, for appellant.

Samuel M. Samter and J. J. Posner, both of San Francisco, for respondent Mathews.

Chas. W. Haswell, of San Francisco, for respondents Davison and others.

TYLER, P. J. Motion to dismiss the appeal herein on the ground that it was taken after the time limited by law.

Judgment was entered on February 26, 1929. On March 6, 1929, a notice of intention to move for a new trial was served and filed. This document recites that the defendant Home Fire & Marine Insurance Company intends to move the court for an order vacating the judgment and granting a new trial on various grounds stated in the notice. It was further recited that the motion would be made upon the minutes of the court. It is here claimed in support of the motion to dismiss that, as no motion for a new trial was ever made, the proceedings taken by appellant were not sufficient to extend the time within

which to take the appeal, and therefore it was taken too late, and should be dismissed.

The position is without merit. Where a notice of intention to move for a new trial is served and filed within the statutory time, it extends the time within which an appeal may be taken, even though the motion is not presented within 60 days after service of notice of entry of judgment, and a notice of appeal filed within the statutory time after denial of such motion by operation of law is within time.

Under section 939 of the Code of Civil Procedure the filing of such notice in time is the commencement of a new proceeding, which remains pending until disposed of by the court or by operation of law. *Estate of Bergland*, 177 Cal. 227, 170 P. 400; *Ferguson v. Fonner*, 87 Cal. App. 590, 262 P. 337.

The motion to dismiss is denied.

We concur: KNIGHT, J.; CASHIN, J.

103 Cal. App. 392

DAVIDSON INV. CO. v. DABNEY.
(Civ. 6269.)

District Court of Appeal, Second District, Division 2, California. Jan. 24, 1930.

1. Pleading $\S$ 121(1), 129(1)—Denial on lack of knowledge or information sufficient to form belief is not denial and so fatally defective as to constitute admission.

Denial, in answer to complaint in action in claim and delivery, that defendant has no knowledge or information sufficient to form belief regarding allegations contained in paragraph of complaint and basing his denial thereon, denying each and every allegation in said paragraph, *held* not a denial and so fatally defective as to require it to be construed as admission of allegations attempted to be denied, since attempted denial, being evasive and raising no issue, may be entirely disregarded.

2. Pleading $\S$ 126—Denial in action of claim and delivery that automobile was worth \$1,500 and alleging greater value held negative pregnant and insufficient.

Allegations of answer to complaint in action of claim and delivery for automobile regarding value, denying that automobile is of value of \$1,500, and alleging automobile is worth far in excess of that sum, *held* a negative pregnant and insufficient as denial.

3. Pleading $\S$ 129(2)—Denial, in action of claim and delivery, of unlawful detention, without denying detention, held to raise no issue and constitute admission of possession.

Denial in action of claim and delivery that property is unlawfully detained by defendant, without denying fact of defendant's possession and detention thereof, *held* insufficient to raise

issue as to facts and to amount to admission of possession as alleged in complaint.

4. Replevin $\S$ 63—Allegations of answer in claim and delivery for automobile justifying detention under contract to purchase on which defendant defaulted held insufficient as defense.

Answer, in action of claim and delivery, alleging facts attempting to justify defendant's admitted detention of automobile upon theory that he was purchasing it upon executory contract on which he, by his own pleading, was in default, *held* insufficient to constitute defense, since equitable defense cannot be based on contract which defendant has failed to perform.

5. Appeal and error $\S$ 959(3)—Discretion of trial court in allowing or refusing amendments to pleading during trial will not be disturbed on appeal unless abused.

Allowance or refusal of amendments to pleading during trial is matter largely in discretion of trial court, whose rulings will not be disturbed on appeal unless abuse of discretion is clearly shown.

Appeal from Superior Court, Los Angeles County; Paul B. Dougherty, Judge.

Action by the Davidson Investment Company against Henry R. Dabney. Judgment for plaintiff, and defendant appeals. Affirmed.

I. Henry Harris, of Los Angeles, for appellant.

Denio, Hart, Taubman & Simpson and Matthew C. Simpson, all of Long Beach, for respondent.

BURNELL, Justice pro tem. The defendant, appealing from a judgment on the pleadings, seeks a reversal thereof upon three grounds: First, that material issues were raised by his answer; second, that the pleading of affirmative matter as a defense barred the plaintiff from taking such judgment; and, third, that the refusal of the court to allow him to amend his answer was reversible error.

[1] The complaint is in the form common to actions in claim and delivery. It alleges the ownership and right of possession in the plaintiff of a certain automobile, that the value thereof is \$1,500, that the same is in the possession of and wrongfully detained by the defendant, a demand by the plaintiff for possession and refusal of delivery by the defendant, and \$1,500 damages. The allegation as to plaintiff's ownership and right of possession is traversed by a denial in the following form: "The defendant has no knowledge or information sufficient to form a belief as to those allegations contained in paragraph two of the complaint, and basing his denial thereon denies each and every allegation in said paragraph contained." It is too well established in California to be controverted

that a denial on lack of knowledge or information sufficient to form a belief is not a denial and is so fatally defective as to require it to be construed as an admission of the allegations attempted to be denied. In the case of *Aronson & Co. v. Pearson*, 199 Cal. 295, 249 P. 191, 193, the defendant attempted to make a denial in the following words: "Defendant alleges she has not sufficient knowledge or information upon which to base a belief, and, placing her denial upon that ground denies," etc. The court said regarding this sort of an attempted denial: "For sixty-eight years the form of denial adopted by the defendant has been held insufficient. Relative to the denial of the allegations of a verified complaint, section 437 of the Code of Civil Procedure provides: 'If the defendant has no information or belief upon the subject sufficient to enable him to answer an allegation of the complaint, he may so state in his answer, and place his denial on that ground.' Section 46 of the Practice Act * * * as amended in 1854 * * * permitted a defendant to deny an allegation of a verified complaint 'according to his information and belief.' In *Curtis v. Richards & Vantine*, 9 Cal. 34, 38, the defendants based their denial upon the averment that 'they have not sufficient knowledge or information to form a belief.' The court said: 'By the forty-sixth section of the Practice Act, as originally passed in 1851, it was provided, that an allegation of the complaint might be controverted by a denial 'of any knowledge thereof sufficient to form a belief.' In practice, this mode of denial was found to furnish a convenient pretext for evading the statute. In some instances, defendants became critical in their judgments, as to the extent of knowledge sufficient to form a belief, and would, without hesitation, deny, in that form, facts, upon the existence of which they did not hesitate to act in other matters. In 1854, the forty-sixth section was amended to the present language, and the wisdom of the amendment is well illustrated by the present case.' The same construction has been placed upon the foregoing provision of section 437 of the Code of Civil Procedure. *Naftzger v. Gregg*, 99 Cal. 83, 87, 37 Am. St. Rep. 23, 33 P. 757; *Turner v. Watkins*, 36 Cal. App. 503, 504, 172 P. 620; *Nave v. Graham*, 37 Cal. App. 332, 334, 174 P. 76. Such a denial will not be held fatally defective upon appeal if it was treated by the parties at the trial as creating an issue, but, since in this case neither party offered any evidence bearing upon the question, there is no ground for holding that it was so treated."

Such an attempted denial is evasive and raises no issue. It may therefore be entirely disregarded. *Le Breton v. Stanley Contracting Co.*, 15 Cal. App. 429, 114 P. 1028; *Bartlett Estate Co. v. Fraser*, 11 Cal. App. 373, 105 P. 130; *Mullally v. Townsend*, 119 Cal. 47, 50 P. 1066.

[2] Defendant thus answers the allegation of the complaint as to value: "Denies that the personal property described in the complaint is of the value of fifteen hundred dollars (\$1500.00) and in that behalf alleges that said property is worth far in excess of the sum of fifteen hundred (\$1500.00) dollars." This is a splendid example of a negative pregnant which can give birth to no issue.

[3] The allegation as to defendant's possession is met by a denial that the property "is unlawfully detained by" the defendant, but the fact of defendant's possession and detention thereof is not denied at all. This manner of pleading is an attempt to deny a legal conclusion and raises no issue as to the facts, as has many times been held in this state. *Prichard v. Kimball*, 190 Cal. 763, 214 P. 863; *Richardson v. Smith*, 29 Cal. 529; *Lay v. Neville*, 25 Cal. 545; *Busenius v. Coffee*, 14 Cal. 91. It amounts to an admission of possession as alleged in the complaint. *Richardson v. Smith*, supra.

The attempted denial of the allegation as to damages is open to the same criticism as that just discussed, and the remaining allegations of the complaint are not denied at all.

It is evident from the foregoing review of the defendant's answer that it raises no issue as to any of the facts alleged in the complaint and that appellant's first point is without merit.

[4] As to the claim that the second defense sets up affirmative matter and thus bars plaintiff from the right to ask and receive a judgment on the pleadings, we are constrained to hold that it fails to allege facts which would constitute a defense to the case made by the facts as pleaded in the complaint and, as we have held, admitted by the failure of the defendant to deny them. The defense attempted to be set up is as follows: That the defendant on December 1, 1925, purchased the automobile which is the subject of the action from the plaintiff under an agreement whereby defendant was to pay \$2,500 therefor, of which sum \$250 was to be and was paid at the time the agreement was made, the balance to be paid in monthly installments of \$250 each. A further consideration for the purchase was the settlement of a lawsuit in which one Ring was defendant and the agreement of the plaintiff herein to dismiss that action and to return to Ring a note and a mortgage given by him "to secure the payment thereof upon the chattels mentioned" in the complaint. It is alleged that the plaintiff failed to return the note and mortgage and to dismiss the action, and that the note is in the sum of \$2,000, "which sum this defendant promised and agreed with said Ring that he would pay." This purported defense sets up, at most, an executory agreement of sale. It does not aver that title passed, and it does not allege that any payments have been made

to plaintiff on the contract other than the down payment of \$250, although at the date of verification of the answer four months had elapsed since the date of the contract to purchase. Neither does it allege that any time was fixed for the dismissal of the action or for the return of the note and mortgage to Ring. The most that can be said of it is that it attempts to justify defendant's admitted detention of the automobile owned by plaintiff upon the theory that he is purchasing it upon an executory contract on which he is, by his own pleading, in default.

The situation is analogous to that in *Hannan v. McNickle*, 82 Cal. 122, 23 P. 272, in which the defendant in an action in ejectment by way of defense set up a contract entered into by the plaintiff and himself for his purchase of the property in question. We quote from the opinion in that case: "But taking the defendant's own theory, viz., that the purchase money was to be paid in monthly installments of \$10 each, it follows that at the end of each month an installment became due; and, therefore, at the time that a demand was made for possession, there were at least 32 installments due and unpaid. In any view that can be taken, therefore, the defendant was in default with his payments. He did not perform what his contract required of him; and, this being so, the fact that he made valuable improvements does not avail him. Such improvements cannot enable him to refuse to perform his contract, and yet retain possession of the property. The performance of his contract is an essential feature of any equitable defense on his part. If any authority were needed for such a plain proposition, it is to be found in some of the cases cited by the appellant himself. *Hicks v. Lovell*, 64 Cal. 20 [27 P. 942, 49 Am. Rep. 679]; *Whittier v. Stege*, 61 Cal. 241. The fact that interest was to be paid on overdue installments does not operate to extend the time for payment of the principal. To say that the defendant was entitled to hold the possession until all the installments became due is the very reverse of the true rule, which is that he has no sufficient equity until he has paid all that are due. *Alston v. Wingfield*, 53 Ga. 22. There is no question as to whether time was of the essence of the contract; for the defendant does not offer to pay what is due under the contract, but denies that he is in default. This case is determined in favor of plaintiff by *Hoffman v. Remnant*, 72 Cal. 1, 12 P. 804, which is precisely in point, and shows that the plaintiff

had a right to recover. See *Seabury v. [Doe ex dem.] Stewart*, 22 Ala. 207-217, 58 Am. Dec. 254, where the point is ably discussed, and the authorities cited. The plaintiff was not called on to rescind the contract, or return any part of the purchase money. His right of recovery is consistent with the contract. He recovers because the defendant was in default in paying the purchase money, and defendant cannot have land and money both. *Central Pacific R. Co. v. Mudd*, 59 Cal. 585; *Seabury v. [Doe ex dem.] Stewart*, 22 Ala. 207-217, 58 Am. Dec. 254; *Hansbrough v. Peck*, 5 Wall. 506 [18 L. Ed. 520]. Equitable principles cannot affect plaintiff's rights, since equity follows the law, and rules as the law rules."

We believe that the principles announced in *Hannan v. McNickle*, while there applied in an action to recover possession of real property, are equally applicable where the property possession of which is sought to be recovered is personal property. An equitable defense cannot be based on a contract which the defendant has failed to perform. *Howard v. Hewitt*, 139 Cal. 614, 73 P. 414.

[5] We find no abuse of discretion in the refusal of the court to permit defendant to amend his answer. After the motion for judgment on the pleadings had been made and during argument thereon, counsel for the defendant said: "If Your Honor will permit me to amend the special defense by alleging —by saying that on or about the first day of December, 1925, the defendant purchased the property described in paragraph two of the complaint from the plaintiff under an agreement wherein and whereby the defendant agreed to pay plaintiff \$2500.00 payable as follows—the terms are as evidenced by the contract." If we are to regard this as a formal motion for an order granting leave to amend, the fact remains that the proposed amendment, if incorporated in the answer, would not have given it any additional weight as a statement of facts constituting a defense; and the allowance or refusal of amendments during trial is a matter largely in the discretion of the trial court, whose rulings will not be disturbed on appeal unless an abuse of discretion is clearly shown. *Milliken v. Valencia*, 47 Cal. App. 16, 189 P. 1049; *Billesbach v. Larkey*, 161 Cal. 649, 120 P. 31.

The judgment is affirmed.

We concur: CRAIG, Acting P. J.; IRA F. THOMPSON, J.

103 Cal. App. 209

HAVENS v. LOEBEL (Civ. 3950.)★

District Court of Appeal, Third District, California. Jan. 16, 1930.

Rehearing Denied Feb. 15, 1930. Hearing Denied by Supreme Court March 17, 1930.

1. Automobiles ⇨208—Automobile driver held contributorily negligent in driving at unlawful rate of speed at time of collision (Vehicle Act, §§ 113, 121).

In action to recover damages on account of death of minor son of plaintiff in collision between automobiles operated by plaintiff and defendant, evidence *held* to establish that plaintiff was guilty of contributory negligence as a matter of law because of traveling at an unlawful rate of speed within provisions of Vehicle Act, §§ 113, 121 (St. 1923, pp. 553, 557).

2. Automobiles ⇨208—Automobile driver traveling on boulevard or arterial highway is not exempted from restriction and obligations imposed by law (Vehicle Act, §§ 113, 121, and § 131, as amended by St. 1925, p. 412, § 15).

Automobile driver is not, by reason of fact that he was traveling upon a boulevard or arterial street or highway, exempted from restrictions, limitations, and obligations imposed by Vehicle Act, §§ 113, 121 (St. 1923, pp. 553, 557), and section 131 (St. 1923, p. 560), as amended by St. 1925, p. 412, § 15, relative to speed and right of way.

Appeal from Superior Court, Sutter County; K. S. Mahon, Judge.

Action by R. F. Havens against A. Loebel. Judgment for plaintiff, and defendant appeals. Reversed.

J. Hampton Hoge, of San Francisco, Len H. Honey, of Stockton, and Lloyd E. Hewitt, of Yuba City, for appellant.

Arthur Coats, of Yuba City, and Alvin Weis, of Marysville, for respondent.

PLUMMER, J. This action was instituted by the plaintiff to recover damages from the defendant for and on account of the death of Gordon Leroy Havens, a minor son of the plaintiff, alleged to have been caused by the negligent operation of an automobile by the defendant.

[1] The record shows that on or about the 20th day of March, 1927, the plaintiff, with whom his minor son was riding, was driving westerly on a certain paved highway known as and called the Tahoe-Ukiah highway. At a point about $3\frac{1}{2}$ miles west of Yuba City this highway is intersected by a public highway known as and called the "Hooper road." While the Hooper road intersects the Tahoe-Ukiah highway, it does not cross the same. The defendant, at the same period of time, was driving southerly on the Hooper road. The record further shows that the board of supervisors of Sutter county had, by ordinance, declared the Tahoe-Ukiah highway a

boulevard, and had placed a stop signal on the Hooper road at or near the point where it connects with the Tahoe-Ukiah highway. In the collision which occurred between the car driven by the plaintiff and the one driven by the defendant, Gordon Leroy Havens, who at the time was of the age of about six years, was so injured that he died shortly thereafter. The traveled portion of the Tahoe-Ukiah highway was paved to a width of about 15 feet. The record shows that it was the car driven by the plaintiff which collided with the one driven by the defendant, the plaintiff's car striking the defendant's car on the left-hand side to the rear of the front seat. The testimony also shows that it was the left or driver's side of the plaintiff's car which was most injured by the impact. The force of the plaintiff's car in striking the defendant's machine forced the defendant's machine partly around and off the paved portion of the Tahoe-Ukiah highway so that its position was to the south thereof and facing approximately due east. The car driven by the plaintiff, after the collision, was standing almost horizontally across the pavement. There is testimony to the effect that defendant did not bring his car to a standstill in accordance with the stop signal on the Hooper road, but proceeded past the same and onto the Tahoe-Ukiah highway, with the intent of turning eastward thereon. The plaintiff's testimony establishes that he was driving westerly at a speed of approximately 30 miles an hour, that he was traveling at such speed for some distance before reaching the intersection of the Hooper road, and that he continued on and across a portion of the intersection, without slackening the speed of his car, until he was within 4 or 5 feet of the automobile driven by the defendant. There is also testimony to the effect that on the north side of the Tahoe-Ukiah highway there was, on the 20th day of March, 1927, an olive orchard, and that this olive orchard extended up to the Hooper road. The testimony of some of the witnesses was to the effect that the trees of the olive orchard more or less interrupted the vision of an approaching automobile on the Hooper road, the plaintiff, however, testifying that he could see between the trees, and that an automobile driving southerly on the Hooper road would not be at any time entirely out of one's vision when traveling westward on the Tahoe-Ukiah highway. The collision occurred about 6 o'clock in the evening, and at a time when one traveling westward had to protect himself from the rays of the sun. This fact is clearly established by the testimony of the different witnesses. The testimony of the plaintiff, which we will hereafter set forth, shows beyond controversy that, from the point where the collision took place on the paved portion of the Tahoe-Ukiah highway northward into the Hooper road, there is an

open space of at least 50 feet where a car approaching from the north on the latter road was ordinarily plainly and clearly visible. The testimony of the plaintiff likewise establishes that for the last 100 feet before reaching the intersection of the Hooper and Tahoe-Ukiah highways the plaintiff was traveling with his eyes blinded by the sunlight so that he could not or did not see whether there was any car approaching from the Hooper road or whether there was any obstruction whatever to his progress as he was driving westward. The testimony of the plaintiff further shows that at no time while his eyes were blinded by the sunlight did he slacken the speed of his car, but proceeded at the speed of 30 miles per hour. Upon the conclusion of the plaintiff's testimony the defendant moved for a nonsuit on the ground that the plaintiff's own testimony established his contributory negligence. This motion was denied, and at the conclusion of the case judgment went for the plaintiff, from which the defendant appeals. Upon this appeal it is contended that the plaintiff's own testimony establishes his contributory negligence up to the time of the collision; that it was his car that collided with the defendant's car; and, also, that there is no testimony establishing any negligence on the part of the defendant. Without quoting any of the testimony relating to the alleged negligence of the defendant, we will simply content ourselves with saying that there is sufficient testimony in the record upon which negligence upon his part may be predicated. What we have to say deals particularly with the alleged contributory negligence of the defendant. After testifying that he was familiar with the highways referred to, and had traveled the same a number of times, and was, at the time of the collision, driving at a speed of around 30 miles an hour, the following questions and answers appear in the transcript:

"Q. And you could not see very well on account of the sun, could you? A. It was just about six o'clock and the sun was shining on the highway and in my eyes to a certain extent.

"Q. And wasn't it shining in your eyes to such an extent that it interfered with your vision of the road and the side road? A. It especially interfered with my vision on the side road at a certain point when you are right close to it—right close to an object and the sun is shining towards you there is a glare and a dark spot on the right-hand side of your windshield and that is why I watched that space there and that is how the machine got on me, it came through that dark space at the vital time."

The witness was then asked the following questions and gave the following answers:

"Q. I will ask you if, when you testified before the coroner's inquest, you were asked this question, and if you gave this answer:

'Question: How fast were you driving? Answer: I was driving thirty miles an hour; I looked at the speedometer just a few seconds before that; I could not have driven any faster and stayed on the pavement facing the sun; I never drive any faster under those conditions.'

Being asked if he gave that testimony, he stated that he did. Further on the witness testified that he gave the following testimony before the coroner's inquest:

"Q. The sun was in your eyes? A. It was just a little after six o'clock.

"Q. The sun obstructed your view? A. There was an awful glare and the radiator—I have practically a new machine and the radiator and the hood are rather high and there was a glare both from that and the highway.

"Q. The sun kind of bothered you? A. It blinded me to the extent I kind of had my hand up."

Further:

"Q. Now, Mr. Havens, the fact is that you did not see the Loebel car until you were just in the act of striking it? A. Just as they came out on to the pavement, just as they started out on the pavement."

And being asked if he gave the following testimony before the coroner's inquest, plaintiff testified that he did:

"Q. You saw nothing of this car until it loomed up in front of you? A. I saw nothing, absolutely nothing until it was right in front of me like it was placed there by magic.

"Q. How far were you from the car when you first saw it? A. I was right on top of it."

And further:

"Q. Where was your car when you first saw the Loebel car, how far back from the point X? A. Five or six feet."

Without quoting any further testimony, it is sufficient to repeat what we have stated, that the testimony of the plaintiff shows an open space from the Tahoe-Ukiah highway extending northerly on the Hooper road for at least 50 feet, and that this open space is plainly visible, under ordinary conditions, for at least 100 feet to the eastward on the Tahoe-Ukiah highway, from its intersection with the Hooper road, to one traveling westward on the paved portion of the Tahoe-Ukiah highway, and that during the time the plaintiff traversed that distance on the Tahoe-Ukiah highway, at the rate of 30 miles per hour, his vision was so obscured by the sunlight that he could not and did not see the approach of the defendant's car. It may, however, be further stated that the testimony of the plaintiff referred to what he called the "dark spot" on his windshield caused by the reflection of the sun, so that he could not see any car approaching for the distance mentioned on the

Hooper road. Was the plaintiff, under the circumstances set forth, guilty of contributory negligence? In other words, was he negligently driving his own car, at the time it collided with, or ran into the defendant's automobile? At the time of the collision in question the California Vehicle Act (St. 1923, p. 517), as amended in 1925 (St. 1925, p. 398), was in force. Section 113 of that act (St. 1923, p. 553) reads: "Any person driving a vehicle on the public highways of this state shall drive the same at a careful and prudent speed not greater than is reasonable and proper, having due regard to the traffic, surface and width of the highway, and no person shall drive any vehicle upon a public highway at such a speed as to endanger the life, limb or property of any person." Section 121 of the same act (St. 1923, p. 557) reads: "Any person who knowingly and wilfully drives any vehicle upon a public highway, either without due caution and circumspection or in such manner as to endanger the life, limb, or property of any person, shall be guilty of reckless driving," etc. Subdivision 2 of section 113 of the California Vehicle Act (St. 1923, p. 553) limits the speed of one driving or traversing an intersection of highways, when the driver's view is obstructed, to 15 miles an hour. It further specifies that "a driver's view shall be deemed to be obstructed when at any time during the last one hundred feet of his approach to such intersection he does not have a clear and uninterrupted view of such intersection and of the traffic upon all of the highways entering such intersection for a distance of two hundred feet from such intersection." Section 131 of the same act (St. 1925, p. 412, § 15), at the time of the collision in question, gave the right of way as follows: "When two vehicles approach an intersection of public highways at approximately the same time, the vehicle approaching from the right shall have the right of way, provided such vehicle is traveling at a lawful speed." Unless controlled by ordinances relating to the stop signal, under the conditions presented in this case, the defendant had the right of way. But if he had brought his car to a standstill at the stop signal, as claimed by him, he had then the duty of determining whether he could safely proceed out and upon the Tahoe-Ukiah highway, and that would be a question for the jury, as to whether he was or was not negligent in so doing, which question, however, we do not need consider.

Like most cases which we have examined having to do with the speed limit at intersections where the driver's view is interrupted, dealing with objects such as buildings or trees, we do not see why, in principle, it does not apply to any driver who does not have, in the language of the section, a clear and uninterrupted view of such intersection from any cause whatsoever, and that, upon his

clear and uninterrupted view being taken away, it is the duty of a driver to reduce his speed to 15 miles per hour. We do not see why, if a driver is blinded by the sun so that he has no clear and uninterrupted view, he should not be held to the same speed as though his view were uninterrupted by either trees or buildings. The danger is just as great in one instance as in the other, and, in addition to the other sections requiring an automobile driver to so limit his speed as not to endanger person or property, we think the speed limit permissible under such conditions, when one does not have a clear and uninterrupted view of an intersecting highway, is as provided by the section. Whatever the cause, the sections to which we have referred are applicable, and the speed must be reduced.

In the case of *Dam v. Bond*, 80 Cal. App. 342, 251 P. 818, 822, this court, in its opinion, referring to the case of *Graybiel v. Auger*, 64 Cal. App. 679, 222 P. 635, considering the rate of speed permitted by the California Vehicle Act, said: "It is not the absolute speed at which an automobile is being driven that determines whether it is or is not being propelled at a reckless rate, but the conditions and circumstances of the highway at the instant of time must be taken into consideration, and if these conditions are such that the safety of persons and property require a lesser rate of speed, it is the duty of the driver of the motor vehicle to slow down the speed of his car." A hearing of that case was denied by the Supreme Court. It was contended in the case of *Dam v. Bond*, *supra*, that the automobile driver charged with negligence, was not driving beyond the speed limit of 35 miles per hour, and what was said, as above quoted, was in relation to the speed limit of 35 miles per hour then allowed upon an unobstructed highway.

In *Hammond v. Morrison*, 90 N. J. Law, 15, 100 A. 154, the Supreme Court of New Jersey, in considering a case where the automobile driver was blinded by street lights, used the following language: "The defendant did not deny that the decedent came to his death in the way above stated, but attempted to excuse himself upon the ground that just before the collision the street lights which he had passed were reflected into his eyes by the windshield of his car, so that he was unable to see in front of him, and that this temporary blindness was the cause of the collision. His own story demonstrates his lack of care. No man is entitled to operate an automobile through a public street blindfolded. When his vision is temporarily destroyed in the way which the defendant indicated, it is his duty to stop his car, and so adjust his windshield as to prevent its interfering with his ability to see in front of him. The defendant, instead of doing this, took the chance of finding the way clear, and ran blindly into the trolley car behind which the decedent was standing. Having seen fit

to do this, he cannot escape responsibility if his reckless conduct results in injury to a fellow being."

In the case of *Budnick v. Petersen*, 215 Mich. 678, 184 N. W. 493, the Supreme Court of Michigan lays down the rule that, if the vision of an automobile driver is obscured by the glaring lights of an approaching car, it is his duty to slacken his speed and have his car under such control that he might stop it immediately if necessary. See, also, *Yano v. Stott, etc., Co.*, 184 Wis. 492, 199 N. W. 48, and *Holsaple v. Superintendents*, 232 Mich. 603, 206 N. W. 529.

In *Pietsch v. McCarthy*, 159 Wis. 251, 150 N. W. 482, 483, the Supreme Court of Wisconsin used the following language: "The plaintiff testified that he was proceeding at a rate of speed of from 10 to 13 miles an hour; that his vision was so dazzled by headlights of automobiles coming in the opposite direction that he could not see the wagon ahead of him, and that in this situation he proceeded a distance of 100 feet without slackening his speed until he bumped into the wagon, which he did not see until he struck it. It seems clear, under these facts, that he was guilty of contributory negligence as a matter of law." It is true that the Supreme Court of Michigan has carried the rule further in relation to an automobile driver being required to limit his speed so that the car can be stopped within the radius of the vision afforded by his headlights, and that, if he does not do so, it is negligence as a matter of law. But there seems to be no conflict in the decisions which we have examined, and which are referred to in the cases which we have cited, that when an automobile driver has been blinded by approaching lights, it is his duty to reduce the speed of his car.

In the case of *Hatzakorjian v. Rucker-Fuller Desk Co.*, 197 Cal. 82, 239 P. 709, 715, 41 A. L. R. 1027, the circumstances presented and considered by the court were identical with those here being considered, to wit: The fact of an automobile driver not lessening his speed when blinded by approaching lights, the only difference being, in the instant case the sun takes the place of the approaching automobile. The Supreme Court, in deciding the *Hatzakorjian* Case, adopted the opinion of Mr. Justice Hart of this court, and the facts considered are so applicable to this case that we set them forth. Referring to the automobile driver in question, it is there said: "He was traveling, up to the time the glare reflected from the lights of the approaching automobile * * * at the rate of 25 miles an hour; when the glare struck his eyes he was a distance of between 150 and 200 feet from where he collided with deceased; the glare so obstructed his vision that he was unable to see an object on the highway before him, although his lights were in good condition and under ordinary circumstances he

was able by them to discern an object before him at a distance of from 75 to 100 yards; he did not see the deceased until after his car struck him; when the glare first struck his eyes and blinded him, with the result as indicated, he diminished the speed of his car so that thereafter and until he struck deceased, he was still traveling at a speed of between 20 and 25 miles an hour; he did not put on his brakes, nor turn off either the gas or ignition; his brakes were in perfect order and he said he could have stopped his car between the time the glare first struck his eyes and the time he struck deceased, but that he did not do so, nor make any attempt to do so; that he was not anticipating the presence of pedestrians on the highway in front of him—in fact, his mind, he himself in effect stated, was not on the matter of whether he might or might not overtake a pedestrian. It is only necessary to compare the foregoing résumé of Kennell's own testimony with the requirements of the law with respect to the duties of operators of automobiles when driving over the highways of the state to force the conclusion that, from the time the glare from the lights of the approaching car first reflected through his windshield into his eyes, he proceeded on until he struck and killed the deceased with a degree of indifference or recklessness as to the rights and safety of others who might be ahead of him on the highway closely approaching, if indeed, not amounting, under the circumstances, as revealed by his own testimony, to gross negligence." We think this statement of the law a true and correct statement as applicable to the case at bar. The plaintiff, by his own testimony, was traveling 30 miles an hour, with his eyes blinded by the sunlight so that he could not or did not see the approach of the defendant's automobile. He did not slacken his speed during the time that he was blinded, but permitted his car to move forward under conditions rendering it impossible for him to see the defendant's car until he was within four or five feet of it. Thus, his negligence, by his own words, continued right up to and including the time when his automobile crashed into the one driven by the defendant. The case to which we have referred cites a number of other cases, among them California cases, holding: "That it is the duty of a driver of an automobile to anticipate the presence of pedestrians upon the highway over which he is traveling, is thoroughly settled as a part of the law of the road." This language was used in relation to circumstances where pedestrians were using the road, but is pertinent to conditions where automobile drivers may be anticipated as using a road.

In the case of *Donat v. Dillon*, 192 Cal. 426, 221 P. 193, 194, where it was claimed that the defendant had the right of way, the court used the following language: "A motorist must at all times use due care to avoid

colliding with another; he must be ever alert and watchful, so as not to place himself in danger, and, while he may assume that others will exercise due care, he cannot for that reason omit any of the care which the law demands of him. Assuming, therefore, that the defendant had the right of way, he was required to proceed across the intersection in a careful and prudent manner, ever watchful of the direction in which danger was most likely to be apprehended."

[2] As the testimony of the plaintiff, and the cases which we have cited, including the various sections of the California Vehicle Act, show that the plaintiff was traveling at an unlawful rate of speed, and that his unlawful rate of speed continued up until the time his car struck the defendant's car, and that the plaintiff at no time lessened the speed of his automobile as required by the law as set forth in the Hatzakorzian Case, the conclusion is unescapable that he was guilty of contributory negligence as a matter of law and complies with the requirements set forth in the case of Flores v. Fitzgerald, 204 Cal. 374, 268 P. 369. There is nothing in the California Vehicle Act which exempts an automobile driver, traveling upon a boulevard or arterial street or highway, from the restrictions, limitations, and obligations imposed by the sections to which we have referred and the cases which we have cited; and whether blinded by the rays of the sun or the glaring lights of an approaching automobile, a driver who, under such circumstances, fails to slacken his speed, and without seeing it runs into another car, cannot escape the effects of his own contributory negligence simply because the street or highway is marked "arterial."

The defendant's motion for a nonsuit should have been granted.

The judgment is reversed.

We concur: FINCH, P. J.; R. L. THOMPSON, J.

103 Cal. App. 409

LISLE v. E. B. & A. L. STONE CO.
(Civ. 6882.)

District Court of Appeal, First District, Division 1, California. Jan. 25, 1930.

1. Brokers ⇨86(4)—Evidence held to support conclusion that agent was not procuring cause of sale made by principal after termination of agency.

In action by agent, having exclusive authority but not exclusive right to sell real property, to recover broker's commission on sale made by principal to municipality after expiration of contract of agency, evidence that agent, although appearing before proper municipal officers on different occasions, had quoted varying prices

without ever making definite offer, *held* sufficient to warrant conclusion that agent was not the procuring cause of sale; agent's conduct being such as reasonably to justify municipal officers in their refusal to negotiate further.

2. Brokers ⇨50—Agent who fails to sell property during existence of his agency is not entitled to commission.

Although agent vested with exclusive authority but not exclusive right to sell may be the first to offer property to one who purchases after termination of agency, an agent to be entitled to a commission must make a sale within time limited by contract of agency, unless delayed by negligence, fault, or fraud of principal.

3. Brokers ⇨86(1)—Contention that agent was defrauded of commission was not sustained by record revealing nothing that would necessarily rebut presumption of good faith.

In action by agent to recover commission on sale made by principal, contention that fraud of principal prevented consummation of sale during existence of agency could not be supported, where record disclosed nothing the necessary effect of which would be to overcome presumption of good faith.

4. Trial ⇨98—Court's comment on materiality of evidence was not equivalent to exclusion thereof when qualified by words "let us see what it is."

Contention that court erred in excluding testimony could not be supported where ruling was, "I don't know that it is very material but let us see what it is," since court, although commenting upon possible effect of evidence, did not thereby exclude it.

Appeal from Superior Court, Alameda County; J. D. Murphey, Judge.

Action by Belle Lisle against the E. B. & A. L. Stone Company. From a judgment for defendant, plaintiff appeals. Affirmed.

Wm. V. Cowan, of Oakland, and S. C. Wright, of San Francisco, for appellant.

Donahue, Hynes & Hamlin, of Oakland, for respondent.

PER CURIAM. The above action was for the recovery of a commission for the sale of certain real property which plaintiff alleged was effected by her as a broker. This allegation was denied, and the case was tried by the court without a jury. Judgment was ordered for defendant corporation and, findings having been waived, was entered accordingly.

The plaintiff, who has appealed, contends that the judgment is not supported by the evidence and that the defendant was shown to have been guilty of bad faith in the transaction.

Plaintiff's authority was evidenced by certain letters from the defendant corporation agreeing to pay her a commission for the sale of the property which consisted of several parcels of land in the city of Oakland. The authority to sell was exclusive for certain pe-

riods limited by the letters, which also specified the prices asked for the several parcels. By the terms of her contract plaintiff's authority expired on July 5, 1927, and the evidence shows that in August, 1927, a sale of the property was made by the defendant to the city of Oakland. The city was represented in the transaction by its port commission. According to the president of that body, the plaintiff appeared before the commission at different times, but on no occasion did she offer the property at a definite price or fix a price for any of the parcels. According to this witness, the prices mentioned by her varied from time to time until finally the members of the commission, who knew the owner of the property and were familiar with it before they were approached by plaintiff, refused to negotiate further with her. The commission subsequently opened negotiations with the defendant, which led to the purchase of the property by the city.

[1] The above, with the testimony of an officer of the corporation that the plaintiff on July 4, 1927, requested a further extension of her contract, supports the implied conclusion of the trial court that her efforts to effect a sale were fruitless; and where, as here, her conduct was such as to reasonably justify the commission in refusing further negotiations with her, the further conclusion that she was not the procuring cause of the sale subsequently made was warranted by the evidence.

[2] The plaintiff was not given the exclusive right to sell the property (*Snook v. Page*, 29 Cal. App. 246, 155 P. 107; *Cal. L. Security Co. v. Ritchie*, 40 Cal. App. 246, 180 P. 625; *Faith v. Meisetschlager*, 45 Cal. App. 7, 187 P. 61); and the rule is well settled that to entitle an agent to a commission he must make a sale within the time limited by his contract of agency. If he fails to do so, he is not entitled to the commission even though he made efforts to sell and first caused the property to be called to the attention of the person who subsequently made the purchase, unless the delay was caused by the negligence, fault, or fraud of the owner. *Zeimer v. Antisell*, 75 Cal. 509, 17 P. 642; *Ropes v. John Rosenfeld's Sons*, 145 Cal. 671, 79 P. 354.

[3] As stated, the plaintiff contends that her failure to consummate the sale was due to the fraudulent conduct of the defendant. Such, however, was not the conclusion of the trial court, and we find nothing in the record the necessary effect of which would be to overcome the presumption that the defendant acted fairly and in good faith. On the contrary, testimony was introduced that there was no interference with plaintiff's activities or any attempt to influence the attitude of the commission toward her.

[4] Lastly, it is urged that the court erroneously excluded certain testimony which tend-

ed to show that the sale was brought about by the plaintiff. While the trial court commented upon the possible effect of the offered testimony, it was not excluded. The ruling of the court was as follows: "I don't know that it is very material but let us see what it is." Whereupon the question designed to elicit such testimony was withdrawn by the plaintiff.

The judgment is supported by the evidence, and no error appears which in our opinion warrants the conclusion that the result was a miscarriage of justice.

The judgment is affirmed.

103 Cal. App. 173

RICHMOND v. MOORE.

RICHMOND et ux. v. SAME.

(Civ. 7030.)★

District Court of Appeal, First District, Division 2, California. Jan. 15, 1930.

Rehearing Denied Feb. 14, 1930. Hearing Denied by Supreme Court March 13, 1930.

1. Automobiles ⇨244(9, 35)—Evidence that motorist drove too close to street car at excessive speed supported judgment for pedestrian, injured on stepping from street car.

In action by pedestrian to recover for injuries sustained when struck by automobile on stepping from street car, evidence from which jury could have concluded that motorist's speed of 25 or 35 miles per hour was excessive and negligent, and that motorist drove too close to street car, supported judgment for pedestrian.

2. Negligence ⇨85(2)—Age and mental capacity of minor must be considered, in determining whether he was contributorily negligent.

In action by minor to recover for injuries alleged to have been negligently inflicted, age and mental capacity of minor must be considered, in determining whether he was guilty of contributory negligence.

3. Automobiles ⇨245(74)—Whether minor, struck by automobile on stepping from street car, was contributorily negligent, held for jury.

Where minor eight years of age was struck by automobile as he stepped from street car, whether minor was guilty of contributory negligence held for jury.

4. New trial ⇨29—Asking if jurors in automobile accident case were interested in insurance company held not ground for new trial, question being asked in good faith.

Denial of motion for new trial in action against motorist for personal injuries, on ground that jurors were asked if they were interested in certain insurance company, held not

improper, where plaintiff filed counter affidavits stating that question was asked in good faith, believing that named insurance company was in fact defendant's insurer, and that jurors were questioned generally as to their interest in any insurance company.

5. New trial ⚡31—Parties, not objecting to examination of jurors at outset of trial, could not raise question of improper examination as grounds for new trial.

Parties, not objecting to examination of jurors at outset of trial, could not raise question of improper examination as ground for new trial, in event of unfavorable verdict.

6. Appeal and error ⚡1032(2)—Party complaining of exclusion of evidence must show, not only that evidence was material, but also that exclusion was harmful.

Party objecting to exclusion of evidence must show, not only that evidence was material, but also that exclusion thereof was harmful.

7. Evidence ⚡471(17)—Motorist's answers that there was no reason for her to sound horn prior to accident held properly stricken as conclusions.

In action against motorist for personal injuries sustained when pedestrian was struck on stepping from street car, where motorist, in answering questions on direct examination, stated that she did not sound horn prior to accident, and insisted on adding, "there was no reason for me to do so," and "the car was not close enough to me for that, when I first saw him," quoted parts of answers held properly stricken out, on ground that they stated conclusions of witness.

8. Appeal and error ⚡1033(5)—Trial ⚡296(8)—Giving improper instruction requiring greater degree of proof than required by law held not ground for reversal, where proper instructions were given, and instruction complained of operated on respondents more directly than on appellant.

Giving improper instruction in automobile accident case, that evidence is satisfactory which ordinarily produces moral certainty or conviction in unprejudiced mind, held not cause for reversal, where proper instructions on subject of burden of proof and preponderance of evidence were given, and instruction complained of operated on respondents in respect to their proving appellant's negligence more directly than on appellant in respect to sustaining her burden of proving defense of contributory negligence.

9. Automobiles ⚡246(60)—Instructing that burden of proving contributory negligence was on defendant, without stating in same instruction that contributory negligence might appear by plaintiffs' evidence, held proper.

In pedestrian's action against motorist for personal injuries, instructing that burden of proof to establish contributory negligence is on motorist, without stating in same instruction that contributory negligence might be made to

appear by pedestrian's evidence, as well as motorist's evidence held proper.

10. Automobiles ⚡246(6)—Instructing on proof of negligence by violation of statute or ordinance, without stating in same instruction that such negligence must proximately cause injury, held not error.

In action by pedestrian against motorist for personal injuries sustained in alighting from street car, it was not error to instruct on proof of negligence by proof of violation of statute or ordinance, without stating in same instruction that negligence so proven is not actionable negligence, unless it proximately causes injury.

11. Automobiles ⚡246(6)—Instruction on proof of negligence of motorist by violation of statute or ordinance, and including in same instruction statement concerning excusable violation thereof, held not error.

In pedestrian's action against motorist for personal injuries sustained while alighting from street car, instructing on proof of negligence by proof of violation of statute or ordinance, and including in same instruction statement concerning excusable, unintentional, or blameless violation of ordinance or statute, held not error.

12. Automobiles ⚡246(6)—Refusing instruction that pedestrian, struck on stepping from street car, could not recover from motorist if street car company, dismissed from case, was solely liable, held not error.

In action against motorist for personal injuries sustained by pedestrian on stepping from street car, refusing instruction that pedestrian could not recover, if accident was caused solely by negligence of street car company, held not error, the company's motion for nonsuit having been granted.

13. Automobiles ⚡246(35)—Refusing instruction which would require same care of minor struck by motorist as that required of adult held proper.

In action by minor pedestrian against motorist for personal injuries sustained when pedestrian was struck on stepping from street car, refusing instruction which would require of minor care required of adult held proper.

14. Damages ⚡132(7)—\$5,000 damages held not excessive for minor eight years old, whose injuries included leg fracture and fractures of both arms.

\$5,000 damages for minor eight years of age, struck by automobile, held not excessive, where minor's injuries included transverse fracture of leg, transverse fractures of both arms, cut over left eye, requiring him to remain in hospital two months, with plaster casts on both arms and leg.

15. Damages ⚡133—\$2,500 damages to parents of minor, which included \$1,125 expenses, held not excessive, where minor sustained fractures of leg and of both arms.

\$2,500 damages to parents of minor, which included \$1,125 actual expenses, held not excessive, where minor eight years of age suffered fractures of leg and of both arms.

16. Trial $\hookrightarrow$ 252(20)—Absence of evidence of minor's earnings did not make instruction allowing parents to recover sum which would compensate them for loss of minor's earnings improper.

In parents' action against motorist for injuries negligently inflicted on minor eight years of age, absence of evidence of actual earnings of minor did not make instruction allowing parents to recover such sum as would compensate them for loss of earnings or services of minor, which they would reasonably suffer during his minority, improper.

Appeals from Superior Court, City and County of San Francisco; Edmund P. Morgan, Judge.

Two separate actions by William A. Richmond, Jr., by Dora C. Richmond, his guardian ad litem, and by William A. Richmond and wife, against Mrs. William G. Moore. Judgment for plaintiffs, and defendant appeals. Affirmed.

Redman, Alexander & Bacon, of San Francisco, for appellant.

Jesse H. Steinhart and John J. Goldberg, both of San Francisco, for respondents.

KOFORD, P. J. The above-named minor respondent and his parents obtained separate verdicts and judgments for damages for personal injuries received by the minor when struck by the automobile of appellant. The points raised on appeal relate to the sufficiency of the proof, the examination of the jurors, rulings on the evidence, and instructions to the jury.

The minor was eight years of age at the time of the accident. He was struck by the appellant's automobile just after he had stepped off of the No. 32 street car at its southerly and westerly terminus on the west side of Stanyan street, just north of Haight street, San Francisco. The street car had approached Haight street from the north. The automobile came towards the street car from the south. The minor left the street car by the front or southerly platform of the street car, and stepped off from the exit of the east side thereof, that being the only exit provided for him. According to the evidence relied upon by respondents, the minor was struck immediately upon stepping off the street car and within 2 feet thereof. The appellant claims that the minor respondent suddenly rushed out from the street car in a diagonal direction, without looking for an automobile, and had proceeded 6 or 8 feet from the street car before being struck.

[1] While the evidence is conflicting, our examination of the record discloses sufficient evidence of negligence on the part of appellant to support the verdict in favor of respondents. The evidence disclosed negligence on the part of the appellant in several par-

ticulars. The jury could have concluded from the evidence that appellant's speed of 25 or 35 miles per hour was excessive and negligent under the circumstances and conditions disclosed by the record that she should have given a warning signal of her approach; that she drove too close to the street car, seeing either the conductor or minor respondent making ready to alight in the direction of her course.

[2, 3] It is argued that this court should hold the minor respondent negligent himself as a matter of law. The form of the argument deserves mention. First, the evidence is explained and interpreted in a way so favorably to the appellant as to show that the conduct of the minor in an adult person would amount to contributory negligence; then authorities are cited showing that under some circumstances minors as young as eight years have not only been held capable of contributory negligence, but also have been held barred by contributory negligence as a matter of law. Other citations by appellant, however, show that her counsel realize that the question of contributory negligence of a minor cannot be thus divided into two parts.

The question must be answered by a consideration of all the evidence in the case, including the evidence of the age and mental capacity of the minor. These last-mentioned facts are to be considered in direct conjunction with each other fact in the case. Neither the trial court nor this court should hold as a matter of law that the minor respondent was guilty of contributory negligence as a matter of law. The effect of his age upon the question of whether he had measured up to the standard of care and conduct which the law exacts from him was a question of fact for the jury. The same thing is true for an additional reason. The facts relied upon by appellant to show that the minor respondent was negligent are disputed facts. The evidence by no means compelled the jury to find that the minor jumped off a moving street car in the middle of the block and, without looking for automobiles, ran in a diagonal course towards the sidewalk and directly into the path of the automobile. Evidence to the contrary justified the jury in finding that the accident did not occur in the manner claimed by the appellant.

[4, 5] Upon motion for new trial appellant's counsel filed an affidavit setting out that in the examination of the jurors they were asked if they were interested as stockholders or otherwise in the Standard Accident Insurance Company. The affidavit further set forth that the named insurance company had not in fact insured the appellant. The counteraffidavit of respondents' counsel stated that the question was asked in good faith, believing that the named insurance company was in fact the insurance carrier of appellant,

that appellant was insured at any rate (upon information and belief) in some company which conducted her defense, that the jurors were also questioned generally as to their interest in any liability insurance company, and that counsel for appellant made no objection of any kind in respect to such examination of jurors by respondents. Under these affidavits the trial court was justified in concluding that the incident was merely one of misnomer, and that it was neither intended to result, nor did it result, in a verdict arrived at in any part by an improper consideration of the fact that an insurance carrier would be responsible for such damages as might be awarded respondents.

No question is made by the parties of the circumstances that this point was raised in the trial court only by affidavit on motion for a new trial. We should nevertheless say that appellant, after hearing the examination of the jurors at the very outset of the trial, should not be permitted to sit silently through the trial without making any objection, and then raise the point only in the event of an unfavorable verdict. Parties may examine jurors to ascertain their possible financial interest in the outcome of the case, but an appeal to prejudice or to other improper considerations has never been permitted. *Girard v. Irvine* (Cal. App.) 275 P. 840, and cases therein cited. The denial of a new trial was a decision by the trial court that the verdict was not induced by improper considerations, and this decision cannot, under the circumstances shown by the affidavits, be said by this court to be unjustified. *Girard v. Irvine*, *supra*.

[6] Appellant testified upon direct examination that, after the boy had been removed from beneath her automobile and placed within it, she asked the conductor something (the record does not show what she asked him), but, upon objection being made, she was not permitted to testify what the conductor had stated. The statement is claimed by appellant to have been a spontaneous and unpremeditated one, and therefore admissible as part of the *res gestæ*, according to the rule in *Heckle v. Southern Pacific Co.*, 123 Cal. 441, 56 P. 56. The meager record on this point fails to show that the statement was any part of the *res gestæ*. On the contrary, it rather shows that it was not. Neither does the record show whether the alleged statement of the conductor was material or whether its exclusion was harmful in any way. Appellant should have shown each of these things in order to sustain the burden resting upon an appellant. *Marshall v. Hancock*, 80 Cal. 82, 22 P. 61; *Snowball v. Snowball*, 164 Cal. 476, 129 P. 784; *Coleman v. Farwell*, (Cal. Sup.) 276 P. 335; *Dougherty v. Ellingson* (Cal. App.) 275 P. 456.

[7] In answering certain questions upon direct examination, appellant answered that

she had not sounded her horn prior to the accident, and insisted upon adding to her answer, "there was no reason for me to [do so]," and "the car was not close enough to me for that, when I first saw him [the conductor]." These parts of her answers were properly stricken out, upon the ground that they stated conclusions of the witness, rather than facts.

[8] Appellant claims that the giving of instruction No. 7 was reversible error under the authority of *People v. Miller*, 171 Cal. 649, 653, 154 P. 468, and *Estate of Ross*, 179 Cal. 629, 178 P. 510. The instruction reads: "Evidence is satisfactory which ordinarily produces moral certainty or conviction in an unprejudiced mind. Such evidence alone will justify a verdict. It is not necessary that your minds be free from all doubt." The instruction should not have been given. The question remains, however, whether the giving of it requires a reversal of the case.

In this connection two things should be noticed. First, the court also gave complete and proper instructions upon the subject of burden of proof and preponderance of evidence, stating that in civil cases a preponderance of evidence is all that is required and also stating that if the minor respondent was guilty of any negligence which contributed proximately to his injuries then none of the plaintiffs could recover. It also instructed that the other respondents must have been free of any contributory negligence in order to recover. Second, it should be noticed that the instruction complained of, in requiring a greater degree of proof to justify a verdict than is required by law, operated upon the respondents in respect to sustaining their burden of proving appellant's negligence more directly than upon the appellant in respect to sustaining her burden of proving the defense of contributory negligence. Upon these two grounds, the instruction complained of has been held not to justify a reversal of a cause. *Gregoriev v. Northwestern Pacific Railroad Co.* (Cal. App.) 273 P. 76, and cases therein cited; *Mella v. Hooper*, 200 Cal. 628, 254 P. 256; see, also, *East Bay Municipal Utility District v. Kieffer* (Cal. App.) 278 P. 476.

[9] It was proper for the court to instruct that the burden of proof to establish contributory negligence of plaintiff was upon appellant, without stating in the same instruction that such contributory negligence might be made to appear by evidence offered by the plaintiffs, as well as by the evidence offered by the defendant. That such contributory negligence may be shown by evidence offered by the plaintiffs is not an exception to the rule that the burden of proof is upon the defendant. It is only one of the ways in which the burden of proof may be sustained. There was no more reason for attaching this statement to an instruction on the defendant's burden of proof than to an instruction upon the plaintiffs' burden of proof. Fur-

thermore, the instructions clearly state in another part that appellant's defense could be inferred from evidence offered by respondents.

[10, 11] It was not error to instruct upon the proof of negligence by the proof of violation of a statute or ordinance, without stating in the same instruction that negligence so proven is not actionable negligence, unless it is a proximate cause of the injury. In the instant case the court also instructed upon the two subjects in a single instruction immediately preceding the questioned one. Neither did the court err in not including in the same instruction a statement concerning the excusable, unintentional, or blameless violation of an ordinance or statute. Such a violation, of course, is not in fact or in law a true violation. The case relied upon by appellant in this connection, *Berkovitz v. American River Gravel Co.*, 191 Cal. 195, 215 P. 675, relates to the failure of a motorist to maintain a tail-light burning on his automobile—something which might occur without the knowledge or negligence of the motorist. The case holds that an instruction on this point should have been given because requested and applicable. The appellant does not claim that the evidence in this case particularly made this matter a proper subject of instruction and the appellant did not ask the court to instruct upon the subject.

[12] The court did not err in refusing to instruct the jury that the respondent could not recover if the accident was caused solely by the negligence of the street car company. The street car company was out of the case, its motion for nonsuit having been granted. The only helpful part of the requested instruction was the word "solely." It was a poor way of stating the condition of no actionable negligence upon the part of the appellant, for it called the attention of the jury to a false quantity in the case.

[13] The court properly refused to instruct the jury upon the duty of an adult person when crossing a street. The requested instruction, as worded, would require of the minor respondent the same care as that required of an adult.

[14-16] The award of damages was not excessive. The minor's injuries included a transverse fracture of the right leg near the knee, transverse fractures of both arms, and bad cut over left eye, which became infected. The minor remained in a hospital, with plaster casts on both arms and on the broken leg, extending up to the ribs. He remained in the hospital two months, and in bed at home for a month longer. There was also testimony to the effect that he suffered nervous shock, contusions, and bruises, impairment of his health and strength, and that at the time of the trial he was still nervous and carried

a plainly visible scar two inches long over his left eye. There is no merit in the contention that the award of \$5,000 was excessive, in view of the injuries received by the minor respondent.

The award of \$2,500 to the parents of the minor included \$1,125 actual expense. The court's instructions limited the amount which the jury might award the parents to two things, the expense incurred by reason of the accident and such sum as would compensate them for any loss of earnings or service of the minor which they would reasonably suffer during his minority. The absence of evidence of actual earnings of the minor did not make this instruction erroneous. *Girard v. Irvine* (Cal. App.) 275 P. 840, and cases therein cited. In the instant case the parent respondents were not suing for the loss of actual earnings and services of their minor eight year old son as special damages. Such a point was foreign to the trial and it is not conceivable that the jury included in the award to the respondents anything other than would be legitimately included in the parents' damage for the loss of earning capacity and capacity for services of the minor for which there is not precise measure of damages. *Girard v. Irvine*, supra; *Sally v. W. T. Garratt & Co.*, 11 Cal. App. 138, 104 P. 325.

This disposes of all the points raised by the appellant. The judgments appealed from are affirmed.

We concur: STURTEVANT, J.; NOURSE, J.

103 Cal. App. 275

KRESS v. TOOKER-JORDAN CORPORATION. (Civ. 6271.)

District Court of Appeal, Second District, Division 2, California. Jan. 20, 1930.

1. Licenses $\S$ 39—Testimony of assistant secretary of corporation that certain permits to sell stock were the only ones she had found did not alone authorize introduction of such permits as only permits issued (Corporate Securities Act, $\S$ 12).

In suit against corporation by purchaser of corporation's stock at pledgee's sale, to have stock transferred to his name on books of corporation, in which defense was that the issuance of the stock was not authorized, and that the certificates were therefore void, under Corporate Securities Act (St. 1917, p. 679) $\S$ 12, testimony of assistant secretary that she had nothing to do with application to sell stock, and that permits shown to her were the only ones she had found, did not authorize introduction in evidence of such permits as the only ones issued to corporation, where there was no proof that no other permits were issued, and commissioner of corporations and corporation's secretary were not called; introduction of in-

ferior evidence giving rise to presumption that higher evidence would be adverse, under Code Civ. Proc. § 1963, subd. 6.

2. Licenses Ⓒ39—In suit against corporation to require transfer of stock on books, corporation had burden to prove stock was issued without authority (Corporate Securities Act, § 12).

In suit by purchaser of capital stock of corporation at pledgee's sale, corporation had burden to prove its affirmative defense that stock had been issued to its employees without authority from commissioner of corporations, and was therefore void, under Corporate Securities Act (St. 1917, p. 679) § 12; employees having pledged stock to secure loan for corporation.

3. Licenses Ⓒ39—Finding that issuance of stock was authorized held justified in suit by purchaser to require transfer thereof on corporation's books (Corporate Securities Act, § 12).

In suit by purchaser at pledgee's sale of stock pledged by employees of corporation, to require transfer thereof on corporation's books, in which defense was that issuance of stock to employees had not been authorized by commissioner of corporations, and that stock was therefore void, under Corporate Securities Act (St. 1917, p. 679) § 12, finding that the sale and issuance of the stock was in fact authorized by permit from commissioner of corporations held justified under evidence, in view of presumption that law has been obeyed, and that private transactions have been fair and regular, under Code Civ. Proc. § 1963, subds. 33, 19.

4. Licenses Ⓒ39—Corporation could not take advantage of failure of officers to keep proper records, to prove issuance of stock was not authorized (Corporate Securities Act, § 12).

In suit by purchaser at pledgee's sale of stock issued by corporation to employees and pledged by them, to require transfer of stock on corporation's books, in which defense was that issuance to employees was unauthorized, and that stock was therefore void, under Corporate Securities Act (St. 1917, p. 679) § 12, corporation could not avail itself of failure of its own officers or employees to make and to keep proper records of its transactions, as showing that the issuance of the stock had not been authorized by the commissioner of corporations.

5. Corporations Ⓒ432(3, 4)—Certificates bearing signatures of proper officers, with corporate seal affixed, are presumably issued by authority of corporation.

Fact that corporate seal was attached to certificates of stock of corporation and that certificates bore signatures of proper officers raised presumption, sufficient until overcome by other evidence, that officers did not exceed their authority, and that certificates, which plaintiff sought to have transferred to his name on corporation's books, were issued by authority of corporation.

6. Appeal and error Ⓒ1071(6)—Conclusion that party is bona fide purchaser is one of law, so that trial court's omission to find on this point is immaterial.

Conclusion that party is or is not a bona fide purchaser or holder is one of law, and not of fact, and therefore omission of trial court to expressly find on this point is immaterial, since such a finding, if made as one of fact, would have to be disregarded.

7. Corporations Ⓒ162, 163—Indebtedness due corporation from original stockholders held not to create lien on stock, where there was no agreement to that effect, and purchaser of certificates not disclosing such agreement as to lien or unpaid indebtedness took free from lien (Civ. Code, § 324).

Fact that part of indebtedness due corporation on stock remained unpaid did not create lien on stock, but merely personal obligation as between the original stockholders and the corporation, where there was no agreement between them and corporation creating lien on stock, and language of certificate did not indicate either the existence of such an agreement or that the stock was not fully paid for, and therefore purchaser at pledgee's sale of stock took free from indebtedness to corporation, and it was immaterial whether the purchaser had knowledge of the indebtedness; shares of stock being transferable, under Civ. Code, § 324.

8. Corporations Ⓒ163—Original stockholder may transfer stock notwithstanding indebtedness remaining due corporation (Civ. Code, § 324).

In absence of agreement between original stockholder and corporation creating lien for unpaid purchase price of stock, fact that stockholder is indebted to corporation will not prevent him from transferring title to stock to third party, under Civ. Code, § 324, permitting such transfer.

9. Payment Ⓒ16(1)—Agreement that note is to discharge original obligation operates as payment, and such agreement may be inferred.

While promissory note is generally merely evidence of indebtedness and does not discharge debt, agreement between parties that note is to discharge original obligation and substitute a new one therefor operates to satisfy original debt, and such agreement may be inferred from declarations and conduct of parties.

10. Corporations Ⓒ133—In suit to compel transfer of stock on corporation's books, evidence warranted finding that corporation accepted notes of original stockholders in payment.

In suit to compel corporation to transfer stock on books to purchaser thereof at pledgee's sale, evidence justified finding that notes of original stockholders were accepted by corporation in payment of indebtedness due on stock, in view of requirement of Civ. Code, § 323, that certificate issued prior to full payment must show what amount has been paid thereon.

11. Corporations  131—That purchaser of stock at pledgee's sale paid only small amount did not prevent transfer on corporation's books, where corporation had no lien and there was no evidence of market value.

That purchaser of stock at pledgee's sale paid only small amount therefor did not defeat his right to have stock transferred on corporation's books, where corporation had no lien on stock, and there was no evidence as to the actual market value of stock at time of sale.

Appeal from Superior Court, Los Angeles County; Joseph W. Vickers, Judge.

Suit by Samuel Kress against the Tooker-Jordan Corporation. Judgment for plaintiff, and defendant appeals. Affirmed.

Merriam, Rinehart & Merriam, of Pasadena, for appellants.

G. R. Dexter and Howard B. Henshey, both of Los Angeles, for respondent.

BURNELL, Justice pro tem. This appeal is from a judgment decreeing the plaintiff to be the owner of 300 shares of the capital stock of the appellant corporation and ordering the latter to issue the same to him free of all claims of the corporation or any other person. The facts as found by the court may be thus summarized:

Prior to August 2, 1922, one Boadway, "who was then an officer and actively in charge of the management of defendant corporation" (then known as "Boadway Bros."), solicited a loan for and on behalf of the corporation from the Central Commercial Savings Bank (hereinafter referred to as "the bank"), and was informed by the officers thereof that the bank was unable to make a single loan of the size required. It was thereupon arranged between Boadway, acting for the corporation, and the bank, that a loan of \$8,500 would be made to each of three of the employees of the corporation namely, Feeny, Ormsby, and Smith, conditioned on each of them executing his note for \$8,500, to be secured by a collateral deposit with the bank of 100 shares of the common stock of the corporation, and that as additional security Boadway was to indorse each of the three notes. August 2, 1922, the corporation issued to each of these employees 100 shares of its common stock, of a par value of \$100 per share; the bank loaned \$8,500 to each of them, and each of them in turn executed his note to the bank in the amount of his loan, pledging the certificates evidencing his 100 shares of stock as security therefor, indorsing the same in blank, and Boadway indorsed the notes. Feeny, Ormsby, and Smith immediately deposited with the bank the amount of their respective loans, together with additional small amounts, and each drew his check for the full amount of his loan in favor of the corporation, which thus received a total of \$25,500.

This transaction was handled solely by Boadway, on behalf of the corporation; no one but himself having any part in the procuring of the loans or any conversation with the officers of the bank with regard thereto. He stated to the bank officers that Feeny, Ormsby, and Smith were each paying to the corporation the \$1,500 difference between the amount loaned by the bank and the par value of the stock, and the bank had no knowledge that the stock was not being paid for in full. In fact, it believed that such was the case. None of the certificates referred to showed upon its face, either that it had not been paid for in full, or what amount, if any, had been paid thereon or therefor. Thereafter the three promissory notes, together with the stock so deposited as collateral security, were in the regular course of business assigned and transferred to North American Bond & Mortgage Company, which, upon the default of Feeny, Ormsby, and Smith as to both principal and interest payments on their respective notes, caused the stock to be sold at a pledgee's sale held January 9, 1924, of which notice was given in the manner provided by law, and at which the plaintiff respondent bid it in. Two days later plaintiff forwarded the certificates to the defendant corporation, together with sufficient money to cover the cost of the United States internal revenue stamps required on the transfer, with the request that the stock be transferred to him on the books and new certificates issued in his name, which request being refused was followed by a formal demand, and thereafter this action was filed.

Upon certain issues tendered by the answer, the court further found that the stock was regularly and duly issued by the corporation under its former name of "Boadway Bros.," and that it had received a good and valuable consideration for the issuance thereof; also that it was not true that no permit had been applied for by the corporation, or issued by the commissioner of corporations, authorizing the issuance or sale of the 300 shares of common stock involved in the action, or that the same was void. It likewise found that the corporation did not at any time advise either the bank or its assignee that the stock had not been validly issued.

[1] One of the points upon which appellant relies in seeking a reversal of the judgment is that the stock involved in this case and the certificates evidencing it were void, because its issuance was unauthorized by any permit from the commissioner of corporations. In support of this contention appellant relies on the provision of section 12 of the Corporate Securities Act (Stats. 1917, p. 679) to the effect that "every security issued by any company, without a permit of the commissioner authorizing the same then in effect, shall be void," and upon the claim that "the

record discloses that the only permit authorizing the sale of capital stock of the defendant then in force was one bearing the date of July 10, 1922, which authorized the sale of 2,000 shares of *preferred stock* at par and for cash, * * * and did not authorize the sale of any common stock. The evidence to which appellant thus refers consists of certified copies of corporate permits issued to the corporation, the first bearing date February 26, 1919, and the last being dated February 5, 1923. This evidence was received under the following circumstances:

A Mrs. Millard, called as a witness by the defendant corporation, testified that she was its assistant secretary and had been such for about two years (the trial was in November, 1926), prior to which she had been employed as a bookkeeper for the corporation for nine or ten years, and that its records had been in her custody for about five years. This testimony she qualified by the statement that between February of 1923 and the date when she became assistant secretary, which was some time in 1924, a lady who preceded her in that position had charge of the records, as did also Mr. Ormsby, the secretary of the corporation, and by the further statement, "Well, my custody of the records has been that they have been in the vault for which I was responsible during all that time," and that her familiarity with the records appertained to "all the records pertaining to the bookkeeping end of it." She then testified that she was not familiar with the archives with respect to applications for permits, "except as I looked through them, but I had nothing to do with the applications," or with the custody of the records with respect thereto; that she had searched through them and that the permits which were shown to her were the only ones she had found. The court permitted the introduction into evidence of the permits, over the objection that the evidence was incompetent, irrelevant and immaterial, not the best evidence, and without proper foundation, with the remark, "I will let it in for what it is worth."

The objection should have been sustained. There was no proof that these permits were the only ones actually issued by the commissioner of corporations. The testimony of Mrs. Millard that they were the only ones she had found falls far short of that. The commissioner of corporations could, of course, have settled the question beyond controversy by producing the records of his office showing all permits issued to the corporation, but the defendant did not see fit to avail itself of this testimony, nor did it even call as its witness its own secretary, the proper custodian of its records, which omissions were in no way explained. It would seem that the presumption, which arises from the production of inferior evidence, "that higher evidence would be ad-

verse" (section 1963, subd. 6, Code Civ. Proc.), might well be here applied.

[2, 3] But apart from the failure of proof to support the issue of illegality of the stock, and if it be assumed for the sake of argument only that the copies of permits found by the witness constituted all the permits issued, they show that the issuance and sale of common stock was in fact authorized. The permit of February 26, 1919, authorized the corporation "to sell and issue to L. A. Boadway 390 shares of its capital stock, and to C. E. Blackwell 50 shares of its capital stock, for the considerations heretofore received by said company, and to sell and issue to L. A. Boadway and O. E. Boadway 2,200 shares of its capital stock in consideration of the transfer first to be made by them of that certain dry goods business situated in the city of San Diego mentioned in the application." The character of the stock as common or preferred is not specified on the face of the permit, but the indorsement on the reverse side thereof is "2,640 shares common." The permit of December 30, 1919, authorized the sale and issuance of 500 shares of stock, whether common, preferred, or both, not specified, with a similar indorsement. This last-mentioned permit, unlike the other, required the sale to be for cash and at par.

The burden was, of course, upon the defendant to prove its affirmative defense that this stock was issued to its three employees without authority from the commissioner of corporations. If it was not a part of the stock covered by either of these permits, but was an additional and therefore unauthorized and void issuance, that fact could easily have been established by the corporation's own books and records, which the evidence showed to be in its possession. In the absence of contradictory evidence, it must be presumed that the law has been obeyed (section 1963, subd. 33, Code Civ. Proc.), and that private transactions have been fair and regular (subdivision 19). The finding "that it is not true that at no time prior to the sale and issuance of said 300 shares of common stock had any permit been applied for or obtained by defendant corporation from the commissioner of corporations of the state of California, authorizing the sale or issuance of said * * * stock; that it is not true that the issuance of said * * * stock was or is wholly void"—was, under the state of the record, fully warranted.

[4, 5] Appellant also attacks the finding that the issuance of the stock was "duly and regularly authorized" as being in conflict with the "uncontradicted testimony" of Boadway that its issuance "was not shown by any of the corporation's records other than the stock book itself." On this point appellant cites no authority, and it may be dismissed with the statement that the corporation can-

not avail itself of the failure of its own officers or employees to make and to keep proper records of its transactions, and with the observation that the fact that the corporate seal was affixed to the certificates and that they bore the signatures of its proper officers raises a presumption, sufficient unless and until overcome by other evidence, that the officers did not exceed their authority and that the certificates were issued by authority of the corporation. *Commercial Security Co. v. Modesto Drug Co.*, 43 Cal. App. 162, 178, 184 P. 964; *Anderson v. Wickliffe*, 178 Cal. 120, 172 P. 381; *Chandler v. Hart*, 161 Cal. 405, 119 P. 516, Ann. Cas. 1913B, 1094.

The remaining points attempted to be made by appellant have to do with the question of the good faith of the plaintiff; it being the contention of appellant corporation that plaintiff was not entitled to judgment ordering the corporation to transfer the stock on its books and to issue new certificates to plaintiff unless he could establish that he was a bona fide purchaser for value, and that the evidence did not show and the court did not in fact find that he was such bona fide purchaser.

[6] Disposing first of the point as to the finding of the court, it has been repeatedly held that "the conclusion that a party is or is not a bona fide * * * purchaser or holder is one of law and not of fact." *Smith v. Armstrong*, 85 Cal. App. 624, 260 P. 347, 349, from which the quotation is taken, and numerous cases cited therein. Consequently the omission of the trial court to expressly find on this point is immaterial, since such a finding were it made as one of fact would have to be disregarded. *Smith v. Armstrong*, supra.

[7, 8] A bona fide purchaser has been defined as one who can prove the possession of his grantor, the purchase of the property, and the payment of the purchase money in good faith and without notice, actual or constructive. *Eversdon v. Mayhew*, 65 Cal. 163, 3 P. 641; *James v. James*, 80 Cal. App. 185, 251 P. 666. Appellant seeks to remove respondent from this category, not upon the theory that the North American Bond & Mortgage Company had no right to sell the pledged stock, but upon the theory that the purchaser had notice, or at least means of knowledge, that the persons to whom the stock had been sold, and in whose names the certificates stood, had not completed their payments on its purchase price, but still owed the corporation the unpaid portion thereof, for which they had respectively given it their notes for \$1,500. Much of appellant's brief is devoted to a discussion of these matters, but in the view we take of the situation it is not material whether or not the plaintiff, who was concededly acting merely as agent for Mr. Beesemeyer, secretary of the North American Bond

& Mortgage Company and an officer of the bank, knew or did not know of the indebtedness of Feeny, Ormsby, and Smith to the corporation, since this indebtedness created and could create no lien on the stock, but merely a personal obligation as between these three individuals and the corporation.

A case in point, although not cited in any of the briefs herein, is *Anglo-Californian Bank v. Grangers' Bank*, 63 Cal. 359. In that action a certificate evidencing ownership of certain stock of the defendant bank was assigned and delivered to the plaintiff bank by one Fowler, in whose name it stood, as security for the payment of a debt which he owed to such plaintiff bank. At the time of this transfer Fowler was also indebted in a large amount to the defendant bank, and the latter refused to transfer the stock on its books and to issue a certificate in the name of the plaintiff bank, claiming a lien on the stock, under one of its by-laws, for the payment of this indebtedness. While the plaintiff bank had no actual knowledge of this by-law, the court noted that it might have ascertained its existence, had inquiry been made, which the bank neglected to do. It was held, however, that this was not a by-law which the bank had a right to enforce, because it was in conflict with section 324 of the Civil Code, providing that shares of stock "are personal property, and may be transferred by indorsement by signature of the proprietor, his * * * attorney, or legal representative, and the delivery of the certificate." We quote from the opinion:

"The shares for which Fowler held a certificate were personal property, i. e., his personal property, and he could transfer it by his indorsement and the delivery of the certificate to the plaintiff or any one else. Fowler being the holder of the certificate was in the possession of the shares for which it was issued, and those shares were his personal property, which he was authorized by law to transfer by an indorsement and delivery of the certificate to the plaintiff. The defendant was not in possession of the shares for which Fowler held the certificate, and such shares being his personal property, the defendant had no general lien upon it for any balance which might be due it from Fowler in the course of business. Civ. Code, § 3054."

While, as held in the case just reviewed, the law creates no lien upon stock in favor of a corporation as against a stockholder who is indebted to it, and the corporation cannot make a by-law which will operate in and of itself to create such lien, the corporation and its stockholder may by mutual agreement do so, and if this is done it will be good as between them, and an assignee of the stockholder will not be protected by the rule as to bona fide purchasers. This is the holding in *Jennings v. Bank of California*, 79 Cal. 323, 21 P. 852; 5 L. R. A. 233, 12 Am. St. Rep. 145,

in which case the stockholder had received a certificate which stated on its face that the stock evidenced thereby was transferable "only upon the books of the bank, personally or by attorney, upon the surrender of this certificate, *after compliance with the conditions printed on its back.*" The condition thus referred to was as follows: "No transfer of the stock described in this certificate will be made upon the books of the bank until after the payment of all indebtedness due the bank *by the person in whose name the stock stands on the books of the bank,* except with the written consent of the president or cashier." (Italics appear in the opinion.) The court held that under the circumstances of the case an equitable lien on the stock was created by contract.

We quote from the opinion: "Then was there a contract for an equitable lien? We think that such a contract must be implied from the conduct of the parties. We do not say that the mere acceptance by the stockholder of the certificate without objection would constitute a contract, in the absence of subsequent dealings with reference thereto. It is not necessary to express an opinion upon such a case; but we think that the acceptance, without objection, of the certificate containing such a condition, and the subsequent borrowing of money from the bank without anything to exclude the idea that the condition was to be binding, amounts to an assent to it, so far as the particular loan was concerned, and that a contract is to be implied that the stock was to stand upon the books as security for the loan." The stockholder, one Bowman, being indebted to the bank, it was further held that his assignee had no right to enforce a demand for the transfer of the stock to himself on the books of the bank, the court saying:

"The assignee of Bowman is not protected by the rule as to bona fide purchasers for value. Without considering the question as to the negotiability of certificates of stock, it is sufficient to say, in the first place, that, as against the bank, the plaintiff was not the assignee of the legal title. The Code provides that the transfer by indorsement and delivery of the certificate 'is not valid, except between the parties, until the same is entered upon the books,' etc. Civil Code, § 324. As against the bank, therefore, the assignee took a mere equity, which must yield to the superior equity of the defendant. *Vansands v. Middlesex Bank*, 26 Conn. 153, 154; *Taylor v. Weston*, 77 Cal. 534, 20 P. 62; *Stebbins v. Phenix Ins. Co.*, 3 Paige [N. Y.] 361; *Union Bank v. Laird*, 2 Wheat. 393 [4 L. Ed. 269]; *McCready v. Rumsey*, 6 Duer [13 N. Y. Super. Ct.] 582. In the next place, the condition in the certificate was sufficient to put the plaintiff upon inquiry. The case of *Anglo-Californian Bank v. Grangers' Bank*, 63 Cal. 362, is not in conflict with this. There no condi-

tion was embodied in the certificate, and the by-law relied upon was not referred to therein or printed thereon."

In the case before us there is no evidence of any agreement between Feeny, Ormsby and Smith, or either of them, and the corporation defendant, that the latter should have a lien on the stock issued to them, nor did the certificates contain any language which would indicate either the existence of such agreement or that the stock was not issued as fully paid. In the absence of any lien the fact that the stockholders were indebted to the corporation could not operate to prevent them from transferring title to their stock to a third party—unless for the purpose of defrauding a creditor—any more than it could operate to prevent them from transferring any other property which they might own, although, of course, the corporation might, in an action to recover on its claim, have caused an attachment to be levied on the stock just as it might have done with respect to any other property of the debtor stockholders. In *Lankershim Ranch Land Co. v. Herberger*, 82 Cal. 600, 23 P. 134, 135, the defendant stockholder being in arrears to the corporation in payments upon the purchase price of his stock, the latter brought suit against him and caused an attachment to be levied upon his property. The trial court granted his motion to dissolve this attachment, made upon the ground "that the payment of the obligation sued on was secured at the making by a retention of the evidences of title to such personal property, and the certificates of stock for which said obligation was created by plaintiff as security for said debt." Reversing the order dissolving the attachment the court said:

"In granting the motion the court below evidently proceeded upon one of two theories: First, that as the corporation had sold the stock to defendant, but had not issued to him a paid-up certificate of stock, it still retained the stock, and had a special seller's lien thereon for the unpaid installments of his subscription, under section 331 of the Civil Code; or, second, that as it had not issued a certificate for full-paid stock, whether it thereby retained possession of the stock or not, it had a general lien thereon for the unpaid installments. For if a lien existed in either case an attachment would not lie. Code Civil Proc. § 537. A corporation for profit may give credit to the subscribers to its capital stock for the stock, and may, by proper provision in its by-laws, issue certificates to such subscribers prior to full payment for the stock. Civil Code, § 323; *Mitchell v. Beckman*, 64 Cal. 117 [28 P. 110]. The defendant in this case, therefore, upon paying the installments due, and receiving the transferable certificate showing his subscription to and payment of all installments due on 25 shares of the capital stock of plaintiff, thereby became the

owner of such shares of the capital stock evidenced by such certificate, subject to the unpaid installments mentioned in the certificate, and such certificate gave him as complete possession of the shares evidenced by it as though it were a certificate in the ordinary form issued for paid-up stock. Hence, as the plaintiff, at the time the installments sued for became due, did not have possession of the defendant's stock, it could not have a seller's lien thereon.

"Did the corporation have a general lien upon the stock of defendant not dependent upon possession? We think not. Under our statutes, the only lien given to corporations for profit upon their subscribed capital stock, and which does not depend upon the possession of the certificate of stock, is to secure the payment of assessments levied for the purpose of paying expenses, conducting business, and paying debts. Civil Code, § 331. It has been doubted, even, whether a lien upon stock can be created by a by-law, in view of section 324 of the Civil Code, which provides that certificates of stock may be transferred by indorsement and delivery of the certificate, but that such transfer is not valid, except between the parties thereto, until the same is properly entered upon the books of the corporation. *Anglo-Californian Bank v. Grangers' Bank*, 63 Cal. 359. But, however that may be, a lien not dependent upon possession of the certificate of stock may, by a contract between a corporation and its stockholders, be created in favor of the corporation, to secure the indebtedness of the stockholders to the corporation. *Jennings v. Bank of California*, 79 Cal. 323, 21 P. 852 [5 L. R. A. 233, 12 Am. St. Rep. 145].

"It is claimed by the respondent that a contract was made between himself and the corporation whereby the latter was to retain possession of his stock and have a lien thereon for the unpaid installments of the subscription; but the record fails to show such a contract. Our conclusion is that, as no lien existed upon defendant's stock in favor of the plaintiff, to secure the installment sued for, the court erred in granting the order dissolving the attachment, and it should therefore be reversed."

The refusal of the corporation to transfer the stock into the name of the plaintiff on its books was absolute, and the question whether or not the plaintiff would have been liable for the unpaid balance of the purchase price if the transfer had been made is not involved here. Hence the cases of *O'Dea v. Hollywood Cemetery Association*, 154 Cal. 53, 97 P. 1; *Visalia & Tulare R. R. Co. v. Hyde*, 110 Cal. 632, 43 P. 10, 52 Am. St. Rep. 136; *Perkins v. Cowles*, 157 Cal. 625, 108 P. 711, 30 L. R. A. (N. S.) 283, 137 Am. St. Rep. 158, and *Geary Street, etc., R. R. Co. v. Bradbury Estate Co.*, 179 Cal. 46, 175 P. 457, upon which appellant relies are not in point. The point

decided in those cases is that one who purchases stock in a corporation which has not been fully paid for by the original purchaser, and who has the same transferred to himself on the books of the corporation, is substituted for the original subscriber as a stockholder and thereafter holds the stock upon the same conditions and subject to the same obligations as the original subscriber prior to the transfer, and is therefore liable to a call or assessment for the unpaid balance due on the stock.

[9, 10] We do not intend by what we have said above to indicate that in our opinion it has been established that the stock in question was *not* fully paid for. On this point the record would seem to establish the contrary. The general rule is that a promissory note is but the evidence of indebtedness and does not discharge the debt for which it was given unless by agreement of the parties (*Western Fuel Co. v. Lewald Co.*, 190 Cal. 25, 210 P. 419; *Ellison v. Henion*, 183 Cal. 171, 190 P. 793, 11 A. L. R. 444); but if the agreement is that the note is to operate to discharge the original obligation and substitute a new one therefor—in other words, that it is taken in payment of the debt—then the original debt is fully satisfied by acceptance of the note, and manifestly such agreement may be inferred from the declarations and actions of the parties. (*Anglo-California Trust Co. v. Wallace*, 58 Cal. App. 625, 209 P. 78). This is the effect of our recent decision in *Taylor v. King*, 282 P. 1017.

In the instant case Mr. Boadway, who handled the entire transaction on behalf of the corporation, testified as follows:

"Q. Do you know of your own knowledge what, if anything, Mr. Ormsby paid for the stock in addition to the \$8,500? A. What did they pay?

"Q. Yes. A. \$1,500 additional.

"Q. How was that payment evidenced? A. In the form of a note made payable to the corporation.

"Q. \$1,500 then in the form of a note was given by each, Smith, Ormsby and Feeny? A. By each individual; yes."

The books of the corporation showed that each of the three purchasers was charged with certificates evidencing 100 shares of common stock, of a total par value of \$10,000, and credited with a check for \$8,500 and a note for \$1,500. Furthermore, Boadway testified that he advised the officers of the bank that each of the three employees was paying the corporation the full par value of the stock. This would seem sufficiently to indicate that the corporation accepted the notes as payment of the \$1,500 difference between the par value of the stock and the \$8,500 borrowed by each of its employees from the bank and paid over to the corporation by check.

This view is further borne out by a consideration of section 323 of the Civil Code,

providing that "all corporations for profit must issue certificates for stock when fully paid up, signed by the president and secretary, and may provide, in their by-laws, for issuing certificates prior to full payment, under such restrictions and for such purposes as their by-laws may provide, but any certificate issued prior to full payment must show on its face what amount has been paid thereon. * * *" The fact that the certificates in question did not show on their faces that but part payment had been made, but were issued as though evidencing stock fully paid for, lends additional weight to the view that the corporation regarded the notes as given and accepted in extinguishment of the balance of the obligation.

[11] Appellant makes the further point that the sale by the bank's assignee was not in good faith because the corporation was not notified and because the stock was bid in and sold for but \$300. This point is untenable, since, as we have held, the corporation had no lien or interest of ownership in the stock, and for the further reason that there is nothing to show that the price paid at the pledgee's sale was inadequate, there being no evidence in the record as to what, if anything, was the actual market value of the stock at the time of the sale.

The judgment is affirmed.

We concur: CRAIG, Acting P. J.; IRA F. THOMPSON, J.

103 Cal. App. 443

FICKBOHM v. KNAUST. (Civ. 3973.)

District Court of Appeal, Third District, California. Jan. 27, 1930.

1. Vendor and purchaser Ⓒ99—Purchaser, acting in good faith and tendering deferred payments and interest shortly after default, held not grossly negligent and entitled to relief from forfeiture (Civ. Code, § 3275).

Purchaser under contract for sale of realty, having sought information regarding total amount required to fully pay vendor's equity in land, and being only in default in payment of two installments at most, and having tendered full compensation for all deferred payments and interest, *held* not guilty of gross negligence, entitling him to be relieved of forfeiture, under Civ. Code, § 3275.

2. Banks and banking Ⓒ90—Facts showing arrangement for purchaser to make payments at vendor's bank held to constitute bank vendor's agent making bank's knowledge of default notice to vendor (Civ. Code, § 2332).

Where vendor under contract for sale of realty designated bank with which she customarily did business as place for making payments, and installments were collected by bank for her benefit and credited to her account, and bank cus-

tomarily gave notice of payments made, bank *held* agent of vendor in accepting deferred payments, and under Civ. Code, § 2332, knowledge on part of bank of default in payment of installments was therefore notice to vendor.

3. Vendor and purchaser Ⓒ101—Vendor having accepted deferred payments with implied notice of default could reinstate prompt payment provision only by giving purchaser notice.

Where vendor accepted deferred payments with implied notice of purchaser's default, vendor could reinstate provision of contract of sale requiring prompt payment only by giving purchaser notice to that effect.

Appeal from Superior Court, Los Angeles County; F. C. Valentine, Judge.

Action by Louis F. Fickbohm against Mary A. Knaust, in which defendant filed cross-complaint. From a judgment for defendant on her cross-complaint, plaintiff appeals. Reversed.

Frank J. Lavan, of Culver City, for appellant.

Norman T. Mason, of Los Angeles, for respondent.

R. L. THOMPSON, J. This is an appeal from a judgment upon a cross-complaint decreeing a forfeiture and quieting title to real property for default in the payment of installments due upon the purchase price thereof. The defendant owned only an equity in a certain Los Angeles lot, which she was purchasing on contract from another person. February 15, 1924, the parties to this action executed a written contract by the terms of which the defendant agreed to sell and the plaintiff agreed to buy the lot for \$3,800 to be paid for as follows: \$1,200 cash, which was paid upon the execution of the contract. The balance was to be paid \$35 "on the 15th day of March, 1924, and the balance in monthly installments of equal amounts at the rate of * * * \$420.00 per year," together with seven per cent. interest per annum on deferred payments. Time was made the essence of the contract.

At the request of the plaintiff the defendant designated the branch of the Bank of Italy of Los Angeles, where she was accustomed to do her banking, and authorized it to collect for her and credit to her account, the installments to be paid on this contract. Pursuant to this arrangement the following payments were made to this bank, accepted without objection and credited to the defendant's account, to wit: \$50.17 on March 8, 1924; \$49.97 on April 23, 1924; and \$49.77 on June 3, 1924. Before any default in payments occurred the plaintiff wrote to the defendant to ascertain what her exact interest in this lot was, claiming that his object in doing so was to pay up her entire equity, and that her failure to answer this inquiry led him to believe

she was not insisting upon prompt payments of the installments. This letter was sent May 1, 1924, and read in part as follows: " * * * Will you kindly tell me what is your equity in it [the lot], and what are the payments required on your contract [with the title owner]. In the near future I may be able to pay out your equity. I would appreciate hearing from you soon."

On July 18, 1924, the defendant sent the plaintiff a written notice of rescission of the contract on the ground of delayed payment of monthly installments. The following day the plaintiff tendered to the bank and to the defendant the entire amount due upon the contract including the installments for June and July, together with interest, which was refused.

This action in assumpsit was then commenced to recover the money which had been paid on the purchase price of the land. The contract and the foregoing facts were alleged. The allegations of the complaint were controverted in the answer, except as to the execution of the contract and the payments alleged, which were admitted. A cross-complaint was also filed setting out the contract, the default in the payment of the June and July installments and the cancellation of the contract, together with the usual allegations of a complaint in a suit to quiet title. This cross-complaint was properly answered. The case was tried on the issues presented by plaintiff's theory that the prompt payment of installments was waived by defendant's acceptance of payments which were deferred beyond the time specified by the contract, and that he should be relieved from a forfeiture of the money paid for the reason that he had tendered full compensation to the defendant and was not guilty of gross negligence in the payment of the installments. These issues were all determined against the plaintiff and the contract was declared to have been canceled and title was quieted in the defendant.

The facts of this case should appeal strongly to the conscience of a chancellor. Justice would seem to demand that the plaintiff should be relieved from what, at most, appears to have been a slight and technical default, which was harmless to the defendant, beyond the brief delay in the payment of not more than two installments. There is little use in reiterating the maxim that "equity abhors forfeitures," unless the principle is enforced when the facts warrant its application.

[1] There is a controversy over the interpretation of the contract as to whether the installments were due on the 15th of each month. The plaintiff contends that they were payable at any time during the month. The contract is open to this construction. It provides that the first \$35 installment was due March 15, 1924, and that "the balance [was due] in monthly installments at the rate of \$420 per year." The first payment was made

on March 8th. If the foregoing language of the contract is construed to authorize the payment of subsequent installments at any time during the months which followed, the plaintiff was in default of only a single installment for a period of 18 days when notice of the rescission of the contract was served on him. Full compensation for all deferred payments and interest was tendered the following day. No further damage by virtue of the delay is claimed by the defendant. In view of the unanswered letter, which was sent to the defendant, seeking information as to the total amount required to fully pay for her equity in the land, the legitimate question as to just when the installments were due, and the slight delay in two payments at most, the plaintiff should be credited with good faith in the effort to fulfill his contract. This conduct does not amount to gross negligence. Under such circumstances, even if the defendant did not waive prompt payments by her acceptance of deferred installments, the plaintiff should be relieved from a forfeiture under the provisions of section 3275 of the Civil Code, which provides:

"Whenever, by the terms of an obligation, a party thereto incurs a forfeiture, or a loss in the nature of a forfeiture, by reason of his failure to comply with its provisions, he may be relieved therefrom, upon making full compensation to the other party, except in case of a grossly negligent, wilful, or fraudulent breach of duty."

Regardless of the application of the foregoing equitable provision of the statute, a fair reading of the record shows that the defendant waived strict compliance with the contract with respect to the time of payments by accepting deferred installments.

[2] The respondent claims the bank did not collect the installments as her agent, and that she had no personal notice of delayed payments. We are of the opinion that the record clearly shows the bank to have been her agent. This was the institution with which she had been accustomed to bank. She designated this very bank as the place for making payments. The installments were collected by the bank for her benefit and credited to her account. While the defendant denied receiving notice of the time when these payments were actually made, an officer of the bank testified it was their custom to promptly notify customers when payments were made and credited to their accounts. This is no more than the usual businesslike custom of all banks. In spite of the fact that the defendant was exacting enough to compel the defendant to pay the bank's commissions for collecting the installments, we are of the opinion that the record conclusively shows that the bank acted as the agent of the defendant in these transactions. Knowledge on the part of the bank of the default in the payment of the installments was therefore no-

tice of that fact to the defendant. Section 2332 of the Civil Code provides:

"As against a principal, both principal and agent are deemed to have notice of whatever either has notice of, and ought, in good faith and the exercise of ordinary care and diligence, to communicate to the other."

[3] Having accepted deferred payments with implied notice of such default, the defendant could reinstate the provision of the contract requiring prompt payment, only by giving the plaintiff notice to that effect. 6 Cal. Jur. 357, § 214; *Boone v. Templeman*, 158 Cal. 297, 110 P. 947, 139 Am. St. Rep. 126; *American-Hawaiian Eng., etc., Co. v. Butler*, 165 Cal. 497, 519, 133 P. 280, 289, Ann. Cas. 1916C, 44. In the authority last cited the court says:

"The time of performance even when it is made of the essence, if it is once waived, sets the matter at large, and another date for performance can only be fixed by a definite notice, or by conduct equivalent thereto."

No such notice was ever given to the plaintiff in this case. Title should have been quieted in the defendant in this action, subject to the equities in favor of the plaintiff.

The judgment is reversed.

We concur: FINCH, P. J.; PLUMMER, J.

103 Cal. App. 490

MOREL v. SIMONIAN. (Civ. 3981.)

District Court of Appeal, Third District, California. Jan. 28, 1930.

1. Appeal and error ⇨1011(1)—Findings based on conflicting evidence will not be disturbed by courts of appeal.

Courts of appeal will not disturb findings of fact based upon conflicting evidence.

2. Mechanics' liens ⇨281(4)—In contractor's action to foreclose mechanic's lien, evidence held to support finding that contractor had not built house in workmanlike manner and according to specifications.

In action by contractor to foreclose mechanic's lien, evidence held sufficient to support finding that contractor had not built house in workmanlike manner and according to plans and specifications, and that defendant was damaged in amount of excess of balance remaining due contractor.

3. Mechanics' liens ⇨281(4)—Contractor's contention, in action to foreclose mechanic's lien, that court's assessment of damages was arbitrary, held without merit, where evidence supported finding that contract had not been substantially performed.

In contractor's action to foreclose mechanic's lien, contention that court's finding as to

damages was arbitrary held without merit, where evidence was sufficient to support finding that contract had not been substantially performed.

4. Trial ⇨29(1)—Objection to court's criticizing contractor for failing to perform contract and then seeking to recover for services which he failed to perform held without merit.

In contractor's action to foreclose mechanic's lien, where court criticized contractor for failure to perform contract, and then seeking to recover for services that he failed to render, objection to court's criticism held without merit, since there is no rule of law which prevents judge from expressing his opinion of merits of litigation.

5. New trial ⇨6—Granting or denying motion for new trial is within trial court's discretion.

Granting or denying of motion for new trial rests largely in sound discretion of trial court.

6. New trial ⇨157—Granting or refusing privilege to argue motion for new trial is within trial court's discretion.

Granting or refusing party moving for new trial privilege to argue such motion is within sound discretion of trial court.

Appeal from Superior Court, Los Angeles County; J. Walter Hanby, Judge.

Action by E. Morel to foreclose mechanic's lien against Lionie Berthe Bal Simonian, also known as Mrs. L. B. Simonian. Judgment for defendant, and plaintiff appeals. Affirmed.

J. B. Joujon-Roche and Martin E. Geibel, both of Los Angeles, for appellant.

Davis & Thorne, of Los Angeles, for respondent.

BURROUGHS, Justice pro tem. The plaintiff brought this action to recover the sum of \$865.70 alleged to be the balance due on a building contract and to foreclose a mechanic's lien on the property upon which the building was erected. The action was dismissed as to all of the defendants other than Lionie Berthe Bal Simonian. The court entered judgment in favor of the defendant, and the plaintiff appeals.

It appears from the court's findings of fact that plaintiff and defendant entered into a contract by the terms of which the plaintiff agreed that, for a consideration of \$2,400, he would build, in accordance with plans and specifications adopted by the parties, a dwelling house and garage upon the premises described in the complaint and upon which he seeks to foreclose his lien. The court further found that plaintiff did not substantially perform the contract, and that the building has never been completed in accordance with the plans and specifications and has never been accepted by the defendant. It is further found that the defendant has paid on said contract the sum of \$1,800, and, because

of the plaintiff's failure to construct the building according to the plans and specifications and in a workmanlike manner, defendant was damaged in an amount in excess of any balance remaining due him under the contract.

[1] The appellant contends that such findings are not supported by the evidence. Bearing in mind the well-settled rule that courts of appeal will not disturb findings of fact based upon a conflict in the evidence (*Clopton v. Clopton*, 162 Cal. 27, 121 P. 720), we will briefly epitomize some of the evidence that sustains the findings of fact.

[2] The respondent testified that the buildings were not completed on the 18th day of September, 1925, or at all; that many things were not completed; that the roof was not braced; that the workmanship and plumbing were not what they should have been; that the house could have been occupied, but did not conform to the specifications; that the specifications called for larch siding on the house instead of the No. 2 hemlock which was used by plaintiff; that the cement should have been 3 inches thick, and, as a matter of fact, was much less than that in some places, and that the house did not comply with the specifications in many other respects and was not satisfactory to her.

Appellant admitted on cross-examination that the cement was not 3 inches thick in some places; also, that the cement was broken by an automobile before he left the job; that the specifications called for the underpinning of the house to be 4 inches by 4 inches, but that some of them were 2 inches by 4 inches, and that, under the specifications the girders were to have been 4 inches by 6 inches, but, as a matter of fact, that they were 4 inches by 4 inches; and that under the specifications the floor joists should have been 16 inches apart, but were placed 20 inches apart, except that in one place they were 24 inches apart. Appellant also admitted that he used No. 2 hemlock instead of larch for the siding; that the foundation had some holes in it; that the concrete strips to the garage were so far apart that an ordinary automobile could not be driven on them; and that some of the inside woodwork was hammer marked, which, he said, was made by a poor mechanic whom he had in his employ for a few days, but that he took the woodwork out that was not good enough and replaced it. He also, admitted that the size of the lavatory was not the size provided for by the specifications; that he put no electric switch in the hallway, as called for by the specifications. Plaintiff further admitted that he put in no air vent, as required by city ordinance, and that the siding of the house bulged.

The pleadings also admitted that red paint was used on the roof instead of asphalt. It is true that many of the foregoing admissions by the plaintiff were coupled with a state-

ment that the changes and omissions were at the request of the defendant, but the defendant denied that she made such requests.

George E. Miller, a contractor of eight years' experience, testified that the underpinning of the house was 2 inches by 4 inches, and to install 4 inches by 4 inches would cost \$16; that to replace the girders, which were 4 inches by 4 inches, with 4 inches by 6 inches, would cost \$20; that the floor joists were placed 20 inches on centers, and to tear them out and replace them would cost not less than \$100; and that to tear off the siding and put on larch would cost, including materials, about \$225. This witness also testified that the cement drives were already cracking and crumbling and were very poorly finished on top; that the cause of this was the material used was too thin and contained an insufficient quantity of cement and that it would cost \$75 to tear out all of the cement in the driveway and replace it with a proper mixture. As to the porch, he testified that it was made of cement and was uneven; that the steps were not the same on top as they were on the bottom; that the material was all right, but the workmanship was very poor; and that to correct these defects would cost \$25. Mr. Miller further testified that the moldings over the doors and windows were every one hammer marked, and that it would cost about \$15 to tear them out and replace them; that to take out the lavatory and replace, as called for by the specifications, would cost \$25, less a refund for the old lavatory of about \$15; that it would cost about \$8 to install a switch box in the hall and about \$6 to install a heater vent, in accordance with the city ordinance; and, that it would cost about \$5 to put a cabinet on the back porch. Mr. Miller also testified that the foundation under the front of the house was beginning to crumble, and that there was not enough cement in it to hold solid. The witness further testified that the house was not built in a workmanlike manner.

Mrs. J. C. Harris testified that the woodwork had not been properly stained and had not been sanded, and that the polish was put on very unevenly, and that the varnish showed it and, that the plaster in the house was very uneven. The witness examined the outside of the house and said she could put her fingers under the boards, and that there were a number of places where there were no nails in the studding at all.

M. Weiler, another witness, testified that he was present when appellant commenced the construction of the building; that he saw the building many times; that it was not level, being lower on one side than the other; that he had measured the cement, and that it was only 2 inches thick, and in some places not quite that much; and that he also noticed that the studding had buckled and that the roof was sagging.

We are of the opinion that, under this evidence, the court's findings are sustained. It is true that there is evidence in the record contradicting some of the above evidence, but this court is not concerned with such conflict, there being substantial evidence to sustain the findings of the trial court.

[3] Appellant further contends that under the findings of the court there is due on the contract price the sum of \$593.50, and that the damages found by the court to be due the defendant amount to the sum of \$354, leaving a balance due the plaintiff of \$239.50. It is claimed that the court arbitrarily assessed for other damages found by it to exist, this last-named amount of \$239.50; but that such other defects are insignificant, and that there is no evidence to sustain their assessment at said amount.

In reply to this claim, it is sufficient to say that the trial court found, upon sufficient evidence, that there has not been a substantial performance of the contract by the plaintiff. Under the rule in *Perry v. Quackenbush*, 105 Cal. 311, 38 P. 740, it is held that the owner has a right to such a building as he contracted for, and to authorize a court or jury to find that there has been a substantial performance of a contract, it must be found that he has such a structure. To the same effect is *Jones & Laughlin, etc., Co. v. Abner Doble Co.*, 162 Cal. 497, 123 P. 290. The objection is without merit.

[4] The appellant also claims that his motion for a new trial should have been granted because of the prejudice of the trial judge. This claim is based upon a statement made by the judge, upon the submission of the case. In summing up the evidence and awarding the defendant a judgment the court criticized the plaintiff for his failure to perform the contract and then seeking to recover for services that he had failed to render. The court's statement was quite lengthy, but no useful purpose would be served by setting it out in this opinion. We know of no rule of law that prevents a judge from expressing his opinion of the merits of litigation. The point is also without merit.

[5] Many affidavits were submitted in support of the motion. We have examined each one of them; nearly all set forth what is termed newly discovered evidence, but a large part of said evidence is merely cumulative of the evidence received at the first trial. The granting or denying of a motion for a new trial rests very largely in the sound discretion of the trial court. We discover no abuse of discretion in the order of the court denying the motion.

[6] Complaint is also made that the trial court refused to give appellant the privilege of arguing the motion for a new trial. This

is also a matter of discretion resting with the trial court.

No sufficient reason has been shown why the judgment of the trial court should be disturbed, and it is therefore affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

103 Cal. App. 412

SNODGRASS v. SNODGRASS. (Civ. 6117.)

District Court of Appeal, First District, Division 2, California. Jan. 25, 1930.

1. Costs 213—Moving papers under motion for permission to amend cost bill held not to show mistake, inadvertence, surprise, or excusable neglect (Code Civ. Proc. § 473).

Under defendant's motion for permission to amend purported cost bill, if considered as motion under Code Civ. Proc. § 473, moving papers held not to show mistake, inadvertence, surprise, or excusable neglect, where they showed that defendant intended to serve and file document which on its face would have appeared to be verified claim, but which in fact had never been verified.

2. Costs ⇐213—Moving papers under motion for permission to amend cost bill held insufficient to justify application to trial court to exercise powers to make record speak truth.

Moving papers under defendant's motion for permission to amend purported cost bill held insufficient to justify application to trial court to exercise its inherent powers to make record speak truth, where record as made spoke all of truth, but real application was request to add something, not to amend.

3. Costs ⇐213—Allowing purported amendment to cost bill and denying motion to strike unverified memorandum of cost held error.

Trial court held to have erred in allowing purported amendment to cost bill and in denying motion to strike unverified memorandum of costs, where defendant, within 30 days immediately following filing of remittitur did not file any other document purporting to be memorandum of cost.

Appeal from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

Action by David E. Snodgrass against Harold G. Snodgrass. From orders denying a motion to strike out cost bill and granting leave to amend, plaintiff appeals. Reversed.

Joseph J. Geary, of San Francisco, for appellant.

Arnold C. Lackenbach, of San Francisco, for respondent.

STURTEVANT, J. The remittitur in the case of *Snodgrass v. Snodgrass*, 81 Cal. App. 360, 253 P. 755, went down on the 21st day

District Court of Appeal, Third District, California, Jan. 27, 1930.

of April, 1927. On the 22d day of April, 1927, defendant served and filed a purported cost bill. It had attached to it a verification certificate in which defendant's attorney purported to make the affidavit of verification. The purported affidavit was signed by the attorney, but the jurat was not filled in and was not signed by any officer having the power to administer an oath or by any one else. On the 26th day of April, 1927, the plaintiff served a notice of motion to strike the document from the files. That motion came on for hearing on the 17th day of June, 1927. At the time of the hearing the defendant made a counter motion for permission to amend, and supported his counter motion with the affidavit of his secretary. In her affidavit the secretary alleged that, after the attorney signed the verification, she gave the document to the attorney's clerk, with instructions for him to take it to a notary public who was familiar with the signature of the attorney for the purpose of having the notary public affix his notarial seal thereto; and that the clerk did not follow her directions, but, instead of doing so, he served a copy of the incomplete document on the plaintiff's attorney and filed the original. The trial court granted the defendant's application to amend, and denied the order to strike. The plaintiff appealed from both orders.

[1] Considered as a motion under the provisions of section 473 of the Code of Civil Procedure, the moving papers of the defendant did not show mistake, inadvertence, surprise, or excusable neglect. They showed that the defendant had intended to serve and file a document which on its face would have appeared to be a verified claim, but which in truth and in fact had never been verified, because the affiant had never appeared before any officer to take the oath to the verification.

[2] The papers were insufficient to justify an application to the trial court to exercise its inherent powers to make the record speak the truth. This is so because the record as made spoke all of the truth, but the real application of the defendant was a request to add something, not to amend. 15 C. J. 976, § 395.

[3] Within the 30 days immediately following the filing of the remittitur, the defendant did not file, either with or without the permission of the court, any other document purporting to be a memorandum of cost. From what has been said it follows that the trial court erred in allowing the purported amendment, and it erred in denying the motion to strike the unverified memorandum of costs.

The orders appealed from are reversed.

We concur: KOFORD, P. J.; NOURSE, J.

1. Vendor and purchaser ⇨37(4)—Representations that property sold had great value as oil lands, and that purchasers would make large royalties, coupled with other statements, were not expressions of opinion.

Representations that property sold had great value as oil lands, and that purchasers would make large oil royalties from lots, coupled with agent's representations that United States geologists had made survey of land, and had located large pool of oil under tract, and that when lease was made and pump in operation purchasers would receive one-sixth royalty of oil produced from tract, were not mere expressions of opinion.

2. Vendor and purchaser ⇨37(1)—Agent's statements vendors had standing offer to lease lots that streets would be put in and graded, and that drilling operations would be started immediately, held part of general scheme to defraud purchasers.

Agent's statements to purchasers that vendors had standing offer to lease lots for \$25 for each lot, that streets would be put in and graded, and that drilling operations would be started immediately, taken in connection with other evidence, held to be part of general scheme to defraud purchasers.

3. Vendor and purchaser ⇨44—Evidence held to show vendors' representation they had standing offer to lease lots sold was false.

In action to rescind contract for purchase of real property, evidence held to show that vendors' representation they had standing offer to lease each lot sold for \$25 was false, where it was shown that purchasers asked on many occasions to have agent go ahead and make lease, but were each time put off, and nearly four years elapsed before trial, and yet no leases were ever entered into.

4. Vendor and purchaser ⇨44—Evidence of fraud on part of vendors need not be direct to warrant rescission.

Evidence of fraud on part of vendors need not be direct in order to warrant rescission of land contract.

5. Vendor and purchaser ⇨45—Whether vendors' representations constituted fraud and induced purchasers to enter into contract was question for court sitting as jury.

Whether vendors' representations that property had great value as oil land, and that purchasers would make large oil royalties from lots, and that vendors had standing offer to lease each lot for \$25 constituted fraud, and were inducing cause of purchasers' entering into agreement was question for court sitting as jury.

6. Principal and agent 23(1)—Evidence held to establish agency between person making fraudulent representations inducing plaintiffs to purchase property and his codefendants.

Evidence showing that one codefendant owned property, and that another codefendant had property listed, and that F. was selling through latter's office, that contract was made in name of first codefendant and in their office, and that it received all payments, adjusted a difference between plaintiffs and themselves over a payment, and paid the other codefendant and his partners their commission on deal, *held* to sufficiently establish agency between F., who made fraudulent representations inducing purchasers to enter into contract, and his codefendants.

Appeal from Superior Court, Los Angeles County; L. T. Price, Judge.

Action by George Dalice Gater and wife against C. H. Skinner and others, to rescind a contract for the purchase of real property on the ground of fraud. From a judgment for plaintiff, certain defendants appeal. Affirmed.

W. I. Gilbert, of Los Angeles, for appellants.

Charles H. Sherrick, of Los Angeles, for respondents.

BURROUGHS, Justice pro tem. This is an action to rescind a contract for the purchase of real property on the ground of fraud in its procurement and to recover the sum of \$1,250 paid thereon. Judgment as prayed for was rendered in favor of the plaintiff. The defendant John P. Mills Organization, Inc., a corporation hereinafter called the Mills Company, and the defendants Skinner and Holladay have appealed. The defendant Watts was served with process, but failed to appear therein, and the remaining defendant, Norman A. Foster, was not served with process, nor did he appear in the action. At the close of plaintiff's evidence, the defendants made a motion for a nonsuit, which was denied. Defendants failed to offer any evidence, and the court made its findings of fact and conclusions of law, and the judgment complained of was thereupon entered.

The evidence discloses that the Mills Company was at all the times mentioned in the complaint the owner of lots 44 and 45 of block 3 of the Wardlow-Manor tract in the county of Los Angeles, and was engaged in the business of selling real estate. It had a main and branch office in the city of Long Beach. The branch office was conducted by the defendants Skinner, Watts & Holladay, but both offices carried in large letters signs announcing that they were offices of the Mills Company. The defendant Foster was a licensed real estate agent working with the office of Skinner, Watts & Holladay, and at times working with the office of the Mills

Company. According to the testimony of the defendant Skinner, his firm was the selling agent of the Mills Company.

On June 23, 1923, defendant Foster called upon the plaintiffs and discussed with them the advantages that would accrue to them by investing in the lots above described. Plaintiff George D. Gater testified that Foster told them the tract had just been opened up and was about sold out. He had purchased three of the lots himself, and would have taken more, had he been able to do so. The tract had proved so good with oil that the United States geologists had made a survey and analyzed it, and said they had located a pool of oil directly under the tract. Foster also told them it was going to be opened up as an oil field right away. He further stated that 90 per cent. of the lots had been sold to Mills salesmen. He then told about the oil on Signal Hill, and the people there who owned lots whose income was running some of them, \$800 or \$900 a month. He said the geologists claimed there was a better lake of oil under the land he was trying to sell them than there was under Signal Hill, that there was a strata or line running through there from Signal Hill to the Torrence Field, and there was a main lake right under this tract of land, and it would be far better than Signal Hill. The witness continued substantially as follows:

He wanted to know when I could go over there and see the land. I went over with him the next morning, and he took us pretty well over toward Wilmington, and around where some big oil tanks were being constructed, and he said the production was going to be so great that they had to be built in order to take care of the oil. I told him the road was so rough I would not buy in there. He replied that they were going to build up the streets, and this would be one of the main thoroughfares through the tract. He said I would treble my money on them in three months. He said the lots were only valuable for oil. They had a tent on one corner of the property, and I asked what it was for. He said it was used for serving meals when they had people out there to listen to their speeches and to buy lots. He said he was working for the Mills Company. He told us he had a standing offer to lease all these lots for \$25 per month for each lot, and also had a reliable party figuring on renting them for \$50 per month for each lot, and if we bought they did not want us to lease, wanted it to go through their hands, because the more lots they got together we could get bigger monthly payments. He said, after the oil came in, we would get one-sixth of the royalty of the body of oil that was under the tract; it wouldn't be no time until there would be a regular chain of derricks there that would beat anything on Signal Hill.

The witness further testified that on different occasions he asked Foster to lease the lots for him, and told him to take \$25 per month per lot, but that he never did it; that he went to the main office of the Mills Company about May, 1924, and talked with a Mr. Miner who seemed to be the main man in charge of the office, and demanded his money back, and offered to give them a quitclaim deed to the lots. The witness further stated that he would not have bought the lots, but for the statement that they had located oil under that tract, and that it was a big lake. The contract of purchase of the property was signed by the Mills Company as the seller. All payments thereon made by plaintiffs were made to the Mills Company by check and the checks were returned to plaintiffs endorsed by said company. On May 1, 1924, some correspondence took place over a credit claimed by the plaintiffs as a payment of these lots. In reply thereto the Mills Company wrote a letter in which they stated: "You will note that we have given you credit of \$50 on your final payment of your Wardlow-Manor property."

The testimony of Mrs. Gater, the other plaintiff, is in large measure corroborative of the testimony of her husband. In addition thereto she testified that the day following the trip to the land about which her husband told, Foster visited her home and said to her: "Did you hear the good news?" I said: "What's that?" He said: "That big well came in last night. I went back over there at 12 o'clock, and it gushed up over everything, and I got it all over my shoes and on my clothes—a big gusher came in." He said: "That opens up the field now, and there is only three lots left, and you have got to take them this morning, if you want any, because they will be gone by night." So I told him Mr. Gater didn't want them; and I said, "We haven't got much money anyway." He said, "We'll arrange that." Foster took Mrs. Gater up to the John Mills offices where they saw Holladay.

The witness continued: "He [Holladay] said: 'Well, this is one of the best [buys]. * * * That big gusher came in. It opens up that field over there now. That big gusher looked to be a mile away; he didn't say how far it was; but I could see it when we were there. Mr. Foster pointed out the derrick to us. I wrote him a check for \$25. * * * The check was given, I think, about the 29th of June, 1923. On that same day, Mr. Foster took me down to the main office [of the Mills Company] after I got through with Mr. Holladay, to a lady there and swore me. They told me I had purchased some lots, and they got me to sign a paper, but I don't know what it was, now. I think Mr. Foster called it a sales slip."

The witness testified she signed the long contract about three months later. She said:

"I believed every word of what Mr. Foster said about the leasing of the lots for \$25 each, and the United States Geological Survey, and the pool of oil, and that they were going to put a road in front of the lots. I certainly relied upon it. I wouldn't have paid anything for the lots, if it hadn't been for that. Neither Mr. Foster nor the Mills Organization have ever leased these lots for \$25 each per month, nor for \$50 each per month, to my knowledge. I did demand that they do lease them. To my knowledge, there has been no drilling on that tract of land by the Mills Organization nor any one else. The money we paid for these lots was demanded back from the Mills Organization. We did offer to give a quitclaim deed to the Mills Organization for them. In December, 1923, we knew the derrick [near the land] had been torn down, and then we asked him to give us our money back."

She further testified in effect as follows: "Foster pretended to know the oil business. When I went to the office and talked with Mr. Holladay, there was a big sign there. It read, 'John P. Mills Organization.' I did not see the sign, 'Skinner, Watts & Holladay.' Mr. Holladay said it was the Mills Organization. My husband was opposed to this purchase until the big gusher came in. It was on a line with Signal Hill, and nearer this land than Signal Hill. I only heard read the front page of the agreement. Mr. Foster read it. He said he had read the important parts of it. This was at night, and he was in a hurry."

Wells A. Rathbun, an officer of the Mills Company, testified he did not know whether Foster was with the Mills Company in August, 1923. He stated that their method of operating was such, "even though he were working in our office, he might have a desk there, yet he wouldn't be working for us." Defendant C. H. Skinner testified that Foster was a selling agent for Skinner, Watts & Holladay, and that the latter firm were the selling agents for the Mills Company, and that neither Mills nor his organization ever gave them a right to make any statements claimed by the plaintiffs to have been made by Foster.

[1] Appellants claim that the first two alleged false representations are mere expressions of opinion; the first one being that "said property had great value as oil land," and the other "that respondents would make large oil royalties from said lots." Standing alone, such statements might bear such a construction, but when coupled with the evidence of Foster to the effect that the United States geologists had made a survey of the land and had located a large pool of oil under the tract, and that when the lease was made and the pump in operation the plaintiffs would receive a one-sixth royalty of the oil produced from the tract they go further than mere expres-

sions of opinion, and were undoubtedly intended to and did deceive the plaintiffs.

[2] It is the next claim of error that the statements made to the plaintiffs that defendants had a standing offer to lease the lots for \$25 per month for each lot, that streets would be put in and graded, and that drilling operations would be started immediately were mere promises with reference to the future, and failure to perform them does not constitute actionable fraud. Taken in connection with the other evidence, it is clear that such statements were merely a part of the general scheme to defraud the plaintiffs.

[3] Appellants next claim that there is not a scintilla of testimony in this case that the statements that defendants had a standing offer to lease each lot for \$25 or that United States geologists had examined said property and there was a large pool of oil under said tract and under respondents' lots, or that 90 per cent. of the lots had been sold to the Mills employees, were or are false. Eliminating from consideration the last claim concerning the purchase of the lots by the Mills employees, we will consider the statement that defendants had a standing offer to lease the lots for \$25 each per month. Plaintiffs on many occasions asked Foster to go ahead and make the lease, and were each time put off. Once he asked that any consideration of the offer of \$50 per month be abandoned, and accept the standing offer of \$25 per month. Notwithstanding this request, months elapsed; in fact the trial of this action was had nearly four years after such promises were made, and yet no leases were ever entered into.

It is obvious that only one inference can be drawn from this situation, and that is that the promise was a material statement, made without any intention to perform, and under the evidence of both the plaintiffs was one of the moving causes that led them to enter into the agreement. It is also claimed that there is no evidence that the United States Geological Survey did not examine the property and make the report that there was a pool of oil under the land. This contention might be sound, were it not that Foster stated that by virtue of a certain well on other property having brought in oil had thereby proved the assertion of the said geologists that there was a pool of oil under the lots. Further, Foster himself stated that there was a pool of oil under this land.

In *Phelps v. Grady*, 168 Cal. 73, 77, 141 P. 926, 927, it is said: "True, of course, it is that expressions of opinion honestly made are not actionable. Equity has no concern with them. But equally true it is that a false statement of an opinion * * * expressed to one entitled to rely upon it may form the basis of an action for deceit, like any other misrepresentation of fact." *Crandall v. Parks*, 152

Cal. 772, 93 P. 1018; *Herdan v. Hanson*, 182 Cal. 538, 189 P. 440, 444.

[4] Counsel's contention that fraud must be proved, and that there is no presumption of fraud, and plaintiffs have failed to prove fraud, states a well-recognized rule of law; but this does not mean that the evidence must be direct. In *Herdan v. Hanson*, supra, it is held: "While fraud must be clearly proved, direct evidence is not necessary for this purpose, but the 'indirect evidence and the inference to be drawn from the proved facts must be so convincing as to satisfy trial court or trial jury that fraud was designed and accomplished.'" *Ryder v. Bamberger*, 172 Cal. 791, 158 P. 753.

[5] From the foregoing we are satisfied that such representations, when made with intent to deceive and defraud, whether considered as expressions of opinion or as a statement of fact, constitute fraud and were the inducing cause of the plaintiffs entering into the agreement in the instant case. Furthermore, the question was one for the court, and has been decided adversely to appellants. *Davis v. Monte*, 81 Cal. App. 164, 253 P. 352. It is also claimed by appellants that there is no evidence that any of the statements were false. The evidence shows that in 1923 the defendant Foster told plaintiffs that he would lease their lots for them at \$25 per lot; that they were going to drill for oil at once; that the plaintiffs were to receive a one-sixth royalty from the sale of all oil pumped from the tract; that the land had actually been brought in as oil land, and that there was a pool of oil under the land. The trial of this action took place in March, 1927, nearly four years after the statements were made, and yet the record discloses that none of these promises had been performed at that time. It is very apparent that the promises were made without any intent to perform, particularly in view of the fact that the only derrick near the property had been removed.

[6] It is further claimed that no agency has been established between Foster and his codefendants. The facts are that the Mills Company owned the property; according to defendant Skinner, his firm had the property listed, and Foster was selling through his office. The contract was made in the name of the Mills Company, and in their office; they received all payments, adjusted a difference between the plaintiffs and themselves over a payment; they also paid Skinner and his partners their commission on the deal, and thereby held themselves out as a party in interest. We therefore believe that they are sufficiently connected with their codefendant Foster and should not be released from liability.

Many other points are made for a reversal, but no useful purpose would be served by setting them forth in detail. We have exam-

ined each one, and hold they are without merit.

The judgment is affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

MILO v. PRIOR. (Civ. 6728.) ★

District Court of Appeal, First District, Division 2, California. Jan. 28, 1930.

Rehearing Denied Feb. 27, 1930. Hearing Denied by Supreme Court March 27, 1930.

1. Judgment ⇨562—Judgments not on merits are included in judgments which are not res adjudicata in whole or in part.

Judgments not res adjudicata in whole or in part include judgments which are not on the merits.

2. Judgment ⇨197—Judgments not res adjudicata in whole or in part are without prejudice, and it is proper, though not necessary, for judgment to so state.

Judgments which are not res adjudicata in whole or in part are without prejudice, and it is proper, although not necessary, for judgment itself to so state.

3. Judgment ⇨197—Judgment without prejudice is not proper where cause is tried and submitted only on merits.

A cause which is tried and submitted only on the merits should not result in judgment without prejudice.

4. Appeal and error ⇨223—Judgment without prejudice in personal injury action after trial on merits should not be affirmed on technical points court might find which were not raised in support of reservation.

Where judgment without prejudice was rendered in personal injury action, and on appeal, plaintiff assigned no reason for, or in support of, reservation in judgment, reservation should not be affirmed on any technical points court might be able to find which were not raised or mentioned in any way.

5. Judgment ⇨197—Judgment without prejudice in personal injury action after trial on merits held not entirely void.

Judgment without prejudice in personal injury action after trial on merits was not entirely void, since such a reservation may be properly made where evidence in proceedings at trial warrants such a judgment, notwithstanding Code Civ. Proc. § 581, subd. 1, providing action cannot be dismissed by plaintiff after its submission.

6. Appeal and error ⇨1175(1)—Appellate court will not render final judgment against respondent where it would deprive respondent of right to appeal from final judgment on merits originally entered in appellate court.

Where plaintiff, in action for personal injuries, did not appeal from judgment which was satisfactory to her as a whole, appellate court, in reversing part of judgment appealed from,

will not render a final and nonappealable judgment in favor of defendant on merits, where to do so would have effect of depriving plaintiff of right to assign errors and to appeal from final judgment on merits entered in appellate court for first time.

7. Appeal and error ⇨839(1)—Where part of judgment appealed from is not severable from remainder of judgment, court may review whole judgment.

Rule that only part of judgment appealed from will be reviewed by appellate court is subject to an exception when such portion is not severable from remainder of judgment.

8. Appeal and error ⇨839(1)—Without prejudice provision in judgment held not severable from entire judgment, and therefore appellate court on appeal from such part could review entire judgment.

Where defendant in personal injury action appealed from part of judgment without prejudice after trial on merits, part of judgment appealed from was not severable, and therefore appellate court could review entire judgment, since reservation entered into and qualified each and every part of entire judgment.

Appeal from Superior Court, San Mateo County; George H. Buck, Judge.

Action by Hazel Milo by A. Milo, her guardian ad litem, against Leland S. Prior. From that part of judgment for defendant without prejudice, defendant appeals. Reversed, with directions.

Adopting opinion published in 280 P. 392.

Corbet & Selby, of San Francisco, for appellant.

Hubbard & Hubbard, of San Francisco, for respondent.

KOFORD, P. J. This action was for damages for personal injuries suffered by plaintiff in an automobile collision alleged to have been caused by the negligence of defendant. This action and two other actions between other parties based upon the same automobile collision were tried together upon the same evidence by the court sitting without a jury. After the causes were submitted and briefed, the court gave judgment in each case, denying relief to each of the several plaintiffs and cross-complainants. In this action judgment was announced for defendant without prejudice. Thereafter both plaintiff and defendant waived findings of fact, and after that a judgment was signed by the judge and fled. After stating the usual recitals and waiver of findings, it ordered judgment in favor of defendant "without prejudice to plaintiff's bringing a new action herein if so advised." Defendant appeals from that part of the judgment alone which we have just quoted. The record contains the judgment roll of this case and the reporter's transcript of the testimony taken at the trial of the three cases, but does

not contain the judgment roll in the other two cases nor any findings of fact.

At the time of the collision, the plaintiff, a minor, was riding in an automobile with Norma Furlong and Harry Deller, a minor, who was driving. The other automobile in the collision was driven by the defendant, Leland S. Prior, who was accompanied by his wife, Florence M. Prior. This action was by Hazel Milo against Leland S. Prior alone. The defendant denied negligence, and alleged negligence of Deller and contributory negligence of plaintiff. The other two actions, according to the briefs, were as follows: First, Leland S. Prior against Deller and his parents, for personal injuries and damage to Prior's automobile. In that action Deller's father filed a cross-complaint for damage to the car driven by his son Harry Deller. Second, Florence Prior against Deller and his parents for personal injuries. In that action Deller's father also filed a cross-complaint for damages to his car. In those two actions no one was awarded damages. This might mean that the court decided that both drivers were negligent or that neither was negligent. A final judgment upon the merits for defendant in Hazel Milo v. Leland S. Prior might also mean either that Prior was not negligent or that both Hazel Milo and Leland S. Prior were negligent.

[1-3] Appellant contends that, the action having been fully tried and submitted, the judgment should have been a final judgment between the parties, and not merely a judgment without prejudice. He cites a number of California cases to the effect that a plaintiff may not dismiss an action without prejudice after the case has been tried and submitted, and from this argues that the court cannot decide the cause without prejudice after it has been submitted. Simply because a plaintiff is not permitted by the Code (Code Civ. Proc. § 581, subd. 1) to dismiss the action after its submission, it does not follow that in no case and under no circumstances may a court give a judgment without prejudice. Respondent cites a number of cases to the point that, where a judgment is not upon the merits or expressly provides that it is without prejudice, such judgment is not res adjudicata, the reservation itself being res adjudicata and prevents the raising of any question as to the right to maintain a subsequent suit. These authorities, which are collected in 34 Corpus Juris, 797, note 65, show, however, that such a reservation has been treated as valid in many instances. In Ahlers v. Smiley, 11 Cal. App. 343, 104 P. 997, such a reservation in a judgment is referred to and its effect considered, although the propriety of the reservation is not directly passed upon. The reservation there was in respect to an issue of damages which could not be decided on account of the insufficiency of the pleadings. Many judgments are not res

adjudicata in whole or in part. It will be sufficient for this case to say that they include judgments which are not upon the merits. 15 Cal. Jur. 124 et seq. Such judgments are without prejudice, and it is proper, although perhaps not necessary, for the judgment itself to so state. Lloyd v. Imperial Mach. Stamping & Welding Co., 224 Mass. 574, 113 N. E. 456. A cause which is tried and submitted only upon the merits, however, should not result in a judgment without prejudice. Parsons v. Riley, 33 W. Va. 464, 10 S. E. 806.

[4, 5] There was no motion for dismissal or nonsuit in this case. No findings were made, and so we cannot look to them to find the reason for the reservation. Respondent has suggested no reason for the reservation which he is willing to support, and the reservation should not be affirmed for any technical points we might be able to find, but which were not raised or mentioned in any way. The appeal is therefore well taken. The part of the judgment appealed from, however, is not entirely void, because such a reservation may be properly made where the evidence and proceedings at the trial warrant such a judgment.

[6-8] Supplementary briefs were filed in this court in which the appellant contends that the judgment of this court upon this appeal should have only the effect of eliminating that part of the judgment appealed from and leave the remainder stand as a modified judgment so that there would be a final and non-appealable judgment in favor of the defendant upon the merits. Respondent goes to the other extreme. She contends that the evidence wholly fails to show any negligence on her part, but that the evidence, as well as the court's decision in the companion cases, shows that the defendant was negligent. She therefore asks this court to enter judgment in her favor, or at least that an entire new trial be ordered by this court. As the respondent is not an appellant here, we may not adopt either of these courses upon assignment of errors by her. On the other hand, she should not be penalized for not having taken an appeal from the judgment or from a part thereof when it was satisfactory to her as a whole. For this reason we should not adopt appellant's suggestion, as it would have the effect of depriving respondent of her right to assign errors and to appeal from a final judgment upon the merits entered against her in this court for the first time. The rule that only the part of the judgment appealed from will be reviewed by the appellate court is subject to an exception when such portion is not severable from the remainder of the judgment. In re Yoder, 199 Cal. 699, 704, 251 P. 205; Whalen v. Smith, 163 Cal. 360, 125 P. 904, Ann. Cas. 1913E, 1319. In the instant case the part appealed from is not severable. The reservation enters into and qualifies each

and every part of the entire judgment. *Wanzer v. Self*, 30 Ohio St. 378. The merit of this appeal is, not that such a reservation may never be made, but that the appellant was entitled, according to the record presented here, to have a judgment entered upon the merits either for or against him instead of a judgment which amounts only to a dismissal or nonsuit. According to the record, the case was fully tried and submitted upon its merits, but no judgment upon the merits has been rendered. A judgment which is erroneous because not on the merits is the only one which has been rendered.

The judgment is therefore reversed, and it is ordered that the trial court proceed to render and enter a new judgment upon the merits in the action according to the views herein expressed.

After the foregoing opinion was filed a rehearing was granted, for the purpose of reconsidering what the form of the judgment on appeal should be. After such reconsideration, we are of the opinion that the order previously made by us is the correct one, and the foregoing opinion, together with what is now added, is adopted as the opinion of the court.

Appellant, in his petition for rehearing, asks this court to remand the case, with instructions to the trial court to enter a judgment in favor of appellant upon the merits and expressly allow respondent the right to appeal from such order. This, of course, is inconsistent with appellant's original position that a judgment upon the merits had already been made, and that the part appealed from was severable and was void surplusage, which should be stricken out and disregarded; for, if a judgment upon the merits had already been rendered, no reason would exist to remand the case for judgment on the merits to be made.

The trial court had jurisdiction to give a judgment without prejudice as shown by the instances above referred to in which it has been properly done. See, also, cases collected in *Buchholz-Hill Transp. Co. v. Baxter*, 206 N. Y. 173, 99 N. E. 180, 31 Ann. Cas. 1106. The fact that the trial court did so erroneously in the present case does not mean that it gave a judgment beyond its jurisdiction, but only that it erroneously exercised its jurisdiction. Whether the part of the judgment appealed from be within or without the jurisdiction of the court, however, it is nevertheless not severable from the remainder of the judgment. So, if there were no jurisdiction for the part of the judgment which is appealed from, there would be no jurisdiction for the entire judgment.

We cannot say from the record before us that the trial judge was of the opinion that the defendant was entitled to a judgment

upon the merits. This court cannot say upon this appeal that a judgment for defendant is the only judgment on the merits which could be given upon the evidence.

The judgment appealed from is reversed, and the trial court is directed to enter a judgment upon the merits between the parties hereto upon the evidence and record before it when the cause was submitted to it for decision.

I concur: STURTEVANT, J.

103 Cal. App. 456

ZACHARY et al. v. CHAPMAN et al. ★
(Civ. 3983.)

District Court of Appeal, Third District, California. Jan. 27, 1930.

Rehearing Denied Feb. 26, 1930. Hearing Denied by Supreme Court March 27, 1930.

1. Mechanics' liens ⇨272—Allegations of answer in action to foreclose mechanic's lien held to sufficiently allege plaintiff's noncompliance with contract supporting judgment for defendant.

In action to foreclose mechanic's lien, allegations of defendant's answer that plaintiffs, over protest and objection, installed inferior grade of flooring; that work was of poor class; that ends of pieces of flooring were broken off, and wide cracks left in floor; that broken places were patched with filler and that floor is wavy and does not conform to high-grade material and workmanship employed in construction of other portions of house—held to sufficiently allege plaintiff's noncompliance with terms of flooring contract, and therefore to support judgment for defendant.

2. Mechanics' liens ⇨290(3)—Allegations of answer in action to foreclose mechanic's lien held to sustain finding that plaintiff did not substantially perform contract, precluding recovery.

In action to foreclose mechanic's lien, allegations of answer regarding flooring furnished, installation of material, nature of work, and defects in workmanship held broad enough to sustain finding that plaintiffs did not substantially perform flooring contract, warranting denial of recovery for reasonable value of material furnished and labor done, less damage sustained by defendant.

3. Mechanics' liens ⇨290(1)—Failure to find value of materials furnished and defendant's damages in mechanic's lien foreclosure held immaterial, where plaintiffs did not substantially perform, precluding recovery.

Where plaintiffs, suing to foreclose mechanic's lien, did not substantially perform flooring contract precluding recovery for material and labor, trial court's failure to find reasonable value of materials furnished and labor performed, and deduct therefrom the specific amount of damage sustained by defendant through plaintiffs' failure to comply with contract, held immaterial.

Appeal from Superior Court, Los Angeles County; William C. Doran, Judge.

Action by Harry F. Zachary and another, copartners doing business under the fictitious firm name and style of the National Floor Company, against Arthur E. T. Chapman and another. From a judgment for defendant Chapman, plaintiffs appeal. Affirmed.

Courtney A. Teel, of Los Angeles, for appellants.

Arthur E. T. Chapman and Albert Sidney Brown, both of Los Angeles, for respondent.

BURROUGHS, Justice pro tem. This is an appeal by the plaintiffs from a judgment in favor of the defendant Chapman. The appeal is taken upon the judgment roll alone.

Two causes of action are stated in the complaint. The first is to foreclose a mechanic's lien; the second is in quantum meruit. In the first count it is alleged that the plaintiffs and defendant Chapman entered into a contract by the terms of which, for a consideration of \$247 to be paid to them by the defendant, the plaintiffs agreed to furnish, lay, scrape, sand, and finish complete the hardwood flooring in a residence then being erected for the defendant. It is further alleged that plaintiffs have fully performed all of the terms and conditions of said contract to be performed by them, but that the defendant has failed and refused to pay said sum of \$247, or any part thereof. The second count of the complaint alleges the reasonable value of said materials and labor to be the same in amount as the contract price.

The answer of the defendant Chapman admits the making of the contract, and also admits the nonpayment of the contract price, or any portion thereof. The answer further alleges that the contract provided that plaintiffs were to furnish the best grade of plain white oak flooring, and that the work of scraping, sanding, and finishing complete, said hardwood flooring, would be of the highest grade, and of first-class workmanship, and denies that the plaintiffs furnished the best grade of flooring, and alleges that, over the protest of the defendant, plaintiffs furnished a very inferior grade of flooring and installed it in the house, and that the work was done in a very poor manner, and not in conformity or in accordance with said agreement. It is further alleged in said answer that, in laying said floor, plaintiffs damaged the premises and property in said house, which they had agreed should not be done, and that said damage consisted of punching holes in the sanitas cloth and plaster that was on the walls, and in defacing the baseboards in the rooms at various places, and in the improper installation of a threshold which permitted the collection of water and dampness, and thereby ruined a large front door.

Defendant denies the allegations of the second count of the complaint, and by way of a counterclaim for damages alleges, in detail, a total damage to the building through the fault of the plaintiffs in performing said work in the sum of \$449. Defendant further alleges that, in laying and finishing said flooring, it was not properly fitted and joined and scraped, and on account thereof there were wide cracks and pieces chipped or knocked off the ends of the flooring where they joined, requiring a great deal of filling to be inserted, which is of a temporary nature, and that the floor is uneven and wavy; that in the construction of the other portions of the building defendant used the very highest grade of material obtainable, and that the low grade of flooring and poor workmanship used by the plaintiffs in laying and finishing the floor detracts from the general appearance of the building.

The court found the making of the contract as pleaded by the defendant, and that defendant has not paid the amount claimed to be due thereunder. The court also found the foregoing allegations of defendant's answer to be true.

[1] It is claimed by the appellant that the findings are not supported by the pleadings, in that plaintiffs did not substantially perform the contract, and that the defendant was entitled to have the material and workmanship provided for in said contract, and the contract itself substantially performed. We are of the opinion that the answer does plead the failure of plaintiffs to comply with the terms of the contract. It is alleged that over the protest and objection of the defendant the plaintiffs installed an inferior grade of flooring; that the work was also of a poor class; that the ends of the pieces of flooring were broken off, and wide cracks were left in the floor; that said broken places and cracks were patched with a filler which would not be durable; and that the floor is wavy and does not conform to the high-grade material and workmanship employed in the construction of the other portions of the house. These allegations were found by the court to be true, and are sufficient to sustain the judgment.

[2] It is also claimed by the appellants that under the second count of the complaint the court should have found the reasonable value of the material furnished and labor done, and whatever damage, if any, was suffered by the defendant, should have been deducted therefrom. This is answered by the finding that the material and labor were performed under the contract. In *Perry et al. v. Quackenbush*, 105 Cal. 299, 38 P. 740, 742, it is said: "Since the rule as to what shall constitute performance has become so indefinite, it is an important consideration, in determining

whether there has been a substantial performance, that the deviations are so slight that they might have been made by one who was honestly endeavoring to comply with his contract. Good faith, however, on the part of the contractor, is not enough. The owner has a right to a structure in all essential particulars such as he has contracted for, and, to authorize a court or jury to find that there has been a substantial performance, it must be found that he has such a structure." In the light of this decision, it seems unnecessary to cite additional authority, or discuss the question further. The answer to the complaint is broad enough to sustain the findings of the court that plaintiffs did not substantially perform the contract, and the findings sustain the judgment.

[3] Appellants also complain that the trial court erred in not finding the specific amount of damage suffered by the defendant. Appellants not having substantially performed the contract, that question becomes immaterial.

The judgment is affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

103 Cal. App. 414

IN RE DOUD'S ESTATE.

SMITH v. SMITH.

(Civ. 122.)

District Court of Appeal, Fourth District,
California. Jan. 25, 1930.

1. Executors and administrators ⇨510(9)—Allowance to administratrix of more than one annual premium on bond held not erroneous in view of presumption of right action.

Allowance on final accounting to administratrix of more than one annual premium on her bond held not erroneous, in view of failure of record to establish that estate should have been closed in one year or in any other definite time; the presumption being in favor of action of trial court in making such allowance.

2. Executors and administrators ⇨511(1)—Order setting portion of estate aside to widow was species of "distribution," as respects allowance of attorney's fee.

Portion of estate set apart to widow was a part of estate to be accounted for by administratrix, and order setting it apart was a species of distribution, as respects allowance of attorney's fee on total amount of estate.

[Ed. Note.—For other definitions, see Words and Phrases, First, Second, and Third Series, Distribution.]

3. Executors and administrators ⇨511(5)—Evidence in final accounting of administratrix sustained order allowing \$175 attorney fee.

Evidence in final accounting of administratrix held sufficient to sustain order allowing an attorney fee in the sum of \$175.

4. Executors and administrators ⇨104(6)—Refusal to charge administratrix with compound interest after first year of administration held not erroneous, where record failed to show estate could have been closed in definite time.

Refusal of court in final accounting of administratrix to charge her with compound interest after first year of administration of estate held not erroneous, in view of failure of record to show whether estate could have been closed in one year or any other definite time.

5. Executors and administrators ⇨109(4)—Allowance to administratrix of \$100 for traveling expenses held not erroneous, in view of record.

Allowance on final accounting of \$100 for traveling expenses of administratrix from residence to place where estate was being probated held not erroneous, in view of failure of record to contain facts in respect thereto.

6. Executors and administrators ⇨109(1)—Allowance as debt of estate of payment on sewing machine set apart to widow as exempt property held not erroneous, in view of record.

Allowance on final accounting of administratrix of an item as payment on a sewing machine as debt of estate held not erroneous, in view of failure of record to show that it was not a proper debt, nor when sewing machine was set apart to widow as exempt property.

7. Executors and administrators ⇨109(1)—Allowance on final accounting of hospital bill, included in former account with funeral expenses, held not erroneous.

Allowance on final accounting of administratrix of hospital bill, included in former account with funeral expenses, and appearing to be one of expenses of last illness of deceased, held not erroneous without any showing in record to the contrary.

Appeal from Superior Court, Imperial County; A. C. Finney, Judge.

Final accounting by Olive B. Smith, formerly Olive B. Doud, as administratrix of the estate of M. G. Doud, deceased. From an order settling and approving the final account, C. A. Smith, a creditor, appeals. Affirmed.

Robert G. Hill, of San Diego, for appellant.

D. C. Bitler, of El Centro, for respondent.

BARNARD, J. This is an appeal from an order settling and approving the final account of an administratrix. Olive B. Doud was appointed administratrix of the estate in question on December 23, 1921. Her final account was not filed until September 17, 1928. The appellant, a creditor of the deceased, filed exceptions to the several items in the account, and charged her with negligence, carelessness, and bad faith, in delaying her final settlement. After a hearing, the court approved the account as filed, and this appeal is from that order.

The only record before us consists of the order appealed from, and a bill of exceptions setting forth certain evidence introduced at the hearing on the final account and containing a copy of a portion of the original inventory and appraisal and portions of two previous accounts filed by the administratrix, together with a few vague references to other proceedings in the estate not set forth or explained.

The bill of exceptions sets forth six specifications of error, which we will take up in order.

[1] First, that the court erred in allowing the administratrix more than one annual premium of \$37.50 on her bond as administratrix. This is based on the contention that the estate should have been closed in one year, and that the same was fully ready to be closed within that time. No specific evidence is pointed out to support this contention, other than the fact that the estate was not closed for nearly seven years. On the other hand, the meager record before us shows that the estate contained both real and personal property, and that the real estate and a portion of the personal property were set aside to the widow as a homestead at some time not stated; that certain shares of stock in two banks, valued at over \$5,000, were held by a creditor as collateral security for certain notes, and were later sold and the proceeds applied to these debts, but the time of the sale and the manner and the entire transaction leading up to the same are not disclosed by the record. The record shows that notice to creditors was published in 1921 and republished in 1925, the court having declared the first publication to be void, but nothing appears to show whether this was due to the fault of the administratrix or her attorneys or to other matters beyond their control. The record shows that certain claims, including the one of appellant here, were filed in 1922 and finally rejected in 1926 and 1927; and that a suit was filed and went to trial on the claim of this appellant. In this connection, it may be observed that appellant had the option to consider his claim rejected and act thereon 10 days after it was filed. Section 1496, Code Civ. Proc. The bill of exceptions alleges that the estate is bankrupt. There is nothing in the record to show there was ever a time when the debts could have been paid. It appears that there was another 160 acres of land, which was owned by the administratrix and the deceased as joint tenants, and that a suit was filed in 1927 by appellant herein, against the estate and others, involving that land; that another suit was filed by appellant against the estate upon a promissory note in 1927; that two previous accounts had been filed by the administratrix and approved by the court after certain matters were stricken out, the record being silent as to what these matters were or how

much controversy was involved in that result. It is apparent from the record that there has been much controversy in relation to the affairs of this estate from the beginning. Many assertions are made in appellant's brief that find no support in the short bill of exceptions. The record is in such shape that we cannot tell whether the estate should have been closed in one year or in any other definite time. Not only is the presumption in favor of the action of the trial court, but such evidence as there is appears to support the same.

[2, 3] The second error claimed is in the allowance of attorneys' fees. One attorney was allowed a fee of \$240 in 1926, and a different attorney was allowed \$175 upon the approval of the final account. There is nothing in the record to show what was the basis for the first allowance of \$240, nor what evidence was before the court at the time. That particular account mentions receipts of \$2,006 and apparently appellant contends that the attorney's fee should have been computed on that amount. It is possible the court allowed additional attorney's fees for special services or the court may have computed the attorney's fees on the total amount of the estate, including the portion which was set aside to the widow. This latter portion was a part of the estate, was to be accounted for by the administratrix, and the order setting it apart to her is a species of distribution. *Estate of Miller*, 121 Cal. 353, 53 P. 906. In reference to the last item of \$175 allowed for attorney's fees, the attorney testified that he represented the administratrix in a suit filed against the estate upon a promissory note for \$2,250, preparing for trial and appearing thereat; that he represented the administratrix in another suit in which she was sued as such administratrix; that on three or four occasions he appeared in the superior court in response to citations issued by the court for the appearance of the administratrix; and that he represented the administratrix at the contested hearing on the exceptions to the final account. Whether or not the court allowed this \$175 attorney's fee entirely for special services cannot be determined from the record. However, if that be the case, we cannot say the evidence is not sufficient to sustain the order.

[4] The third specification of error relates to the refusal of the court to charge the administratrix with compound interest after the first year of her administration of the estate. This is based upon the assumption that the estate should have been closed within one year, and, for the reasons stated in commenting upon the first specification of error, this contention cannot be sustained.

[5] It is next insisted that the court erred in allowing the administratrix a total of \$100 for traveling expenses from Los Angeles

to El Centro, where the estate was being probated. It is stated that the administratrix moved to Los Angeles soon after her appointment, but how long thereafter is not alleged, and there are no facts in the record that justify us in holding that the trial court was in error in this respect.

[6] In the fifth specification of error, appellant objects to an item of \$50, which was set out in an earlier account as having been made as a payment upon a sewing machine, as a debt of the estate. This is objected to on the ground that the sewing machine was set apart to the wife as exempt property. There is nothing in the record to show that it was not a proper debt of the estate, nor when the sewing machine was set apart to the wife. The court approved the item at a hearing in 1926.

[7] The last specification of error is an objection to the allowance of \$127.50 for a hospital bill, it being argued that it was not a preferred claim against the estate. The item is objected to now for the first time, although it was approved by the court in 1926 at the hearing of a former account. In the excerpt from that account which is before us, it is included with the funeral expenses and would appear to be one of the expenses of the last illness of the deceased. There is nothing in the record to show the contrary. If this was the fact, it was, of course, a preferred claim. The appellant having failed to show any facts sustaining his contention, the action of the trial court must be upheld.

While the appellant makes a general charge of delay, negligence, and bad faith against the administratrix, he has utterly failed to produce a record upon which his contention could be sustained as to any particular item of the account.

The order appealed from is therefore affirmed.

We concur: SLOANE, P. J.; MARKS, J.

103 Cal. App. 460

CITY OF LOS ANGELES v. HALL et al. ★
(Civ. 7147.)

District Court of Appeal, First District, Division 1, California. Jan. 28, 1930.

Rehearing Denied Feb. 27, 1930. Hearing Denied by Supreme Court March 27, 1930.

1. Eminent domain ⇨262(5)—Jury view of premises at close of plaintiff's evidence, defendants not objecting, held not prejudicial as depriving defendants of fair trial (Code Civ. Proc. § 610).

Permitting jury in condemnation proceedings to view premises at conclusion of plaintiff's evidence, without objection by defendants, held not prejudicial to defendants as depriving them of

fair trial; Code Civ. Proc. § 610, not requiring view to be at any particular stage of trial.

2. Eminent domain ⇨224—Jury verdict in condemnation proceedings cannot be impeached by affidavits of jurors that other jurors had formed opinions as to value of land prior to introduction of evidence (Code Civ. Proc. § 657, subd. 2).

Under Code Civ. Proc. § 657, subd. 2, verdict of jury in condemnation proceedings can be impeached by testimony of juror only on issue of whether determination was result of chance, and testimony of jurors as to statements of other jurors indicating opinions formed prior to introduction of evidence is not admissible to controvert verdict.

3. Eminent domain ⇨246(3)—Proceedings to condemn land for park purposes must be dismissed on city's failure to pay award as provided by statute, unless case be within exception expressly stated by statute, irrespective of issuance of execution (Code Civ. Proc. § 1251 as amended by St. 1911, p. 92, § 1252, and § 1255a, as added by St. 1911, p. 377).

Under Code Civ. Proc. § 1255a, as added by St. 1911, p. 377, providing that failure to comply with section 1251, as amended by St. 1911, p. 92, shall constitute implied abandonment of condemnation proceedings, and under section 1252, requiring payment or deposit of money in court, defendant is entitled to dismissal of proceeding by city to condemn land for park purposes, when award has not been paid as provided by section 1251, as amended by St. 1911, p. 92, notwithstanding no execution issued under section 1252, unless the case be within one of the exceptions mentioned in the statute.

4. Eminent domain ⇨167(4)—Owner is entitled to have condemnation proceedings carried out in all material respects in accordance with statutes.

The owner of property proposed to be taken in condemnation proceedings is entitled to have proceedings leading to that end carried out in all material respects in accord with every requirement of statute.

Appeal from Superior Court, Los Angeles County; Arthur Keetch, Judge.

Condemnation proceeding by the City of Los Angeles against Leicester C. Hall and others. From an adverse decree, and from an order denying the motion to dismiss, named defendant appeals. Judgment affirmed, and order denying motion to dismiss reversed, and cause remanded, with directions.

Leicester C. Hall, in pro. per., and Tanner, Odell & Taft, all of Los Angeles, for appellant.

Jess E. Stephens, City Atty., and Leslie K. Floyd, Deputy City Atty., both of Los Angeles, for respondent.

PER CURIAM. This action was brought by the city of Los Angeles to condemn for park purposes certain real property owned

by defendant and appellant, Leicester C. Hall. A jury awarded him the sum of \$904.05 for the land taken, and an interlocutory judgment was entered accordingly. He moved for a new trial and also for an order dismissing the proceedings upon the ground that the plaintiff had failed to comply with the provisions of section 1251 of the Code of Civil Procedure. The motions were denied, and he has appealed from the judgment and the order denying his motion to dismiss.

The points relied upon for a reversal of the judgment are alleged irregularities in the proceedings of the court, and misconduct of the jury, due to which defendant claims that a new trial should have been granted. The denial of the motion to dismiss is also assigned as error.

[1] At the time plaintiff rested its case, its counsel suggested that the jury should view the land in question. Appellant, who is an attorney, appearing in the action in propria persona, approved the suggestion. The court thereupon fixed an hour of the same day for the view, to which appellant made no objection. He now claims that, the view having been had before all the evidence was presented, he was prevented from having a fair trial.

The statute does not require the jury to view the property at any particular stage of the trial (Code Civ. Proc. § 610), and no prejudice was suffered by appellant from a course of proceeding in which he acquiesced without objection.

[2] In support of the motion for a new trial, certain members of the jury made affidavits that other members thereof had formed opinions as to the value of the land prior to evidence being introduced, and had made statements in the presence of other jurors that the land was of little value. It is not contended that any member of the jury was induced to assent to a finding on any of the issues by resort to the determination of chance; and it is well settled in this state that on no other ground can the verdict be impeached by the testimony of a juror. Code Civ. Proc. § 657, subd. 2; *People v. Azoff*, 105 Cal. 632, 39 P. 59; *Siemsen v. Oakland, etc., Ry.*, 134 Cal. 494, 66 P. 672; *People v. Reid*, 195 Cal. 249, 232 P. 457, 36 A. L. R. 1435.

[3] Section 1251 of the Code of Civil Procedure, as amended in 1911 (Stats. 1911, p. 92), provides that "the plaintiff must, within thirty days after final judgment, pay the sum of money assessed. In case the plaintiff is the State of California, or is a public corporation, and it appears by affidavit that bonds of said state or public corporation must be issued and sold in order to provide the money necessary to pay the sum assessed, then such sum may be paid at any time within six months from the date of such judgment; provided, further, that if the sale of any such bonds can not be had by reason of litigation affecting

the validity thereof, then the time during which such litigation is pending shall not be considered a part of the six months' time in which such payment must be made. * * *

It is provided by section 1252 of the Code of Civil Procedure that "payment may be made to the defendants entitled thereto, or the money may be deposited in court for the defendants, and be distributed to those entitled thereto. If the money be not so paid or deposited, the defendants may have execution as in civil cases; and if the money cannot be made on execution, the court, upon a showing to that effect, must set aside and annul the entire proceedings. * * *

A new section, numbered 1255a, was added to the Code of Civil Procedure by the Statutes of 1911 (Stats. 1911, p. 377). This section provides that the "plaintiff may abandon the proceedings at any time after filing the complaint and before the expiration of thirty days after final judgment, by serving on defendant and filing in court a written notice of such abandonment; and failure to comply with section 1251 of this code shall constitute an implied abandonment of the proceeding. Upon such abandonment, express or implied, * * * a judgment shall be entered dismissing the proceeding. * * *

In the present case the interlocutory judgment was entered on January 17, 1928, this being the final judgment referred to in section 1251 of the Code of Civil Procedure (*Glenn County v. Johnston*, 129 Cal. 404, 62 P. 66; *Cal., etc., R. R. Co. v. Southern Pacific R. R. Co.*, 67 Cal. 59, 7 P. 123), and on March 17, 1928, the notice of motion to dismiss the proceeding was served and filed. The amount awarded appellant, including his costs, was deposited in court by the plaintiff on March 22, 1928, following which the motion to dismiss was heard and denied. Plaintiff contends that, before dismissal could be had, it was necessary for defendant to show that execution had issued as provided by section 1251 of the Code of Civil Procedure, and that the amount of the award could not be made thereon.

[4] While a defendant may avail himself of the remedy provided by this section where he fails to recover the award on execution, section 1255a—which was a later enactment—clearly shows an intention to provide additional relief by dismissal of the proceedings in case the plaintiff has failed for 30 days after final judgment to pay the award. And the exceptions to the requirement that payment be made within that time where the bonds of the state or public corporation must be issued and sold to provide the means of payment, or such sale cannot be had by reason of litigation affecting their validity, impliedly exclude all other exceptions in cases where either the state or a public corporation is a party plaintiff. The owner of property proposed to be taken is entitled to have

the proceedings leading to that end carried out in all material respects (*Graham v. Ballard*, 157 Cal. 96, 106 P. 215); and it has been held that every requirement of the statute giving the least semblance of benefit to the owner must be complied with (*Shipman v. Forbes*, 97 Cal. 572, 32 P. 599).

It is our conclusion from the language of the above sections that the issuance of execution under section 1252 is not a condition to the right to proceed under section 1255a; and that, in enacting the latter section, it was the legislative intention to require dismissal when the award has not been paid as provided by section 1251, unless the case be within one of the exceptions mentioned above.

We find no merit in the appeal from the judgment, but, in view of the facts, the motion to dismiss the proceedings as against appellant should have been granted.

The judgment is accordingly affirmed, and the order denying the motion to dismiss is reversed; the cause is remanded, and the trial court is directed to enter an order dismissing the proceedings as against appellant, Leicester C. Hall, and awarding him his costs and disbursements.

103 Cal. App. 399

PEOPLE v. BRASWELL. (Cr. 12.)★

District Court of Appeal, Fourth District, California. Jan. 24, 1930.

Rehearing Denied Feb. 5, 1930. Hearing Denied by Supreme Court Feb. 20, 1930.

1. Burglary ⇨41(1)—Evidence held to sustain conviction of burglary.

Evidence held sufficient to sustain conviction of burglaries charged in two counts of information.

2. Burglary ⇨42(1)—Unexplained possession of stolen property is insufficient to establish burglary, but may be considered by jury in reaching verdict.

While mere unexplained possession of stolen property is not sufficient to establish crime of burglary, such fact may be considered by jury, together with other circumstances, in arriving at a verdict.

3. Criminal law ⇨419, 420(1)—Sheriff's testimony as to whether defendant was person named in copies of prior judgments of conviction held not hearsay.

Questions to sheriff of county in another state as to whether defendant in burglary trial was person named in copies of judgments of conviction of burglaries in such county held not objectionable, as calling for hearsay testimony; testimony as to whether witness knew defendant to be the same man being called for.

4. Criminal law ⇨1202(3)—Evidence held to justify jury's finding that defendant was man involved in prior convictions of like offense.

In trial under information charging burglary and prior convictions of like offense in another

state, evidence held sufficient to justify jury's finding that defendant was man involved in such prior convictions.

5. Judgment ⇨815—Foreign judgment of insanity held not bar to trial for offenses committed on later date (Pen. Code, § 1367).

Judgment of county court of another state that defendant was insane on date thereof held insufficient to prevent court from placing him on trial for burglaries committed over 15 months later, under Pen. Code, § 1367; question being whether he was sane at time of committing offenses charged.

6. Criminal law ⇨740—Defendant's insanity at time of alleged burglaries held for jury.

Whether defendant was insane at time of committing alleged burglaries held question of fact for jury to determine.

7. Criminal law ⇨1159(5)—Jury's finding on conflicting evidence as to defendant's insanity at time of offenses charged cannot be disturbed on appeal.

The jury's finding on conflicting evidence as to whether defendant was insane at time of committing offenses charged cannot be disturbed on appeal.

8. Criminal law ⇨1212—Three prior convictions of any felony, whether on charges separately brought and tried or not, are sufficient to constitute fourth offender an "habitual criminal" (Pen. Code, § 644, as amended by St. 1927, p. 1066).

Under Pen. Code, § 644, as amended by St. 1927, p. 1066, construed so as to give effect to all provisions thereof, as required by Code Civ. Proc. § 1858, three prior convictions of any felony are sufficient to constitute fourth offender an "habitual criminal," whether they were on charges separately brought and tried or not.

[Ed. Note.—For other definitions, see Words and Phrases, First Series, Habitual Criminal.]

Appeal from Superior Court, San Bernardino County; Charles L. Allison, Judge.

Claude Braswell was convicted of burglary, and he appeals. Affirmed.

Fred Duffy, of San Bernardino, for appellant.

U. S. Webb, Atty. Gen., and John D. Richer, Deputy Atty. Gen., for the People.

BARNARD, J. The defendant was charged in an information filed by the district attorney of San Bernardino county with the crime of burglary in 6 separate counts. He was also charged with 15 prior convictions of a felony. He entered a plea of "not guilty," and "not guilty by reason of insanity," as to each count of the information, and also denied all of the alleged prior convictions.

After a trial by jury, defendant was found guilty of the crime of burglary as charged in counts 1 and 5 of the information, and the jury also found he had suffered prior convictions in Anderson county, Texas, in the following three cases: Criminal 9828, crim-

⇨For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

★Rehearing denied. Hearing denied by Supreme Court.

inal 9831, and criminal 9834. The remaining prior alleged convictions were found to be not true. Defendant was later tried by the same jury on the issue of sanity, and was found to be sane at the time the offenses were committed.

[1, 2] In brief, the evidence with reference to the first count of the information, is as follows: Mrs. A. B. Burcky testified that she lived at 1754 Second avenue, Ontario, Cal., and that about 2 or 2:30 on the morning of February 18, 1929, some one entered and burglarized her home; that the back door of her home was left standing open; that her son's trousers were taken from his room and left lying on the floor, together with her daughter's purse, which was lying on the floor empty. Her son testified that he was awakened by revolver shots, and shortly thereafter the police officers came to the door; that his trousers had been taken from the side of his bed into the next room, and \$7.60 removed therefrom; that \$1.50 was taken from his sister's purse. A police officer, J. L. Lock, testified that shortly after 2 o'clock that morning he and another officer were called to the Burcky home; that he saw the flash of a flash-light, apparently in the house, and as he walked toward the back door the flash-light quit operating; that as he went on around the house, and was near the back door, the flash-light continued to operate in quick, short flashes, going from the front part of the house to the rear, whereupon the defendant came out of the door. When commanded to put up his hands, the defendant ran. Several shots were fired, but the officer overtook defendant and placed him under arrest. The officer then testified:

"After I pursued him and caught him, Officer Fred Tebo also came along, and we took Braswell into custody and returned to the police station and there searched him. At the time we took him in custody we found \$7 in \$1 bills in his left hand and his flash-light in his right hand. We searched for a gun and we found none, but found an ice pick. We then returned to the police station and searched him further, and found a purse with approximately \$56, and I believe mostly in paper money in his pants pocket, and after he was searched took him to the hospital for first aid."

This officer further testified that appellant's purse had two compartments; in one of these there was a roll of currency amounting to \$54, and in the other there were two \$1 bills. The \$54 consisted of one \$20 bill, one \$10 bill, four \$5 bills, and four \$1 bills. In appellant's pants pocket was found 2 half dollars, 6 dimes, 2 quarters, 7 nickels, and 2 pennies; also a knife and a pass-key. When arrested, the appellant had two pairs of socks pulled on over his shoes. This evidence was sufficient to sustain the verdict of the jury as

to 'appellant's connection with the offense charged in the first count.

It is urged that the evidence is not sufficient to establish appellant's connection with the offense charged in count 5 of the information. In reference to that count, one John Batchelor testified that he lived at 1753 Second avenue, Ontario, California, directly across the street from the Burcky home, heretofore mentioned; that he was awakened about 2 o'clock on the morning of February 18th by several shots; that he found the outside door of his house standing open, whereas it had been closed, but not locked, when he retired the night before; that a purse containing \$54 in currency had been taken from his trousers, which were lying on his bed when he retired the previous evening; that the same purse was found the next morning on the adjoining lot, about 20 feet from his house, minus the money. He testified that the \$54 consisted of four \$1 bills, four \$5 bills, one \$10 bill, and one \$20 bill, which was a new crisp bill. He stated that the \$54 found on the appellant looked like his money.

The chief of police testified as follows, with regard to a voluntary conversation he had with appellant: "Officer Lock and myself brought him over, and he talked all the way over on various subjects; talked about being wanted in Texas, and about wanting his property, that part that we had out there, and among other things was a fountain pen and his part of this money, and whatever part that was not 'hot' he wanted; he said he could use it in his business, and all that kind of stuff, and he told at that time about being a reward offered for him in Texas; he said it was '25.' I asked him, '2500 dollars,' and he said, 'no; he wasn't worth that much; it was only \$25.'"

It must be conceded that the mere unexplained possession of stolen property is not sufficient to establish the crime of burglary. *People v. Nichols*, 39 Cal. App. 29, 177 P. 861. However, the fact of such possession, if unexplained, may be taken into consideration by the jury, together with other circumstances, in arriving at a verdict. *People v. Reed*, 58 Cal. App. 7, 207 P. 1025; *People v. McNamara*, 65 Cal. App. 521, 224 P. 476; *People v. Cronevitch*, 86 Cal. App. 646, 261 P. 309.

We have here, not only the unexplained and uncontradicted possession of the stolen money, but also the following facts: The property had been taken from Batchelor's clothes while they were lying on his bed, under such circumstances of stealth that no one in the house was awakened. The door of his house was left open; the pocketbook in which the money had been contained was thrown away; and a similar amount of money in a similar form, and bearing a very close resemblance, was found in a separate

compartment in a pocketbook carried by defendant. He was actually apprehended immediately across the street, where he was engaged in an enterprise exactly similar to the one that had taken place in the Batchelor home. He was at the time fully equipped for such an expedition of stealth, having on two pairs of socks over his shoes, and also having a flash-light, an ice pick, and a pass-key. He also admitted that a part of the money was "hot." While the evidence as to the entry of the appellant into the Batchelor home is circumstantial, we think these facts constitute ample evidence to support the verdict of the jury.

[3, 4] It is next contended that the evidence is not sufficient to sustain the finding of the jury that appellant had theretofore been three times convicted of a felony. This contention is based upon the claim that the identification of the defendant as the party who had been convicted on the former occasions in Texas was not sufficient. Duly authenticated copies of the judgment of conviction of the crime of burglary, in each of the three cases in Texas, were introduced in evidence. The sheriff of Anderson county, Texas, testified that he knew appellant and had placed him under arrest in the latter part of 1919, and that appellant was the same man that was tried in each of the three cases in question. In reference to the three prior convictions in Texas, the sheriff made the following answer to the following questions:

"By Mr. Thompson: Q. Calling your attention first to the authenticated copy of conviction, judgment of conviction, in the case of State of Texas v. Claude Braswell, 9831, tried on January 14, 1920, at which time John W. Normington was foreman of the jury, do you know if this Claude Braswell is the defendant now in court here that is named in that? A. Yes, sir, he is the same party.

"By Mr. Thompson: Q. Now, calling your attention to People's Exhibit 10, which is also an authenticated copy of judgment of conviction in the case of State of Texas v. Claude Braswell, No. 9828, bearing date of January 14, 1920, at which time John W. Normington was the foreman on the trial jury, do you know if this man is the same Claude Braswell as was tried at that court at that time? A. It is.

"Q. Directing your attention now to People's Exhibit 12, which is an authenticated copy of the judgment, record of judgment of conviction in the State of Texas v. Claude Braswell in the county of Anderson, in cause No. 9834, January 14, 1920, at which time John W. Normington was the foreman of that jury trying Claude Braswell named therein, do you know if the Claude Braswell named in this certificate is the same person as is here now on trial? A. Yes, sir, he is the same party."

Appellant insists that these questions called for hearsay testimony. This contention is without merit. The question called for the knowledge of the witness, as to whether he knew appellant to be the same man named in the record of conviction. The question called for the knowledge of the witness as to a fact, and the witness testified as a fact that he knew appellant to be the same man. Appellant had ample opportunity to cross-examine the witness as to the basis of his knowledge, but the record shows no attempt to do so. There was sufficient evidence to justify the finding of the jury that the defendant was the same man involved in the prior convictions.

[5-7] Appellant's next contention is that the court erred in placing defendant upon trial at all, for the reason that a man cannot be tried or punished for a public offense while he is insane. Pen. Code, § 1367. Defendant offered in evidence an authenticated copy of a judgment of the county court of Walker county, Texas, adjudging the defendant insane, under date of November 7, 1927. It is insisted that this judgment should be considered in full force and effect, and that it is sufficient to prevent the defendant being placed on trial.

This contention is also without merit. So far as insanity is concerned, the only question before the trial court was whether appellant was sane at the time of the commission of the offenses charged in the information and the question of his insanity at that time was a question of fact to be determined by the jury. The record of the Texas court adjudging defendant to be insane on November 7, 1927, was admitted in evidence for whatever effect it might have upon the question of defendant's insanity at the time the offense here involved was committed. The jury found that the other evidence introduced was sufficient to establish the sanity of the defendant at the time involved, and their decision is controlling. The question as to whether the defendant was insane at the time of the commission of the offense charged was properly submitted to the jury. People v. Schuler, 87 Cal. App. 68, 261 P. 1059. There being conflicting evidence, the finding of the jury cannot be disturbed on appeal.

[8] It is finally contended by appellant that, even if he were properly found guilty of three prior convictions in the state of Texas, since the record shows that these convictions all occurred on the same day, to wit, January 14, 1920, and in the same court they did not constitute three prior convictions, within the meaning of section 644 of the Penal Code. It is argued that the intent and purpose of section 644 of the Penal Code is to provide that, where a defendant has been apprehended, convicted, and punished, he shall be given an opportunity for reformation, and that after this has occurred three separate times, upon a

fourth conviction he shall be deprived of his liberty for life.

It is argued that the three prior convictions in this case are, in effect, one conviction only, and should be so considered for the purposes of this statute. It may be conceded that this argument might, with considerable force, be addressed to a law-making authority. There might be good reason for providing that an interval, for punishment and for reformation, should take place between respective convictions before regarding a reformation as hopeless. There might also be good reason for providing a different rule where the prior offenses were committed all one day, possibly under peculiar stress of circumstances, and where the respective offenses were committed on different occasions. The record here does not disclose whether the offenses involved in the prior convictions were committed on the same day, or over a period of time. The record does not show whether the cases were tried separately or together. The record discloses that each case had an individual number, that each of the verdicts were, on the same date, signed by the same man, as foreman of the jury.

Prior to the amendment of 1927, section 644 of the Penal Code read as follows:

"Third conviction. Penalty. Every person convicted in this state of any felony who shall previously have been twice convicted, whether in this state or elsewhere, of the crime of robbery, burglary, rape with force and violence, arson or any of them, shall be adjudged to be an habitual criminal and shall be punished by imprisonment in the state penitentiary for not less than ten years.

"Fourth conviction. Penalty. Every person convicted in this state of any felony who shall previously have been three times convicted whether in this state or elsewhere of the crime of robbery, burglary, rape with force and violence, arson or any of them, shall be punished by imprisonment in the state penitentiary for not less than life; provided, however, that nothing in this act shall abrogate or affect the punishment of death in any and all crimes now or hereafter inflicting such punishment of death."

In that year (St. 1927, p. 1066) the section was amended to read as follows:

"Every person convicted in this state of any felony, who shall have been previously twice convicted *upon charges separately brought and tried*, either in this state or elsewhere, of the crime of robbery, burglary, burglary with explosives, rape with force or violence, arson, murder, assault with intent to commit murder, grand theft, bribery of a public official, perjury, subornation of perjury, train wrecking, feloniously receiving stolen goods, felonious assault with a deadly weapon or any of them, shall be adjudged an habitual criminal and shall be punished by imprisonment in the

state prison for life and shall not be eligible for release on parole until he shall have served a minimum of at least twelve years. Every person convicted in this state of any felony who shall have been previously *three times convicted, either in this state or elsewhere, of any felony*, shall be punished by imprisonment in the state prison for not less than life and shall not be eligible to parole. Nothing in this act shall abrogate or affect the punishment by death in any and all crimes now or hereafter inflicting such punishment of death." (Italics ours.)

The first part of this statute provides that every person convicted of any felony, who has been previously twice convicted, where the charges have been separately brought and tried, either in this state or elsewhere, of certain crimes, shall receive life imprisonment, and shall not be paroled for at least 12 years. The second part of the statute provides that every person convicted of any felony, who has been previously three times convicted, either in this state or elsewhere, of *any* felony, shall be given life imprisonment, and shall not be eligible to parole. The second part of the statute leaves out the provision contained in the first part (and placed there for the first time by the amendment of 1927), providing that the prior charges must have been separately brought and tried, and also makes the prior convictions applicable to any felony, instead of the particular ones mentioned in the first portion of the statute. It may be argued with some force that the Legislature should not have required the prior convictions to be upon charges separately brought and tried, when the limit upon parole is fixed at only 12 years, and have left that provision out where the defendant is never to be eligible to parole. In other words, that more is thus required in laying the foundation for a 12-year term than is required for a life term. While that argument might well be addressed to a legislative body, it is not controlling upon the judicial interpretation of the statute in question. In order to adopt appellant's contention, it would be necessary to add the words "upon charges separately brought and tried" to the second part of the statute. This might be done if there were any ambiguity about the second part of the statute, if it was incomplete, or if it had been left in such condition as to disclose that it was the intention of the Legislature to merely add one more to the list of prior convictions, leaving all of the other provisions of the first part of the section intact, and then fix an additional punishment therefor.

Section 1858 of the Code of Civil Procedure reads as follows:

"Construction of Statutes and Instruments—General Rule. In the construction of a statute or instrument, the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not

to insert what has been omitted, or to omit what has been inserted; and where there are several provisions or particulars, such a construction is, if possible, to be adopted as will give effect to all."

It will be noted that the second portion of the statute is complete in itself. It does not adopt or refer back to the preceding portion of the paragraph, but states in full its own conditions. It makes two distinct changes, leaving out the reference to a separate bringing and trying of the prior charges, and changing its application from certain named felonies to any felony. Under the rule of construction laid down by section 1858 of the Code of Civil Procedure, it is not for the courts to insert in the second portion of the section such a provision as is contained in the first portion. It is entirely possible to give effect to each portion of the statute. The Legislature may have considered three prior convictions to have been sufficient to have constituted a man an habitual criminal, whether or not they were upon charges separately brought and tried.

For the reasons given, the judgment appealed from is affirmed.

We concur: SLOANE, P. J.; MARKS, J.

103 Cal. App. 425

LEWIS PUB. CO. v. HENDERSON et al. ★
(Civ. 6681.)

District Court of Appeal, First District,
Division 1, California. Jan. 27, 1930.

Rehearing Denied Feb. 26, 1930. Hearing Denied by Supreme Court March 27, 1930.

1. Evidence ⇨450(8)—Oral testimony that steel plates for reproducing portrait were to be entirely hand-engraved was competent, where memorandum of agreement failed to specify type (Civ. Code, §§ 1625, 1698; Code Civ. Proc. § 1856).

Where memorandum of agreement, relative to purchase of set of books with reproduction of portrait of purchaser and deceased husband from steel plate, which, together with 10 prints therefrom, were to be delivered to purchaser, failed to specify whether steel plates were to be entirely hand-engraved or otherwise, oral testimony was competent, under Civ. Code, § 1625, Code Civ. Proc. § 1856, and Civ. Code, § 1698, to explain ambiguity in memorandum, and evidence to effect that plates were to be entirely hand-engraved was not inconsistent with memorandum, and did not contradict or vary terms thereof.

2. Evidence ⇨432—Law relating to merger and superseding of negotiations by written instruments does not prevent showing want or failure of consideration (Civ. Code, § 1625).

Civ. Code, § 1625, relating to merger and superseding of all negotiations by written instruments, does not prevent a showing by parol evidence of want or failure of consideration in defense of an action on written instrument.

3. Evidence ⇨419(13), 432—Parol evidence as to agreement to reproduce portrait from steel plates entirely hand-engraved was competent on question of consideration and failure of consideration for contract for sale of books.

Parol evidence to effect that seller of set of books had agreed that portrait of purchaser and her deceased husband therein would be reproduced from steel plates entirely hand-engraved, was competent on question of whether such agreement was consideration for agreement to purchase books, and whether such consideration had failed.

4. Sales ⇨176(5)—Failure to return books did not create liability for contract price, in absence of acceptance.

Failure to return set of books sold did not create liability for payment of full contract price, where books were never accepted.

5. Contracts ⇨278(1)—Party to contract cannot compel performance while he himself is in default (Civ. Code, § 1439).

One party to a contract cannot compel another party thereto to perform while he himself is in default, in view of Civ. Code, § 1439.

Appeal from Superior Court, Alameda County; John J. Allen, Judge.

Action by the Lewis Publishing Company against Charles U. Henderson and another, as executors of the last will and testament of Ellen M. Wetherbee, deceased. Judgment for defendants, and plaintiff appeals. Affirmed.

George D. Collins, Jr., of San Francisco, for appellant.

Walker S. Teeson, of Oakland, and Paul A. Lindley, of Berkeley, for respondents.

KNIGHT, J. This is an appeal by plaintiff from an adverse judgment in an action to recover the sum of \$565 on a rejected claim theretofore presented for allowance against the estate of Ellen M. Wetherbee, deceased. The facts as they appear from the findings and the evidence supporting the findings are as follows:

Mrs. Wetherbee subscribed for a set of books which plaintiff was about to publish, entitled "California and Californians," the purchase price being \$65. A few days later plaintiff's representative stated to her that, if she would agree to cancel said subscription and pay an additional \$1,000, plaintiff would reproduce the portrait of herself and her deceased husband in said books from steel plates which would be entirely hand-engraved and deliver to her a set of the books, the hand-engraved steel plates from which the portrait was to be reproduced, and 10 prints therefrom. Mrs. Wetherbee accepted the proposition, and thereupon plaintiff's representative prepared a memorandum of the agreement, which was addressed to plaintiff, signed by Mrs. Wetherbee, and provided, among other things, that one-half of the agreed price of \$1,065 should be paid on submission of the

proofs and the balance on delivery of the books, etc. Mrs. Wetherbee made the first payment of \$500, as called for in the agreement, but before the publication of the books was completed she died. Thereafter the books were sent by express to her late residence, and defendants refused to accept or pay for the same, for the reason, as the answer alleges and the evidence shows, that the portrait of Mrs. Wetherbee and her husband was not reproduced therein from steel plates entirely hand-engraved, as plaintiff agreed it would be, but were executed on plates partly machine-made and of a greatly inferior quality. The trial court concluded from the foregoing facts that plaintiff had not performed its contract; that there had been a failure of consideration, and that, consequently, plaintiff was not in a position to enforce the terms of the contract against the other party thereto.

[1] The main contention made by plaintiff in support of the appeal is that the findings and judgment are erroneous, in that they are founded upon evidence which is violative of the Code provisions declaring in effect that a contract, when reduced to writing, supersedes all negotiations and stipulations concerning its matters which preceded or accompanied its execution (Civ. Code, § 1625; Code Civ. Proc. § 1856), and can be altered only by a contract in writing or by an oral executed agreement, but not otherwise (Civ. Code, § 1698). This contention arises out of the following circumstances: In preparing the memorandum of agreement, plaintiff's representative omitted to specify therein, as agreed, that the steel plates to be used in the reproduction of said portrait were to be entirely hand-engraved; but the answer alleged that such was the agreement and that plaintiff had failed to perform that part of it. Plaintiff did not demur to the answer, but at the trial treated the issue thus raised as the main one to be tried, and in response thereto offered as its first witness Mrs. Lottie Gonzales, who was present at all times during the negotiations between the parties, for the purpose of establishing what the oral agreement was between the parties as to the type of the steel plates; but she testified on direct examination, in response to questions propounded by counsel then representing plaintiff, that plaintiff agreed to furnish and use steel plates which would be entirely hand-engraved.

It will thus be seen that plaintiff is now complaining of the competency of the evidence which it introduced as a part of its case in chief, in response to an issue raised by an answer to which it did not demur, and defendants argue, therefore, that plaintiff is precluded from doing so, particularly for the first time on appeal. *Kuhn v. Dickey*, 66 Cal. App. 227, 225 P. 867. Whether or not that be so, we are of the opinion that the evidence was competent under the provisions of sec-

tion 1856 of the Code of Civil Procedure. It is there provided in effect, among other things, that when the agreement has been reduced to writing the rule as to the exclusion of parol evidence "does not exclude other evidence of the circumstances under which the agreement was made or to which it relates, as defined in section 1860, or to explain an extrinsic ambiguity. * * *

Here the evidence shows that there are various kinds and types of steel plates used in the reproduction of portraits, some being costly, such as those entirely hand-engraved, while others are of a cheaper and inferior variety, such as those made partly by machine, and it further shows that the agreement between the parties was made with the distinct understanding that steel plates, entirely hand-engraved, were to be used. Therefore, since the memorandum of agreement failed so to state, extrinsic evidence was admissible, and in fact necessary, to explain the ambiguity in the memorandum and to show what the parties intended thereby; and the evidence introduced in this behalf, having relation to a matter upon which the written memorandum was silent, and not being inconsistent therewith, cannot be said to contradict or vary the terms thereof. *Sivers v. Sivers*, 97 Cal. 518, 32 P. 571.

[2, 3] Moreover, it is well settled that section 1625 of the Civil Code, relating to the merger and superseding of oral negotiations by a written instrument, does not change the law as to parol evidence of the consideration of such instruments, and accordingly a person may show by such evidence want or failure of consideration in defense of an action on such written instrument. 6 Cal. Jur. 207, and cases cited. In the present case, therefore, the parol evidence introduced by plaintiff and to which it now objects was competent to be considered in determining whether, as defendants claimed, the consideration for the execution of the second agreement, which called for the payment of an additional \$1,000, was that plaintiff agreed to reproduce said portrait from steel plates entirely hand-engraved, and whether such consideration had failed.

[4, 5] Plaintiff makes the further contention that, aside from the merits of points mentioned, defendants are nevertheless liable for the payment of the full contract price because the books were not returned. The evidence upon this point shows, however, that defendants never did accept the books; that some time after they arrived by express at the residence of Mrs. Wetherbee, following her death, they were removed to the city library, but by whom or at whose direction the evidence does not make clear. In any event, as stated in *Rathbun v. Security Mfg. Co.*, 82 Cal. App. 793, 256 P. 296, it is elementary that one party to a contract cannot compel another to perform while he himself is in default. See, also, section 1439, Civ. Code;

Karales v. Los Angeles Creamery Co., 36 Cal. App. 171, 171 P. 821; **Wood, Curtis & Co. v. Seurich**, 5 Cal. App. 252, 90 P. 51; **San Francisco Commercial Agency v. Widemann**, 19 Cal. App. 209, 124 P. 1056. Therefore, in the present case, plaintiff having failed to prove, as alleged in its complaint, that it had performed its part of the contract, was not entitled to enforce its terms against the other party thereto. If the judgment herein were founded upon a rescission of the contract, a different question would be presented, but such is not the case. The defense here rested upon the proposition that plaintiff had failed to perform its contract, and consequently no rescission was attempted or required. **Wood, Curtis & Co. v. Seurich**, supra.

In view of the conclusions we have reached upon the matters above discussed, it becomes unnecessary to consider or determine the remaining contentions made by plaintiff, which relate to the question of plaintiff's corporate entity.

The judgment is affirmed.

We concur: TYLER, P. J.; CASHIN, J.

103 Cal. App. 486

WESTERN IRON WORKS v. SMITH.
(Civ. 6833.)

District Court of Appeal, First District, Division 2, California. Jan. 28, 1930.

1. Sales ⇨52(5)—Evidence held to support finding that in action for goods sold and delivered certain material was never ordered.

In action for goods sold and delivered to recover for certain locker cars and other iron work, evidence held sufficient to justify finding that locker cars were not ordered.

2. Appeal and error ⇨842(1)—Decision of whether consignee by unreasonable retention of goods has waived right of rejection involved question of fact, viewed like any other on appeal.

Whether conduct of consignee in relation to acceptance and retention of goods for unreasonable time without rejection was such as to constitute waiver of right to object was question of fact which, after decision by trial court, will be treated by appellate court like any other question of fact.

3. Sales ⇨22(1)—Letter saying certain material was not in contract could be construed as rejection.

In action for goods sold and delivered, it being contended that locker cars shipped to defendant were not ordered, his letter stating they were not included in contract could be construed as a rejection, although defendant, instead of saying he would not accept, said that trustees for whom he was doing construction work would not accept.

4. Sales ⇨22(1)—Seller's conduct could be construed as bearing resemblance to urging buyer to keep goods on trial, which has been held to warrant delay in rejection.

In action for goods sold and delivered, plaintiff's conduct could be construed as analogous to importuning dissatisfied buyer to retain goods for further trial; such conduct having been held to excuse what otherwise would be unreasonable delay in rejecting unsatisfactory goods.

5. Interest ⇨39(2)—Interest prior to judgment is not recoverable in action for the reasonable value of goods sold.

In action to recover reasonable value of goods sold and delivered, no interest is recoverable prior to judgment.

Appeal from Superior Court, Sonoma County; R. L. Thompson, Judge.

Action by the Western Iron Works against William J. Smith to recover \$1,150 for goods sold and delivered. From a judgment for plaintiff for \$250 without interest, plaintiff appeals. Affirmed.

Waldo F. Postel, of San Francisco (L. Seidenberg, of San Francisco, of counsel), for appellant.

Geary & Geary and C. J. Tauzer, all of Santa Rosa, for respondent.

KOFORD, P. J. Plaintiff instituted this action to recover \$1,150 for locker cars and other iron work alleged to have been sold and delivered to defendant for the Analy Union high school in Sebastopol, Cal. The complaint was in two counts of indebtedness, one for the reasonable value and the other upon an open book account. Plaintiff recovered judgment for \$250 without interest, being for a certain part of the iron work, but was denied judgment for the value of the locker cars. Plaintiff appeals from the judgment.

The main points on appeal are whether the locker cars were ordered and whether the defendant acted promptly enough in rejecting them. Both questions are largely questions of fact, and the appeal therefore presents chiefly the question of the sufficiency of the evidence to justify the findings and judgment of the court. The evidence discussed and printed in the appellant's briefs would make it appear that the locker cars were ordered and that after delivery they were accepted and retained an unreasonable length of time before final and definite rejection. Respondent prints other evidence, however, to the contrary.

In 1926, respondent and appellant entered into a contract for the supply of steel and ironwork for the high school building. Some material (not involved in this action) was delivered. Then in April, 1926, respondent notified appellant that the bond election had failed and that the original plans for the high school building would not be carried out by

the high school trustees. Respondent settled for materials already delivered and the contract was considered as ended.

Thereafter on July 16, 1926, respondent wrote appellant: "They are going to complete the gym here as per the original contract now, and I would like to know if there will be an advance over your original contract with me. I wish you would send all the pipe railing and fixtures for around the bleachers and balcony." Appellant claims the expression in the letter "fixtures for around the bleachers and balcony" included and meant the locker cars. Respondent claims it did not. Appellant claims this letter was an order and made a new written contract. Respondent claims to the contrary.

After receipt of the letter appellant sent its secretary, Mr. Gates, to Sebastopol, July 20, 1926. According to the testimony of appellant and Mr. Parsons, foreman on the building, the conversations at that time and place between Mr. Gates and respondent were to the effect that owing to lack of funds the school board would not purchase locker cars and safety treads. Mr. Gates nevertheless took measurements for the locker cars and safety treads with the expressed understanding that it was only for possible future use and to save another trip to Sebastopol in case it should be finally decided by the board to do that part of the work. Respondent, however, at that time did order certain thresholds and pipes delivered. Thereafter a shipment arrived at Sebastopol. Respondent ordered his truckman to deliver it to the high school building. On October 29, 1926, respondent wrote appellant: "You sent some locker cars up here for the Sebastopol Auditorium and they are not in the contract and the Trustees will not accept them." Thereafter respondent went to San Francisco and talked with the representatives of appellant. He told them that the locker cars had not been ordered, and Mr. Morris, appellant's manager, asked him to "see if he could not have the Board take them over." In February respondent wrote appellant inquiring on behalf of the school trustees about the probable cost of changing the size of the locker cars. The reply was that the change would be impracticable. Then on March 26, 1927, respondent reshipped the locker cars to appellant.

[1] Under the testimony the court was warranted in deciding that the locker cars had not been ordered. It is very doubtful whether the letter itself of July 16, 1926, was an order because of its wording, and because appellant is not suing upon the theory of a revival of the original express contract, but for the reasonable value (different from the original agreed price) as though the letter was a new contract. Taking the letter in connection with the conversations with Gates upon his visit to Sebastopol, the court was at full liberty to decide that the letter was only an inquiry, so treated by the parties, that the real order was as modified by the oral conversation, and that it included only that part of the ironwork for which judgment was confessed.

[2-4] It is true that a consignee of goods may so conduct himself in respect to the acceptance and retention of the goods for an unreasonable time without rejection as to be held to have waived his right to object. This is a question of fact, however, which, when decided by the trial court, is to be viewed by the reviewing court like any other question of fact. The court could construe the letter of October 29, 1926, as a rejection even though it stated "the trustees will not accept them" instead of "I will not accept them." It definitely stated "they are not on the contract." Furthermore, the conversation of respondent with appellant's manager in San Francisco could well be construed as conduct by the appellant analogous to importuning a dissatisfied buyer to retain goods for further trial. Such conduct has been held to excuse what otherwise would be an unreasonable delay on the part of a buyer to reject unsatisfactory goods. *Luitweiler, etc., Co. v. Ukiah, etc., Co.*, 16 Cal. App. 198, 208, 116 P. 707, 712; *Fox v. Harvester, etc., Works*, 83 Cal. 333, 23 P. 295.

[5] The action being for the reasonable value, no interest was recoverable prior to judgment. *Sea v. Lorden*, 37 Cal. App. 445, 174 P. 85, and cases there cited.

The judgment is therefore affirmed.

We concur: STURTEVANT, J.;
NOURSE, J.

HAVENS et ux. v. LOEBEL (Civ. 3951.)★

District Court of Appeal, Third District, California. Jan. 20, 1930.

Rehearing Denied Feb. 19, 1930. Hearing Denied by Supreme Court March 17, 1930.

1. Automobiles ⇨208—Automobile driver held contributorily negligent in collision in driving at unlawful rate of speed when vision was obscured (Vehicle Act, §§ 113, 121, 131).

In action to recover damages on account of injuries to plaintiff's wife, and for loss of services and damages to automobile, in collision between automobiles operated by plaintiff and by defendant, evidence held to establish that plaintiff was guilty of contributory negligence as a matter of law in traveling at an unlawful rate of speed at time vision was obscured, in violation of Vehicle Act, §§ 113, 121, 131 (St. 1923, pp. 553, 557, 560), as amended by St. 1925, p. 412, § 15.

2. Negligence ⇨93(2)—Husband's contributory negligence in operation of automobile in traveling at unlawful speed when vision was obscured was imputable to wife.

Contributory negligence of husband in operation of automobile at time of accident in traveling at an unlawful speed when vision was obscured was imputable to wife riding with him, and prevented recovery by her for injuries sustained in collision.

Appeal from Superior Court, Sutter County; K. S. Mahon, Judge.

Action by R. F. Havens and another against A. Loebel. Judgment for plaintiffs, and defendant appeals. Reversed.

J. Hampton Hoge, of San Francisco, Len H. Honey, of Stockton, and Loyd Hewitt, of Yuba City, for appellant.

Arthur Coats, of Yuba City, and Alvin Weis, of Marysville, for respondents.

PLUMMER, J. This is an action for personal injuries alleged to have been sustained by the plaintiff Leila Havens, by reason of the alleged negligent operation of an automobile by the defendant; also to recover for loss of services and damages to the automobile belonging to the plaintiff R. F. Havens. The plaintiffs had judgment, and the defendant appeals.

This action is based upon the collision of the automobile owned by R. F. Havens with the defendant A. Loebel, mentioned and considered in the action of R. F. Havens v. A. Loebel (Civil No. 3950) 284 P. 676, heretofore decided by this court in an opinion filed on the 16th day of January, 1930. The testimony in the instant case is practically the same as in the case of Havens v. Loebel, so far as it relates to all the conditions and circumstances attending the collision between the two automobiles. In addition to the testimony of the plaintiff there set forth, and the statements in the opinion in that case as to what

the testimony of the plaintiff established in relation to the plaintiff driving into the intersection with his sight so blinded or interrupted by the rays of the sun that he could not and did not see the defendant's car, and that he did so while driving at the rate of 30 miles an hour, without slackening his speed, we may add the following:

After stating that there was no object in the road to interrupt his view, the plaintiff testified: "There was a dark spot on the windshield from the glare; I tested it out and there is a spot on the left-hand side of the windshield, so you could not see." (This was after the witness had stated that he did not see the defendant's car.) Further on the plaintiff testified as to giving certain testimony before the coroner's jury, which is set forth herein as the plaintiff's testimony, when there giving an explanation of the occurrence. It is as follows:

"I was going west just about six o'clock, or a little after, and the sun was directly in my eyes; there were machines coming and going both ways; I was watching my end of the road in order to keep to my side of the pavement; I knew that the stop-signs are along on the roads coming in and I trust to this; I was taking in vision as much as I could see in front of me; if there had been any machine stopped along that side I could have seen it because there is a clear spot there, and just like that, that machine seemed to come just from space like it had been placed by magic right square in front of me; I had no chance at all; to me it seemed as if the machine was stopped dead still right in front of me; that is my vision of the thing. * * * I was driving 30 miles an hour; I looked at the speedometer just a few seconds before that; I couldn't have driven any faster and stay on the pavement facing the sun; I never drive any faster under those conditions; I absolutely saw no car on the road approaching the highway until it was directly in front of me, not until the impact was made; I hit his car; there was an awful glare and the radiator—I have practically a new machine, and the radiator and the hood are rather high; there was a glare from that and the highway."

[1.2] In consideration of this testimony and what we have set forth in the case of Havens v. Loebel, supra, there is no escaping the conclusion that the plaintiff's negligence continued up to the instant that his car struck the side of the defendant's automobile, turning it over, and under the sections of the California Vehicle Act (St. 1923, pp. 553, 557, §§ 113, 121, and section 131, p. 560, as amended by St. 1925, p. 412, § 15), and the cases which we have cited in our former opinion dealing with the same transaction, there is no escaping the conclusion that the plaintiff was guilty of contributory negligence as a matter of law. We may also add that the testimony

In this case shows that the plaintiff Leila Havens was so blinded by the sunlight that she could not and did not see the approach of the defendant's car. Under the authority of *McFadden v. Santa Ana, O. & T. St. Ry. Co.*, 87 Cal. 464, 25 P. 681, 11 L. R. A. 252, it must be held that the contributory negligence of the husband is imputable to the wife and prevents recovery by her.

Basing our opinion upon what we have here said, and the companion case decided by this court in its opinion filed as aforesaid, it follows that the judgment in this case must be and the same is hereby reversed.

We concur: FINCH, P. J.; R. L. THOMPSON, J.

In re McARTHUR'S ESTATE. (Civ. 6643.)★

District Court of Appeal, Second District, Division 1, California. Jan. 25, 1930.

Rehearing Denied Feb. 18, 1930. Hearing. Granted by Supreme Court March 20, 1930.

Descent and distribution §61—Surviving spouse having remarried and died intestate and without issue, sister of deceased spouse held not entitled to one-half estate; "widow" (Civ. Code, § 1386, subd. 8).

Where deceased, dying intestate and without issue, on death of her first husband, had become vested of title to community property, but had thereafter remarried, she was no longer a widow within meaning of Civ. Code, § 1386, subd. 8, at time of her death, her second husband being alive, and sister of first husband was not entitled to one-half of estate under statute, providing that on death of widow without issue common property shall go in equal shares to brothers and sisters of deceased spouse; "widow" being a woman whose husband is dead and who has not married again.

[Ed. Note.—For other definitions, see Words and Phrases, First, Second, and Third Series, Widow.]

Appeal from Superior Court, Los Angeles County; John L. Hudner, Judge.

Proceedings between Lillian Mae Flint and Margaret I. McArthur, administratrix of the estate of Iva Farrand McArthur, deceased. From an order directing distribution of the property, Lillian Mae Flint appeals. Affirmed.

H. G. Simpson, of Pasadena, for appellant.
Victor T. Watkins, of Los Angeles, for respondent.

HOUSER, J. On the death of one Farrand, his widow, Iva Farrand, became vested of the title to certain community property which formerly was the property of her and her said deceased husband. Thereafter she married one McArthur, following which

event she died intestate, without issue, but leaving as her survivor her then husband McArthur. On the probate of her estate, which included the community property which formerly had belonged to her and her former husband, the lower court ordered distribution thereof to the executor of the estate of her second husband, McArthur—he having died following her decease. It is from such order or judgment that this appeal is taken by a surviving sister of Farrand.

The question presented is whether, under the provisions of subdivision 8 of section 1386, of the Civil Code, one-half of the estate should have been distributed to the sister of the former husband of the deceased. If the words of the statute be reduced to a form assumed by appellant to be applicable to the facts herein, it may then be read as follows:

"If the deceased is a widow, * * * and leaves no issue, and the estate, * * * was common property of such decedent and * * * her deceased spouse, while such spouse was living, such property goes in equal shares to the * * * brothers and sisters of such deceased spouse. * * *"

It is conceded by each of the parties herein that the construction of the portion of the statute as thus stated turns on a decision of what is meant by the word "widow," occurring therein.

In the case of *Rosenbloom v. Southern Pacific Co.*, 59 Cal. App. 102, 104, 210 P. 53, 54, a woman was the plaintiff, and one of the questions involved on the appeal was whether, in the absence of an allegation in the complaint that the husband of the plaintiff was dead, she had legal capacity to maintain the action. In ruling on the matter, in part the court said: "* * * She testified that she was a 'widow.' 'A widow is a woman whose husband is dead and who has not married again.' Black's Law Dictionary. A widow is defined to be an unmarried woman whose husband is dead; one who has lost her husband by death and has not taken another"—citing authorities.

In the case of *Commonwealth v. Powell*, 51 Pa. 438, among other things, it is said: "When the property of Eliza L. Jordan passed by her will to Elizabeth P. Powell, the defendant, she was not the wife of the testator's son, for he was dead, nor his widow, for she was again married. * * * In common parlance, we know the term 'widow' means an unmarried woman, and unless it be shown, which has not been attempted, that there is a technical sense to which it is to be referred for exposition, this is the sense in which we must regard it as used by the legislature. Our law dictionaries agree in their definitions of the usual acceptation of the meaning of the word 'widow': a woman whose husband is dead: Whart. 'Widow,' an

unmarried woman whose husband is dead: Bouvier [Law Dict., Vol. 3, page 3454]. Worcester defines the word thus, 'a woman whose husband is dead and who remains unmarried;' and Webster, in the unabridged edition of 1844, 'a woman who has lost her husband by death and has not taken another—one long bereaved of a husband.' The word is so entirely and exclusively descriptive of an unmarried condition, having once been married, that any other sense would be figurative."

To the same effect, see Appeal of Kearns et ux., 120 Pa. 523, 14 A. 435; Bodwell v. Nutter, 63 N. H. 446, 3 A. 421.

In accord with the foregoing authorities, it is clear that, after Iva Farrand was married to McArthur, she was no longer a widow, from which it follows that the statute upon which the appellant relies had no application to the situation which arose on her decease and the consequent distribution of her estate.

The judgment is affirmed.

We concur: CONREY, P. J.; YORK, J.

103 Cal. App. 260

BLAIR et al. v. GUARANTEE TITLE CO. OF LONG BEACH, Inc., et al. (Civ. 3917.)

District Court of Appeal, Third District, California. Jan. 18, 1930.

1. Abatement and revival ☞55(3)—Cause of action to recover value of equity in property obtained from deceased through defendants' fraud held to survive her death (Civ. Code, § 954).

Cause of action to recover value of equity in property obtained from deceased by false and fraudulent representations of defendants held not to abate by death, but to survive under Civ. Code, § 954, providing that thing in action arising out of violation of right of property upon owner's death passes to his personal representative.

2. Appeal and error ☞989—Appellate court, when verdict is attacked for insufficiency of evidence, can only determine whether there is substantial evidence supporting conclusion reached.

Where verdict is attacked on appeal for insufficiency of evidence, only question presented to appellate court is whether there is substantial evidence which in and of itself will support conclusion reached by jury.

3. Appeal and error ☞930(1)—Where verdict is attacked for insufficiency of evidence, appellate court must assume jury resolved conflict, if any, in favor of prevailing party.

Where verdict is attacked on appeal for insufficiency of evidence, and testimony on any material point is in conflict, appellate court

must assume jury resolved conflict in favor of prevailing party.

4. Fraud ☞58(1)—Evidence in action for damages for fraud held to support judgment based upon deceit against escrow officer of defendant title company (Civ. Code, § 1710).

In action for damages growing out of fraudulent real estate transaction, evidence held sufficient to support judgment based upon deceit, under Civ. Code, § 1710, against escrow officer of defendant title company.

5. Fraud ☞49—Allegations of conspiracy in action for fraud held immaterial, and need not be proved to entitle plaintiff to damages from defendants who participated in fraud.

In action for damages growing out of fraudulent real estate transaction, allegations of conspiracy between several defendants held immaterial, and need not be proved to entitle plaintiff to damages from such of defendants as can be shown to have participated or co-operated in defrauding her, since gist of action is injury done to plaintiff by fraudulent and wrongful acts of defendants, and injury is actionable whether result of conspiracy or not.

6. Appeal and error ☞1070(1)—Fact that jury disregarded erroneous and conflicting instructions held not to constitute reversible error.

Fact that jury disregarded erroneous instructions which were somewhat conflicting and instructions on questions of fact and not of law held not reversible error, since jury may disregard erroneous or conflicting instructions.

7. Appeal and error ☞1068(1)—Appellate court cannot put strained construction upon trial court's charge to upset verdict and judgment in action for damages for fraud which is manifestly just.

On appeal by defendants in action for damages growing out of fraudulent real estate transaction, appellate court cannot put strained construction upon trial court's charge to upset verdict and judgment which is manifestly just.

8. Appeal and error ☞216(1)—Defendants appealing from judgment cannot complain of trial court's failure to instruct upon material issue, absent request therefor.

Defendants appealing from judgment in action for damages growing out of fraudulent real estate transaction cannot complain of trial court's failure to instruct upon material issue absent request therefor, since, if defendants believed themselves entitled to specific instruction embodying particular special defense, it was their duty to request such instruction.

9. Trial ☞251(2)—Decree of foreclosure after plaintiff's property was obtained through fraud and conveyed to innocent purchaser held no defense in action for fraud, and therefore instruction on such defense was not required.

In action for damages growing out of fraudulent real estate transaction, decree of foreclosure after deed to plaintiff's property was obtained through fraud and grantee conveyed property to innocent purchaser held not available as defense, though plaintiff was party to foreclosure proceedings, and therefore trial

court was not required to instruct jury on such matter which constituted no defense.

10. Fraud ⚡56—Admitting testimony in action for fraud regarding acts during time defendant's escrow officer lulled plaintiff into false security held not error.

In action for damages growing out of fraudulent real estate transaction, admitting testimony of defendant's escrow officer held not error, where fraud covered entire period from time of transfer of property by plaintiff to time of transfer to innocent purchaser, during which time escrow officer by his fraud and deceit lulled plaintiff into false security and inactivity until it was too late to recover her property.

11. Torts ⚡21—Persons aiding in commission of wrongful act are liable for resulting damages, though expecting no benefits and in fact receiving none.

Persons aiding in commission of wrongful act by another are liable for resulting damages, though they expected no benefits therefrom, and in fact received none.

12. Corporations ⚡423—Title company held liable as principal for actual damage caused by fraudulent acts of escrow officer in performance of official duties depriving plaintiff of property (Civ. Code, § 2338).

Where escrow officer of title company, during time he participated in fraudulent scheme to deprive plaintiff of her property, was duly authorized escrow officer with power and authority to handle all escrow transactions and at time was acting within scope of his powers, title company, under Civ. Code, § 2338, held liable for acts of its escrow officer in perpetrating fraud resulting in damage to plaintiff.

Appeal from Superior Court, Los Angeles County; Percy Hight, Judge.

Action by Bryson P. Blair and another, coexecutors of the estate of Helen Wood Blair, deceased, against the Guarantee Title Company of Long Beach, Inc., and others. Action was dismissed as to the defendant Victor Bellotti, and, from a judgment for plaintiffs, the remaining defendants, except A. E. Cronin, appeal. Affirmed.

Linnell & Linnell, of Long Beach, for appellants.

Russell H. Pray, of Long Beach, for respondents.

PRESTON, Justice pro tem. This is an appeal by defendants Guarantee Title Company of Long Beach and I. H. Wright from a judgment entered against them upon a verdict of a jury in the sum of \$1,750, in an action for damages growing out of a fraudulent real estate transaction.

The facts, as they existed at the time of the transaction hereinafter related, were briefly these: On June 16, 1925, Helen Wood Blair, the original plaintiff in this action, was residing with her husband at Orange, Cal.,

but was the owner of a house and lot at the corner of Seventeenth and Rose streets in the city of Long Beach, which she valued at \$8,500, and which was incumbered by a mortgage in the sum of \$5,000. The defendant A. E. Cronin was a real estate agent residing in Long Beach, and well acquainted with Mrs. Blair, having been her agent in one or two business transactions. Mrs. Blair had implicit faith and confidence in Cronin, and, at the time of the transaction hereinafter related, Mrs. Blair held a note against Cronin for the sum of \$1,000, and, as security for the payment of said note, she held a bill of sale and the registration certificate for Cronin's automobile. Victor Bellotti was another real estate agent residing at Long Beach and a friend of Cronin, but unacquainted with Mrs. Blair. The defendant and appellant Guarantee Title Company was a corporation engaged in the title and escrow business in Long Beach, Cal. The defendant and appellant I. H. Wright was an employee of said Guarantee Title Company, and was its escrow officer.

On said 16th day of June, 1925, Cronin, in company with Bellotti, called upon Mrs. Blair at her home in Orange, and Cronin told her that they could exchange her equity in the Long Beach Property for a ranch of 160 acres at Minot, N. D. Bellotti told her his father was the former owner of this ranch, and that it was a very valuable piece of property, and was clear of all incumbrances. Bellotti and Cronin also stated many details relative to the crops grown on the North Dakota ranch, the land's adaptability, etc., and urged Mrs. Blair to make the exchange. Finally, upon the advice and at the urgent solicitation of Cronin, she agreed to the exchange—that is, she agreed to exchange her equity in the Long Beach property, and the \$1,000 note and bill of sale and registration certificate, for a deed and a clear and unincumbered title to the 160-acre ranch in North Dakota. Cronin then presented to her a deed, which he had already prepared, for the Long Beach property *with the name of the grantee left blank*. Cronin and Bellotti then accompanied Mrs. Blair to a nearby notary public. The notary and Mrs. Blair, seeing there was no grantee named in the deed, insisted that a grantee should be inserted in the deed, but Cronin stated that he did not know the "initials of the owner of the North Dakota ranch," and that it would be all right to execute the deed without naming a grantee; that it was a common practice to leave the grantee blank, etc. Mrs. Blair and the notary apparently accepted Cronin's explanation as satisfactory, for she signed and acknowledged said deed and delivered it to Cronin, with the instructions to deposit it in escrow, to be exchanged for a deed and clear title to the North Dakota property. Cronin suggested

that the appellant Guarantee Title Company be the escrow holder, and Mrs. Blair consented to this suggestion. Cronin, on the same day, and after leaving Mrs. Blair, *inserted his own name in the deed as grantee*. On the same day, to wit, the 16th day of June, 1925, at 4:20 p. m., the deed was recorded in the recorder's office of Los Angeles county, *at the request of the appellant Guarantee Title Company*, and contained printed instructions on the back thereof to return when recorded to the Guarantee Title Company of Long Beach, Cal.

On the same day, Cronin executed a trust deed on said Long Beach property to secure a loan of \$1,700, in which the appellant Guarantee Title Company was named as trustee for John A. Benell, the beneficiary. This trust deed was acknowledged before a notary public, who was also at the same time an employee of, and in the office of, the Guarantee Title Company. Said trust deed was recorded at the same time as the deed from Mrs. Blair to Cronin, and also *at the request of said Guaranty Title Company*. Two days later, and on June 18, 1925, Cronin again called at the office of said Guarantee Title Company in Long Beach, and there, in the presence of appellant I. H. Wright, the escrow officer of said title company, and upon a blank form furnished by Wright, prepared what purports to be an escrow agreement between Mrs. Blair and James I. Butterfield, the owner of the North Dakota ranch, which agreement provides in part: "We, the undersigned, buyer and seller, enter into the following agreement and hereby instruct the Guarantee Title Company of Long Beach, to carry out the conditions and agreements hereby entered into within 30 days from this date; and in the event the conditions of this escrow have not been complied with at the expiration of 30 days, you are instructed to complete same at the earliest possible date thereafter unless written demand shall have been made upon you by the party not in default, otherwise the same is automatically extended. Seller James I. Butterfield * * * Address, Long Beach City, who agrees to sell the buyer, Helen Wood Blair * * * Address, 504 W. Lemon, Orange, California, who agrees to purchase * * * 160 acres in North Dakota * * * in exchange for house and lot, Cor. 17th and Rose, Long Beach, two lots in Bellflower, and Haynes sedan; subject to mortgage on house and lot of \$5,000.00. * * * Interest, insurance and rents are to be pro-rated to date, close of escrow. * * * The Guarantee Title Company of Long Beach is hereby instructed to draw the usual form of Grant Deed, Bill of Sale, from the Seller to the Buyer, and also as herein required and issue the title * * * in the names of new

owner on both properties. * * * Further instructions are buyer is to deliver to A. E. Cronin pink slip, bill of sale and note and bill of sale Mrs. Blair to Cronin. The seller agrees to pay all of the taxes for the fiscal year of 1924 & 5 through this escrow if not already paid. * * * The buyer and seller do each agree to pay their half of the escrow charges and expenses. It is agreed that this escrow and the papers and the funds deposited therein cannot be withdrawn by either party before the close of this escrow, and all charges paid without the written consent of both parties hereto. It is agreed that in case the seller performs his part of this agreement and the purchaser fails to make further deposit as herein required, the escrow deposit herein referred to shall be forfeited to the seller, and the Guarantee Title Company of Long Beach is hereby requested to pay same to the seller. It is also agreed that the Guarantee Title Company of Long Beach shall not be responsible for adjustments in rents, interest, insurance premiums or commissions, unless the correct amounts have been furnished the Guarantee Title Company of Long Beach by the interested parties."

To this agreement, *Cronin, also in the presence of Wright, signed the name of "Helen Wood Blair, by A. E. Cronin," and forged the name of "James I. Butterfield,"* the owner of the North Dakota ranch. Wright thereupon filed said purported escrow agreement in said Guarantee Title Company's office, and opened an escrow therein for this transaction, and numbered it 7079. Wright testified, however, that the deed from Mrs. Blair to Cronin was never placed in escrow by Cronin or any one else. The Blair deed bore no escrow number; neither did the trust deed.

A few days after delivering this blank deed to Cronin, and after Cronin and Wright opened the purported escrow above mentioned, Mrs. Blair, accompanied by her husband, went to the office of said title company in Long Beach, *and was there advised by Wright "that the exchange had been escrowed and that everything in it was coming along all right,"* and exhibited to her the purported signature of James I. Butterfield to said escrow agreement, but did not inform her that said name "James I. Butterfield" had been forged to said agreement by Cronin.

Thereafter, and on July 6, 1925, Wright wrote the following letter to Mrs. Blair:

"Mrs. Helen Wood Blair, 504 North Lemon street, Orange, California. Dear Madam: Re our escrow 7079

"Your escrow on the North Dakota quarter is nearing completion, but in order to finish this escrow, we must have a note of \$1,000.00, and bill of sale given to you by Mr. Cronin,

also bill of sale from you to him showing that he is the legal owner of his car.

"Kindly find bill of sale enclosed which you will please sign. Please return to this office at your earliest convenience.

"Yours very truly,

"Guarantee Title Company,

"By I. H. Wright, Escrow Officer."

In response to this letter, Mrs. Blair, in company with her husband, again visited the title company's office and delivered to Wright the said \$1,000 note, bill of sale, and registration certificate. On this occasion, Wright informed her "that the exchange was practically completed, and that the only thing that was delaying it was that the deed from Butterfield to her for the North Dakota property had been sent to North Dakota for recording, and as soon as it was returned, the escrow would be completed and the deal finally consummated." Wright, however, knew at that time *that this statement was false, that no deed had ever been placed in escrow or procured from Butterfield for the North Dakota ranch, and also knew that Butterfield had not agreed or authorized Cronin to make the exchange, and also knew that Butterfield was entirely ignorant of any negotiations being carried on with Mrs. Blair by Cronin.*

Thereafter, and before Mrs. Blair had discovered that Wright's statements were false, and on July 23, 1925, A. E. Cronin conveyed the Long Beach property to Evelyn Ferguson, who was an innocent purchaser. This deed was also acknowledged before a notary public, who was at the same time in the employ of the Guarantee Title Company.

Thereafter, and in August or September, 1925, Wright was discharged by said title company as its escrow officer and clerk, and was succeeded by one J. Gordon Poe, and on September 3, 1925, Poe wrote Mrs. Blair as follows: "I have just been in conference with your agent, Mr. A. E. Cronin, and I find things are in somewhat of a muddle. I have arranged with Mr. Cronin to come to this office at eleven o'clock Tuesday morning September 8th, and meet you and Mr. Blair, if you can possibly come. This is very urgent and I must ask that you make it convenient to be here at that hour. There is nothing we can do until Tuesday, at which time Mr. Cronin has agreed that he will make a justifiable settlement with you."

In response to this letter, Mrs. Blair and her husband again called at the office of the title company in Long Beach, and were informed by Poe that Wright was no longer connected with the title company, and that the escrow was incomplete, and in a "mess," and that it contained only the thousand dollar note and the bill of sale and the registration certificate, and did not contain her deed or the deed from Butterfield for the

North Dakota property. Thereupon Mrs. Blair demanded of Poe the return of her deed that she had given Cronin, but was informed by Mr. Poe that the deed was not in the possession of the title company. Poe, however, returned to Mrs. Blair the \$1,000 note. During this conversation, Mrs. Blair was informed by Mr. Poe that the purported signature of Butterfield to the escrow agreement was forged, and that no deed from Butterfield to her was ever procured or placed in escrow, and that Butterfield never had agreed to the exchange and knew nothing of the purported transaction.

Through this information given by Poe, Mrs. Blair discovered for the first time that she had been defrauded out of her Long Beach property and that the title thereto had passed into the hands of an innocent purchaser.

Thereafter, and on the 7th day of October, 1925, C. E. Brumwell and Martha V. Brumwell brought an action against Mrs. Blair, Cronin, and the Guarantee Title Company and others to foreclose the \$5,000 mortgage on the Long Beach property formerly belonging to Mrs. Blair. Mrs. Blair made no appearance in this action, and the decree of foreclosure and order of sale was finally entered and the property sold pursuant to this decree and order. Thereafter, and on the 29th day of April, 1926, Mrs. Blair brought this action against Guarantee Title Company, I. H. Wright, A. E. Cronin, and Victor Bellotti, and alleged in her complaint in considerable detail the facts we have enumerated above, by which she claims she was defrauded of her equity in the Long Beach property. She also alleged a conspiracy on the part of Cronin, Wright, and the Guarantee Title Company to defraud her of her property.

Mrs. Blair died before this action was tried in the court below, and the respondents, executors of her last will and testament, were, by order of the superior court, substituted as parties plaintiff in her place and stead. Before her death, her deposition was taken and was used at the trial of the action.

The case was tried before the court sitting with a jury, and a verdict was rendered in favor of the plaintiffs and against the defendants Guarantee Title Company, I. H. Wright, and A. E. Cronin, for the sum of \$1,750, as above stated. The action was dismissed as to the defendant Bellotti. Cronin has not appealed.

[1] The appellants first contend that this action abated by the death of Mrs. Blair. There is no merit in this contention. This action is for the recovery of the value of Mrs. Blair's equity in the house and lot in Long Beach, which she claimed was obtained from her by the false and fraudulent representations of defendants. All the cases cited and

relied upon by appellants in support of their contention that the action abated by her death, deal with torts, none with contracts, and affect the person only and not the estate. In the case at bar, *the thing in action arises out of the violation of a right of property* which, by the express language of section 954 of the Civil Code, *passes to the personal representatives of the deceased*, for that section provides: "A thing in action arising out of the violation of a right of property, or out of an obligation, may be transferred by the owner. Upon the death of the owner it passes to his personal representatives"—and it necessarily follows that the thing in action would pass to the legal representatives of the plaintiff upon her death. *Vraghizan v. Savings Union, etc., Co.*, 31 Cal. App. 713, 161 P. 507; *Henderson v. Henshall (C. C. A.)* 54 F. 320; 1 Cal. Jur. 68, 69, 70.

In *Pomeroy's Remedies and Remedial Rights*, § 147, it is said: "It is now the general American doctrine that all causes of action arising from torts to property, real or personal—injuries to the estate by which its value is diminished—do survive and go to the administrator or executor as assets in his hands."

[2, 3] Appellant next contends that the evidence is insufficient to justify the verdict of the jury. We are unable to agree with this contention. When a verdict is attacked for insufficiency of the evidence, our power begins and ends with the inquiry whether there is substantial evidence, contradicted or uncontradicted, which in and of itself will support the conclusion reached by the jury. If, on any material point, the testimony is in conflict it must be assumed that the jury resolved the conflict in favor of the prevailing party. *Treadwell v. Nickel*, 194 Cal. 243-260, 228 P. 25; *Gjurich v. Fieg*, 164 Cal. 429-431, 129 P. 464, Ann. Cas. 1916B, 111; *Wilbur v. Wilbur*, 197 Cal. 1, 239 P. 332.

[4] We have set forth enough of the record to show that the verdict has substantial support in the evidence. It is true that the evidence shows that Cronin was the instigator and prime mover in this diabolical scheme to defraud Mrs. Blair of her property, but it is equally true, as shown by the evidence, that Wright, by concealing from Mrs. Blair, from time to time, the true condition of the escrow in his hands, and making false statements to her, thereby aided and abetted Cronin in carrying out his fraudulent scheme to rob Mrs. Blair of her property. It is idle to contend that Wright did not knowingly and actively participate in the fraudulent scheme of Cronin's. If Wright was innocent of any wrongdoing, then why did he, as escrow officer of the Guarantee Title Company, accept from Cronin a forged escrow agreement and open a pretended escrow with his title company? Why did he not require Cronin to de-

posit with him the Blair and Butterfield deeds, as contemplated by the escrow agreement? Why did he not tell Mrs. Blair, before Cronin had sold her property to an innocent purchaser, that her deed was not in escrow and that Butterfield had not agreed to the exchange and knew nothing of the transaction? Why did he tell Mrs. Blair "that the Butterfield deed had been sent to North Dakota for recordation and as soon as it was returned the exchange would be finally completed," when he knew that Butterfield had never executed such a deed and that the whole proposed exchange was fictitious and a fraudulent scheme of Cronin's to obtain title to her Long Beach property? If Wright had told her the facts on her first or second visit to his office, she could no doubt have recovered her property from Cronin, because she inquired of Wright concerning the condition of the exchange before Cronin conveyed her property to an innocent purchaser. Can it be said, from the acts and conduct of Wright, that he was wholly innocent of any wrongdoing? Certainly not, and it is the height of absurdity to make such a claim. Wright's own admissions are sufficient to show his participation in the fraudulent scheme of Cronin's. The evidence is also sufficient to support a judgment against Wright based upon deceit. Section 1710, Civ. Code.

[5] Appellants argue that respondents have wholly failed to prove that a conspiracy existed between Cronin, Bellotti, and Wright to obtain the deed from Mrs. Blair and defraud her of her equity in the Long Beach property. Conceding, for the sake of argument, that this claim is true, it does not defeat plaintiffs' action. It is wholly unnecessary to establish such a conspiracy, because the gist of the action is the *injury done to Mrs. Blair by the fraudulent and wrongful acts of Cronin, Wright, and Bellotti, and this injury is actionable, whether it is the result of conspiracy or not*. The allegations of a conspiracy are immaterial and need not be proved. *Mrs. Blair is entitled to relief for the injury done her from such of the defendants as can be shown to have participated or co-operated in doing her the wrong*. *More v. Finger*, 128 Cal. 319, 60 P. 933; *Herron v. Hughes*, 25 Cal. 553; *Nevin v. Gary*, 12 Cal. App. 1, 106 P. 422; *Revert v. Hesse*, 184 Cal. 295, 193 P. 943; *Bowman v. Wohlke*, 166 Cal. 121, 135 P. 37, Ann. Cas. 1915B, 1011; 4 Cal. Jur. 528; *Mox Incorporated v. Woods*, 202 Cal. 675-678, 262 P. 302.

[6] Appellants next contend that the verdict of the jury is against the law and the instructions. A careful reading of the instructions satisfies us that they are somewhat conflicting, and that some of them were instructions on questions of fact and not of law, but we fail to see how these instructions could have operated injuriously against the appel-

lants. The instructions tended to prejudice the rights of respondents, rather than those of appellants. The instructions, taken as a whole, were far more favorable to the appellants than to the respondents.

If the jury, as appellants contend, disregarded the instructions appellants refer to, still this alone does not constitute grounds for a reversal, for a jury may disregard erroneous or conflicting instructions. *Kelley-Clarke Co. v. Leslie*, 61 Cal. App. 566, 215 P. 699, 703; *Dennison v. Chapman*, 105 Cal. 447, 448, 39 P. 61; 14 R. C. L. § 74, pp. 815, 816; *Treadwell v. Nickel*, supra.

In *Kelley-Clarke Co. v. Leslie*, supra, the court said: "The jury either disregarded or misunderstood the instructions of the court. The verdict was in favor of plaintiff and against defendants for the amount sued for. This presents an interesting, but by no means novel, question. It has been repeatedly held that—'A conflict in instructions which could not operate injuriously to appellant is not ground for reversal.' * * * It is only when an erroneous instruction has resulted in prejudicing the rights of the complaining party that the judgment will be reversed, and it is the general rule that such action will not be taken by the appellate court for error in giving or refusing to give instructions if the verdict is manifestly right. * * * Mr. Thompson, in his work on Trials (section 2431), says that instructions faulty or technically erroneous will not work a reversal of the judgment if the jury are not misled, or if as a whole the case was fairly presented to them, and especially if their verdict is obviously correct."

[7] We are not called upon to put a strained construction upon the trial court's charge to upset the verdict and judgment in the instant case, which is so manifestly just. *Wright v. Foreman*, 86 Cal. App. 595, 261 P. 481.

Appellants next complain that the court erred in failing to instruct upon a material issue. This contention is based upon these facts: Appellants, for a further and separate defense to the complaint, plead that, by reason of the foreclosure proceedings in the case of *Brumwell et al. v. Helen Wood Blair, A. E. Cronin et al.*, plaintiff, Helen Wood Blair, was estopped from claiming any right, title, or interest in the Long Beach property, or from claiming any damages from appellant Guarantee Title Company on any of the grounds stated in her complaint. There are two complete answers to this contention:

[8] First, if appellants believed themselves entitled to a specific instruction embodying this particular special defense, it was their duty to request the court to give such an instruction. Having failed to request such an instruction, they cannot now be heard to com-

plain. *Carbaugh v. White Bus Line*, 51 Cal. App. 6, 195 P. 1066; *Gomez v. Scanlan*, 155 Cal. 532, 102 P. 12; *Treadwell v. Nickel*, supra; *Lahti v. McMenamin*, 204 Cal. 415, 268 P. 644; *Johnson v. Pearson* (Cal. App.) 280 P. 394.

[9] Second, said foreclosure action was instituted October 7, 1925, four months after the deed to the property had been obtained from Mrs. Blair by Cronin, and three months after Cronin had conveyed the property into the hands of an innocent purchaser. Under these circumstances, the decree of foreclosure could avail appellants nothing in this case, and no defense could be predicated thereon. Therefore the court was not called upon to instruct the jury on matters that constituted no defense to the action.

[10] Appellants also contend that the court erred in admitting in evidence the testimony of I. H. Wright, and in support of this contention state: "It has already been shown that the offense in obtaining the deed was committed on the 16th day of June, 1925, and that the escrow proceedings were opened on the 18th day of June, 1925. The offense was completed on the 16th day of June, 1925. Mr. Wright is named as a coconspirator, but the rule is that after the completion of the offense the acts and declaration of a coconspirator are not admissible for any purpose. This would bar the letter that Mr. Wright wrote to Helen Wood Blair."

We cannot agree with this argument. *The offense was not completed on the 16th day of June, 1925, as appellants suggest, but it covered the period from that date to the date of the transfer of the property by Cronin to the innocent purchaser, which occurred on July 23, 1925.* During this period, the evidence shows that Wright, by his fraud and deceit, lulled Mrs. Blair into false security and inactivity until it was too late to recover her property from Cronin. Wright's acts and conduct made it possible for Cronin to get away with Mrs. Blair's property, without her discovering what was going on. Under these facts, we think the evidence was properly admitted.

Appellant Guarantee Title Company contends that it is not liable for the acts and conduct of Wright for two reasons: First, because there was no proof that either Wright or the Guarantee Title Company received or kept any of the proceeds from the transfer of Mrs. Blair's property; second, there is no evidence to show that said acts were within the scope of the authority of the agent, or that the Guarantee Title Company ratified the acts of its agent, Wright.

[11] Neither of these contentions can be sustained. The law is well settled that those who aid in the commission of a wrongful act by another are liable for the resulting dam-

ages, although they expected no benefits from the wrongful act and, in fact, received none. *Brumley v. Chattanooga Speedway, etc., Co.*, 138 Tenn. 534, 198 S. W. 775; *Breedlove v. Bundy*, 96 Ind. 319; *Felsenthal v. Thieben*, 23 Ill. App. 569; *Revert v. Hesse*, supra; *Mox Incorporated v. Woods*, supra.

[12] The evidence is undisputed that Wright was the duly authorized escrow officer and clerk of said Guarantee Title Company and had power and authority to handle all escrow transactions for said title company. It is also clear from the evidence that Wright was acting within the line of his known powers—that is, he was handling for his company what purported to be an escrow transaction, and any loss arising from his dishonesty, when acting within the apparent scope of his agency, should be borne by the title company, *because it enabled him to assist Cronin in perpetrating the fraud upon Mrs. Blair, rather than by Mrs. Blair, who innocently suffered the loss of her property by the fraud of Cronin, aided and assisted by the fraud and deceit of Wright.* This principle is sustained by a long line of authorities, among them being *Bank of Palo Alto v. Pacific Postal Tel. Cable Co. (C. C.)* 103 F. 841; *National Bank of San Mateo v. Whitney*, 181 Cal. 202, 205, 206, 183 P. 789, 8 A. L. R. 298.

The Guarantee Title Company would be responsible as principal for all the actual damage caused by the fraudulent acts of its agent, Wright, committed in the performance of his official duties as escrow officer. *Wade v. Thayer*, 40 Cal. 578; *Turner v. N. B. & M. R. Co.*, 34 Cal. 599; *Mendelsohn & Coleman v. Anaheim Lighter Co.*, 40 Cal. 657; *Otis Elevator Co. v. First National Bank*, 163 Cal. 31, 124 P. 704, 41 L. R. A. (N. S.) 529; *Muehlebach v. Paso Robles S. Hotel*, 65 Cal. App. 634, 225 P. 19; sec. 2338, Civ. Code; *Johnson v. Monson*, 183 Cal. 149, 190 P. 635.

We deem a further discussion of this case entirely unnecessary. Looking at the substance of this transaction in its true light, unclouded by the earnest but highly technical arguments of appellants' counsel, we find that Cronin was not only the trusted confidant and friend, but the agent and business adviser, of Mrs. Blair. His relation to her was fiduciary, and every rule of law and honesty commanded of him the utmost fairness and good faith in all his dealings with her. Instead of living up to the trust and confidence reposed in him, he procured title to Mrs. Blair's property by means of chicanery and various varieties of fraud and deceit. Then we find Wright, who was also the confidential and trusted employee and agent of the title company, whom the public had a right to believe was honest and trustworthy, aiding and assisting Cronin in defrauding Mrs. Blair of her property, and by his deceit

and fraud lulling her into false security until the title to her property had passed into the hands of an innocent purchaser. The law abhors fraud in all its guises and renders abortive its shrewdest intrigues and machinations.

We find no reason for disturbing the righteous verdict and judgment of the jury.

Judgment affirmed.

We concur: FINCH, P. J.; R. L. THOMPSON, J.

103 Cal. App. 306
PEOPLE ex rel. STEPHENS, City Atty., et al.,
v. SECCOMBE. (Civ. 6273.)

District Court of Appeal, Second District, Division 2, California. Jan. 21, 1930.

1. Nuisance ⇨84—Complaint in action to restrain defendant from continuing profession of userer held not to state cause of action (Code Civ. Proc. § 731; Civ. Code, §§ 3479, 3480).

In action brought under Code Civ. Proc. § 731, to obtain injunction restraining defendant from continuing to pursue occupation of userer, allegations that defendant had been convicted on two separate occasions of violating usury law, and that he intended to further violate law, which would obstruct free use of property, and thus amount to a nuisance, within meaning of Civ. Code, §§ 3479, 3480, held not to state cause of action.

2. Nuisance ⇨84—Where action is for abatement of nuisance by injunction, it is not sufficient to allege merely that defendant had committed and intended to commit additional criminal acts (Civ. Code, §§ 3479, 3480).

Where action is for abatement of nuisance by injunction, facts which bring act or course of conduct within definition of nuisance in Civ. Code, §§ 3479, 3480, must be pleaded, and it is not sufficient to allege merely that defendant has committed and intended to commit additional criminal acts.

3. Nuisance ⇨80—Acts constituting nuisance may be enjoined, although same acts are of criminal nature.

Equity will not withhold remedy of injunctive relief merely because acts constituting nuisance are also of criminal nature.

4. Injunction ⇨102—Injunction cannot be obtained to prevent commission of crime, or series of crimes, which do not constitute nuisance (Civ. Code, § 3369).

Where acts or conduct which are sought to be enjoined constitute merely crime or series of crimes, and not nuisance, neither specific nor preventive relief can be granted, under Civ. Code, § 3369.

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Action by the People of the State of California, on the relation of Jess E. Stephens, City Attorney, and J. M. Friedlander, City Prosecutor, of the City of Los Angeles, against A. H. Seecombe. From a judgment of dismissal, plaintiff appeals. Affirmed.

E. J. Lickley, Ford M. Jack, and Vernon S. Gray, all of Los Angeles, for appellant.

Baillie, Turner & Lake and Albert E. Marks, all of Los Angeles, for respondent.

BURNELL, Justice pro tem. This is an appeal from a judgment of dismissal following an order sustaining a demurrer to the complaint without leave to amend. The purpose of the action was to obtain an injunction restraining the defendant from continuing to pursue the occupation of usurer. The complaint contains the following allegations:

That the city attorney and city prosecutor of the city of Los Angeles bring the action as such on behalf of the people of the state of California; that the defendant has on two separate occasions been convicted of the misdemeanor of "demanding and receiving usury"; "that many other complaints have been made to plaintiff" charging the defendant with violation of the Usury Law (St. 1919, p. lxxxiii), and that "plaintiff has filed and prepared to file many criminal complaints" against defendant charging him with violations of the same law; that defendant conducts a money-lending business and has violated and intends to continue to violate the Usury Law as a continuous course of conduct; that "many thousands" of the population of Los Angeles, which exceeds a million persons (latest estimates of the Chamber of Commerce are over a million and a half), borrow money and do business with money lenders; that those doing business with the defendant "are persons of limited means and are necessitous borrowers," and are forced to pay him usury because of their great need for obtaining money; that unless restrained defendant "will carry out his said continuous course of conduct, and will thereby not only injure persons so forced to pay usury to the said defendant, but will also cause a loss and detriment to the community and to the economic and financial well-being of said community, and also thereby cause a loss of income to the state of California and the city of Los Angeles, under its revenues, taxes and laws"; and that the people of the state of California "is without adequate remedy of law to prevent the defendant from carrying out and continuing said continuous course of conduct and from doing said unlawful acts," except by injunction.

[1] It appears to have been the theory of the pleader, and is the theory of the city prosecutor, whose signature is appended to the briefs filed on behalf of appellant, that sanction for the institution of the action is

to be found in the last sentence of section 731 of the Code of Civil Procedure, reading as follows: "A civil action may be brought in the name of the people of the state of California to abate a public nuisance, as the same is defined in section thirty-four hundred and eighty of the Civil Code, by the district attorney of any county in which such nuisance exists, or by the city attorney of any town or city in which such nuisance exists, and each of said officers shall have concurrent right to bring such action for a public nuisance existing within a town or city, and such district attorney, or city attorney, of any county or city in which such nuisance exists must bring such action whenever directed by the board of supervisors of such county or whenever directed by the legislative authority of such town or city."

Section 3480 of the Civil Code defines a public nuisance as "one which affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal." A nuisance is "anything which is (a) injurious to health, or is (b) indecent or offensive to the senses, or (c) an obstruction to the free use of property, * * * or (d) unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway." Civ. Code, § 3479. We have interpolated the parenthesis-inclosed letters in the Code definition the better to set off and differentiate the various separate classes of conditions or acts any one of which constitutes a nuisance. It is very evident that, if following the despicable calling of usurer constitutes a public nuisance as above defined, it must be because such conduct constitutes "an obstruction to the free use of property" as set forth in clause (c). It could not by any stretch of the imagination be considered as covered by any other clause of the Code definition.

The complaint, however, contains no allegation of facts, as distinguished from conclusions of the pleader, which, being deemed true, would support a conclusion of law that the defendant's course of conduct constitutes an obstruction to the free use of the property either of the state or of "an entire community or neighborhood, or any considerable number of persons." It does plead that the defendant has committed two separate misdemeanors and alleges that he *intends* to commit further crimes of the same nature. This, however, is but an allegation of past and a conclusion as to future criminality.

Intention is a mental process. A statement of one's own intention may be one of fact regarding the present state of his mind as to his future conduct, but a statement as to another's intention can be but the conclusion of

him who makes it as to the state of mind of that other. Thus in *Ellis Landing & Dock Co. v. Richmond*, 70 Cal. App. 720, 234 P. 336, 337, it was held that "the mere conclusion of the pleader" that the defendants threatened to do certain things, "without the recital of any facts showing such intention, can add nothing to the complaint." To the same effect is *Hodge v. Alabama Water Co.*, 205 Ala. 472, 88 So. 585. Here it is not even alleged that the defendant has threatened to, or made any statement that he intended to, continue in the future to violate the law as he had done in the past on the two occasions specified in the complaint. The allegations as to complaints which have been made to "plaintiff" with respect to defendant's usurious conduct, and as to the criminal complaints filed and prepared to be filed against him, can, of course, add no weight to the pleading, since as to offenses of which he has not been actually convicted he must be presumed innocent.

[2] Criminal conduct may, of course, be coupled with the maintenance of a nuisance, as, for example, the maintenance of a factory giving forth noisome gases, which not only offend the sense of smell of those residing in the vicinity, but also imperil their health in a district where the law prohibits and penalizes the maintenance of such establishments. But as a nuisance may exist without a concomitant crime, so may criminality exist without the criminal act or course of conduct constituting a nuisance as defined by the laws of this state. It follows that, where the action is for abatement of a nuisance by injunction or otherwise, facts which bring the act or course of conduct within the definition of a nuisance must be pleaded, and it is not sufficient to allege merely that the defendant has committed and intends to commit additional criminal acts. The only attempt in the complaint before us to allege facts which would go to show that the course of law violation which it is averred the defendant *intends* to continue to pursue will obstruct the free use of property, and thus amount to a nuisance, is found in the statement "that, unless restrained by this court, defendant and his agents, servants and employees will carry out his said continuous course of conduct and will thereby not only injure persons so forced to pay usury to the said defendant, but will also cause a loss and detriment to the community and to the economic and financial well-being of said community, and also thereby cause a loss of income to the state of California and the city of Los Angeles, under its revenues, taxes and laws."

The manner in which the persons forced to pay usury to the defendant will be injured or in which the free use of their property will be obstructed is not stated, nor are there any facts alleged from which a court could determine as a conclusion of law that defendant's continued violation of the Usury Law

will cause a loss or detriment, by an obstruction of the free use of its property, to the community or a loss of income to the state or to the city. As to the latter, the income of both city and state is derived from taxation of property therein, and while the allegation of the defendant's usurious conduct might warrant the conclusion that some of the property of his victims has been or will be wrongfully acquired by him, it is difficult to see in what way that circumstance is calculated to cause any loss of income to city or to state, since such property would be equally subject to taxation in whoever's hands it might be.

A very similar allegation was contained in the complaint in *Ellis Landing, etc., Co. v. Richmond*, supra, in which the court affirmed a judgment for the defendant, following an order sustaining a demurrer without leave to amend; it being there averred that unless the carrying out of an alleged void agreement by the officials of the city of Richmond be restrained "the income of said city will be reduced and the taxable burden of plaintiff will be increased, to his irreparable injury and damage."

The pleading here is of a similar nature to that in *State v. Johnson*, 26 N. M. 20, 188 P. 1109, 1110, a case in which the state of New Mexico brought an action to enjoin the defendant from continuing the practice of medicine and osteopathy without a license as provided by law. The complaint averred that such illegal practice constituted a nuisance "and is dangerous, detrimental, and injurious to the health of the inhabitants of the county of Bernalillo and state of New Mexico," but pleaded no facts showing in what way it was, or, if continued, would be, either dangerous, detrimental, or injurious to the public health. It was held that this allegation was a mere conclusion of the pleader, and not an averment of fact, and the judgment of the trial court sustaining a demurrer and dismissing the action was affirmed. Such an allegation is akin to one that the plaintiff will, unless an injunction be granted, suffer irreparable injury and that he has no adequate remedy at law, and is regarded as a mere conclusion of the pleader, unless accompanied by a statement of facts from which the court can draw the conclusion which the pleader himself has stated. *Bishop v. Owens*, 5 Cal. App. 83, 89 P. 844. "The mere allegation that irreparable injury will result to the complainant, unless protection is extended to him, is not sufficient; the facts must be stated, that the court may see that the apprehensions of irreparable mischief are well founded." *Carlisle v. Stevenson*, 3 Md. Ch. 499, quoted in *Mechanics' Foundry v. Ryall*, 75 Cal. 601, 17 P. 703; *Torbit v. Warner* (Mo. Sup.) 217 S. W. 40.

[3] The greater part of appellant's briefs is taken up by a discussion of the legal proposition that equity will not withhold the rem-

edy of injunctive relief merely because the acts constituting a nuisance are also of a criminal nature. There is no question of the correctness of this statement (*Pierce v. Stablen's Union*, 156 Cal. 70, 103 P. 324; *In re Wood*, 194 Cal. 49, 227 P. 908, 909; *People v. Gold Run D. & M. Co.*, 66 Cal. 138, 4 P. 1152, 56 Am. Rep. 80; *Weis v. Superior Court*, 30 Cal. App. 730, 159 P. 464; *Herald v. Glendale Lodge*, 46 Cal. App. 325, 189 P. 329, 333), but it must appear that the acts, condition of property, or course of conduct complained of fall within the definition of a nuisance as laid down by our laws, and that the injury is, and if the wrong is persisted in will continue to be, of a tangible character, affecting (where property is involved) some designated property.

This principle is demonstrated by the California cases relied on by appellant. Thus the cases of *People v. Truckee Lumber Co.*, 116 Cal. 397, 48 P. 374, 39 L. R. A. 581, 58 Am. St. Rep. 183, *People v. Stafford Packing Co.*, 193 Cal. 719, 227 P. 485, and *People v. Monterey Fish Products Co.*, 195 Cal. 548, 234 P. 398, 38 A. L. R. 1186, involve acts which, in addition to being forbidden by law, amounted to obstruction to the free use of property of the state, to wit, fish within the territorial waters of the state, title to which is vested in the state and by it held in trust for the benefit of the inhabitants thereof.

People v. Gold Run, etc., Co., supra, involved the dumping of tailings from mining operations into the American and Sacramento rivers, thereby shallowing and widening them, increasing the liability of overflow, with consequent danger of disastrous floods, and affecting their navigability, a clear case of that type of nuisance within the purview of clause (d) of section 3479 of the Civil Code, and constituting as well an obstruction of the free use of the property, a navigable river, of the state. *Pierce v. Stablen's Union*, supra, had to do with an actual interference with the plaintiff's business, accompanied by threats of continued trespasses upon his property.

In re Wood, supra, was a case in which the petitioner sought release on habeas corpus from imprisonment for contempt consisting of the violation of an injunction restraining him and other members of the Industrial Workers of the World from "further conspiring with each other to carry out, and from carrying out, or attempting to carry out, their conspiracy to injure, destroy, and damage

property in the state of California, and to take over and assume possession of the industries and properties in said state," and from circulating printed matter advocating the destruction of property. The court noted that among the aims of petitioner's organization, for which the affidavits on injunction showed that he had been busily recruiting members, was "the overthrow of organized government by unlawful means, among which are sabotage, arson, and other crimes of violence and oppression."

In *Herald v. Glendale Lodge*, supra, the right of a member of a lodge of Elks to have the lodge enjoined from serving beer in violation of a city ordinance was upheld upon the theory that such criminal conduct would result in prosecutions, as a result of which the lodge would be fined and put to expense for legal services, "and that such fines, costs, and expenses will fall upon the membership of the club, or at least be paid from money in which the members have an interest." The court there said: "This procedure is not against the infraction of law in itself, but against the infliction upon the club and its members of the pecuniary loss, as well, perhaps, as social odium, affecting the material prosperity of the club, growing out of the unlawful method adopted by the managers in carrying on its business."

[4] But where the acts or conduct complained of constitute merely a crime or series of crimes, the rule as laid down in section 3369 of the Civil Code applies: "Neither specific nor preventive relief can be granted to enforce a penal law, except in a case of nuisance." This rule is reiterated in the cases we have just mentioned. As was well said in *State v. Ehrlick*, 65 W. Va. 700, 64 S. E. 935, 939, 23 L. R. A. (N. S.) 691: "It is not the criminality of the act that gives jurisdiction in equity, but the deprivation of personal and property rights interfered with, injured, destroyed, or taken away by the unlawful act. For the mere vindication of the criminal law and the enforcement of the public policy of the state, let it be founded upon moral or other considerations, the legal remedy by indictment and prosecution is fully adequate and peculiarly appropriate."

The judgment is affirmed.

We concur: CRAIG, Acting P. J.; IRA F. THOMPSON, J.

103 Cal. App. 340

PACIFIC FRUIT EXCHANGE v. DUKE
et al. (Civ. 3949.)★

District Court of Appeal, Third District, California. Jan. 22, 1930.

Rehearing Denied Feb. 21, 1930. Hearing Denied by Supreme Court March 20, 1930.

1. Mortgages ⇨47—Words of grant or conveyance of property are not required to constitute valid mortgage (Civ. Code, § 2920).

Words of grant or conveyance of property are not required to constitute valid mortgage, since mortgage is merely written contract hypothecating specific property and creating lien for security of debt, under Civ. Code, § 2920, and is not necessarily a grant of real property.

2. Mortgages ⇨40—Where document, after describing real property on which crop lien was created, stated land described was also mortgaged to secure indebtedness, it constituted valid real estate mortgage (Civ. Code, § 2948).

Where document, after naming parties, setting out promissory note in detail and describing real property on which crop lien was created to secure payment of note, stated that "real estate herein described is also hereby mortgaged to secure indebtedness herein mentioned," such instrument, taken as a whole, complied with statutory form under Civ. Code, § 2948, and created valid real estate mortgage.

3. Mortgages ⇨40(4)—Commencement of foreclosure action was sufficient notice of election to declare entire amount due for default.

Commencement of action to foreclose mortgage was sufficient notice of election to declare entire amount due for default of payment of principal and interest.

4. Mortgages ⇨105—Where conflict respecting maturity of debt exists between conditions in mortgage and in note, provisions of note control.

Where conflict respecting maturity of debt exists between conditions which appear in mortgage and in note secured thereby, provisions of note will control.

5. Mortgages ⇨105—Clause in note authorizing acceleration of date of maturity for default in payment of principal or interest controls statement in mortgage conflicting therewith, where provisions could not be reconciled.

Clause in note authorizing acceleration of date of maturity for default in payment of principal or interest controls statement in mortgage which was conflicting therewith, where provisions of the two instruments could not be reasonably reconciled.

Appeal from Superior Court, San Joaquin County; D. M. Young, Judge.

Suit by the Pacific Fruit Exchange against G. E. Duke and others, to foreclose a mortgage. From a decree of foreclosure, defendants appeal. Affirmed.

G. E. Duke, of Oakland, and Robert W. Huston, of Sacramento, for appellants.

Nutter, Hancock & Rutherford and A. P. Hayne, all of Stockton, for respondent.

R. L. THOMPSON, J. This is an appeal from a decree of foreclosure. The defendants were the owners of 200 acres of farm land in San Joaquin county. April 24, 1925, they executed and delivered to the plaintiff, which was a fruit-marketing corporation, their promissory note for \$15,000, payable in installments of \$5,000 on September 15 of 1925, 1926, and 1927, secured pursuant to section 2955 of the Civil Code by a crop mortgage upon all the products from said land during the years from 1925 to 1929, inclusive. The instrument also provided that "the real estate herein described is also hereby mortgaged to secure the indebtedness herein mentioned." Only about the sum of \$3,200 was paid upon the indebtedness in 1925.

In 1926 the property was sold to the state for delinquent taxes, and was subsequently redeemed by the plaintiff. In 1926 the farm was not cultivated or cared for in proper manner and the plaintiff was compelled to and did take possession thereof and operate the same at a reasonable cost of \$5,769.79, leaving a deficit in the income for that year of \$2,233.26. No further sum was paid upon said note. The terms of the note provided in part that: " * * * We and each of us promise to pay to Pacific Fruit Exchange, a corporation, or order, the sum of fifteen thousand and no/100 dollars, * * * with interest thereon from date until paid, at the rate of eight per cent. per annum in like gold coin, payable annually, and if not so paid the interest may be added to the principal and bear like interest, and the whole note may, at the option of the holder, without notice to the maker thereof, be treated as due and payable. * * *" For default in the payments of both principal and interest for the years 1925 and 1926 the plaintiff declared the entire amount represented by the note to be due. In January, 1927, this suit for foreclosure was brought. The instrument was treated as an agreement for a crop lien and also as a real estate mortgage to secure the payment of the note.

The facts were stipulated at the trial. By agreement, two questions only are raised to be determined on this appeal. The appellants contend that (1) the instrument in question is not a real estate mortgage, but, upon the contrary, that it creates only a crop lien; (2) the foreclosure action was prematurely commenced, since the time for deferred payments was specifically extended to December 1, 1929, by the following terms of the mortgage:

"It is further agreed by the parties of the first part that if the whole of said indebted-

ness, and all other indebtedness due, owing or existing from first parties or either of them during said year, to second party, is not paid out of the proceeds of said crops of 1925-26-27-28-29, *the parties of the first part may pay such balance in United States gold coin, on or before the first day of December, 1929*, but should the whole of said indebtedness not be paid on or before the first day of December, 1929 (time being of the essence of this contract), then this agreement is hereby continued through the season of 1930 and thereafter so long as any indebtedness remains unpaid from the parties of the first part to the party of the second part, in all respects as herein agreed upon for the seasons of 1925-26-27-28-29."

[1] We are of the opinion that the instrument in question constitutes a valid real estate mortgage which the plaintiff was authorized to foreclose for any default in the terms thereof or for deferred payments on the note for the security of which the mortgage was given. The appellants assert that the provision of the instrument that "the real estate herein described is also hereby mortgaged to secure the indebtedness herein mentioned" is defective as a real estate mortgage for the reason that it contains no language of grant or conveyance of the real property previously described. Words of grant or conveyance of the property are not required to constitute a valid mortgage. A mortgage is merely a written contract hypothecating specific property and creating a lien for the security of a debt. Section 2920, Civ. Code; 17 Cal. Jur. 696, § 5. A mortgage is not necessarily a grant of real property. *Adler v. Sargent*, 109 Cal. 42, 49, 41 P. 799. Neither is a mortgage, strictly speaking, a conveyance or transfer of property. *Booker v. Castillo*, 154 Cal. 672, 677, 98 P. 1067. Section 2948 of the Civil Code prescribes the form for a real estate mortgage, with which provisions the instrument involved in the present case conforms in every essential respect. No language of grant or conveyance is employed in this statutory form. The language designating the character of the instrument as required by that section of the code is "that the mortgagor mortgages to the mortgagee [here describe the property], as security for the payment to him of [here follows a description of the amount and terms of the indebtedness secured]."

[2] In the present case, after naming the parties, setting out the promissory note in detail and describing the real property upon which a crop lien was created to secure the payment of the note, the document further states that "the real estate herein described is also hereby mortgaged to secure the indebtedness herein mentioned." This instrument taken as a whole not only complies with the statutory form for a real estate mort-

gage, but it clearly expresses the intent of the parties to thereby create a valid real estate mortgage. In the case of *Barrollhet v. Battelle*, 7 Cal. 450, very similar language which was employed in a lease of real property was held to constitute a valid mortgage authorizing a foreclosure for default in the payment of rent. The court said:

"The first question which arises in this case, is, whether the stipulation amounts to a mortgage, according to the true intent of the parties. It will be observed that the language, though concise, is very explicit. The house is 'declared to be mortgaged as security.' That the parties meant something by these words is clear, and what else could that meaning be, but that which is so clearly expressed? What language could more clearly express, in the same number of words, the intention to create a mortgage? The term, 'mortgaged,' is very definite and certain in itself, but the parties have added 'as security for the payment of the monthly rent herein stipulated,' thus giving an express definition of the sense in which they used the term." Nor is the challenged language of the instrument which creates the real estate mortgage repugnant to the terms of the same document providing for the crop lien. The real estate mortgage and the crop lien are merely cumulative methods of securing the payment of the note.

[3-5] The foreclosure proceeding was not commenced prematurely. The defendants were in default of payments of both principal and interest for the years of 1925 and 1926. The specific terms of the note authorized the holder thereof to declare the entire amount due for default at any time without notice to the makers thereof. The plaintiff elected to do so. The commencement of the action was sufficient notice of this election. It is true that the provision of the contract heretofore quoted purports to allow the defendants to pay the deficiency in any annual installments which were due, "on or before the first day of December, 1929." The language of the note and this provision of the contract are utterly and irreconcilably inconsistent. Where a conflict respecting the maturity of a debt exists between the conditions which appear in a mortgage and in the note secured thereby, the provisions of the note will control. 1 *Jones on Mortgages* (7th Ed.) 82, § 71; 19 R. C. L. 493, § 287; 46 L. R. A. (N. S.) 477, note.

A clause in a note authorizing the acceleration of the date of maturity for default in the payment of principal or interest will control a statement in the mortgage which is conflicting therewith unless the provisions of the two instruments may be reasonably reconciled. 19 R. C. L. 494, § 290. It is true that when the note is silent regarding an option on the part of the holder thereof to declare the entire debt due for

default in the payment of an installment of interest and the mortgage contains such an acceleration clause, the latter will control. 41 C. J. 453, § 340. This is because the provisions of the two instruments are not repugnant and may be reconciled by adding to the note the further remedy for default which is provided by the mortgage. In the present case, however, the provisions respecting the maturity of the note and mortgage are irreconcilable and the default clause of the note must, therefore, prevail.

The judgment is affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

103 Cal. App. 354

LIEBMAN v. RICHMOND et al. (Civ. 7131.)★

District Court of Appeal, First District, Division 2, California. Jan. 23, 1930.

Rehearing Denied Feb. 21, 1930. Hearing Denied by Supreme Court March 20, 1930.

1. Nuisance ☞65—Attorney could not maintain action to abate courthouse as nuisance; it being maintained by express authority of statute (Civ. Code, § 3482; Pol. Code, § 4041).

Under Civ. Code, § 3482, attorney at law could not maintain action to abate county courthouse as nuisance; it being maintained by express authority of Pol. Code, § 4041.

2. Nuisance ☞80—That county supervisors were not doing their duty was not basis for action to abate county courthouse as nuisance (Pen. Code, § 758).

That county supervisors were not doing their duty, in that county courthouse was defective, unsanitary, decayed, deteriorated, etc., was not basis for action to abate courthouse as nuisance, although it might be basis for different kind of action under Pen. Code, § 758.

3. Nuisance ☞61—Dilapidated wooden building is not nuisance per se.

A dilapidated wooden building is not a nuisance per se.

4. Counties ☞143—Where county courthouse becomes out of repair and for that reason person is injured, such person has remedy by action for damages (St. 1923, p. 675).

Where county courthouse becomes out of repair, broken down, or dangerous, and for that reason person is injured, such person has remedy by way of action for damages under St. 1923, p. 675.

5. Statutes ☞233—In absence of express words to contrary, state is not included within general terms of statute.

In absence of express words to contrary, state is not included within the general terms of a statute.

6. States ☞191(1)—State may not be sued without its consent.

State may not be sued except it gives its consent.

7. States ☞191(1)—Statute giving state's consent to be sued will not be construed in favor of private litigant.

Statute giving consent of state to be sued will not be construed in favor of a private litigant.

8. Nuisance ☞82—If statutes do not expressly include right to sue counties to abate nuisance, power does not exist.

If statutes do not expressly include right to sue counties to abate a nuisance, such power does not exist.

9. Nuisance ☞84—Complaint to abate courthouse as nuisance did not state facts warranting recovery of damages where there was no attempt to plead negligence or amount of damages, if any (St. 1923, p. 675).

Complaint by attorney at law to abate county courthouse as nuisance did not state facts warranting recovery of damages under St. 1923, p. 675, where no attempt was made to plead negligence or to plead amount of damages, if any.

Appeal from Superior Court, Alameda County; Walter V. Tryon, Judge.

Suit by Richard Liebman against Ralph Richmond and others, as the Board of Supervisors of Alameda County, and another, to abate the courthouse of Alameda County as a nuisance. From a judgment sustaining a demurrer, plaintiff appeals. Affirmed.

Richard Liebman, of Oakland, in pro. per. Earl Warren, Dist. Atty., Frank M. Ogden, Asst. Dist. Atty., and James H. Oakley, Deputy Dist. Atty., all of Oakland, for respondents.

STURTEVANT, J. The plaintiff commenced an action against the defendants to abate the courthouse of Alameda county, alleging it to be a nuisance. The defendants appeared and interposed a demurrer to the plaintiff's second amended complaint. The demurrer was sustained without leave to amend, and, from the judgment entered thereon, the plaintiff has appealed.

Among other things, it is alleged that Alameda county is a subdivision of the state; that the personal defendants are the supervisors of Alameda county; that plaintiff is an attorney at law, practicing before the courts of Alameda county, and in particular before the courts located in the courthouse; that the courthouse was built in 1868; that it consists of two stories and a basement, and that there is a cupola thereon weighing six tons; that the joists of the floor are rotten; that a portion of the roof is rotten; that the foundations of the cupola are crumbling and giving way; that the stairway is weakened; that pieces of the plaster in the ceiling are con-

stantly falling; that the floor trembles when walked across; that the roof leaks; that the sanitary system is inadequate; that the courtrooms are dark; that the acoustic properties in the courtrooms are poor; that there is no ventilating system in the building; and that the heating system is inadequate.

The defendants assert that this plaintiff should show (1) that his special injury differs, not merely in degree, but also in kind, from that sustained by other members of the public; and (2) that it affects either plaintiff's property or his personal enjoyment of a right. Answering that assertion, the plaintiff asserts that the very essence of his case is that his right to practice his profession as an attorney at law is property of the highest character (*Carvassa v. Off* [Cal. Sup.] 274 P. 523), and that it is that right which he complains is and will be affected. Continuing, he claims that, having made that showing, it is immaterial that there are other attorneys at law who are similarly affected to the same degree or otherwise (*Lind v. City of San Luis Obispo*, 109 Cal. 340, 344, 42 P. 437). But that was an action brought to abate a nuisance per se.

[1, 2] The defendants assert that, as the courthouse is a public building, built and maintained as a place of business of public agencies created by a sovereign state for the transaction of a part, at least, of the sovereign business, it is not such a public nuisance as the plaintiff may sue to abate. To that contention the plaintiff replies that the sovereign power does not authorize the defendants to maintain a building that is "defective, unsanitary, decayed, deteriorated," etc. The defendants reply that the power to build and maintain a courthouse has been vested in the defendant board by the express provisions of the statutes, and the building may not be abated as a nuisance. The reply is sound. Section 3482 of the Civil Code provides: "Nothing which is done or maintained under the express authority of a statute can be deemed a nuisance." The courthouse is being maintained by the express authority of the statute. Pol. Code, § 4041. But it is said the defendants are not doing their duty. If that is true, it is not a basis for this action, but may be a basis for a different kind of an action. Pen. Code, § 758. The defendants cite and rely on *Commonwealth v. Reed*, 34 Pa. 275, 71 Am. Dec. 661. That case involved a portion of the Erie Canal which was constructed by the state of Pennsylvania. Later defendant purchased. At page 282 the court said:

"We should suppose that works of internal improvement, erected at the expense and by the officers of the state, for the benefit of the citizens at large, never could be regarded by the law as a nuisance; for the sovereign authority has expressly intended them to advance the prosperity of the community. If this be so, how is it possible, that their char-

acter should be entirely altered by being placed in the hands of a private company, with an express requirement that they should be kept up for the purposes of the canal, in order that it may be and remain a public highway? The Commonwealth and its agents could not have been indicted, and it seems clear, that the company and its officers occupy precisely the same position.

"It would, indeed, be strange, that any legal proceeding could be instituted in a county through which a great public work passes, by which the whole purposes of the improvement might be destroyed, upon the singular allegation, that what has been constructed under the express authority of the Legislature, is a great public nuisance."

[3, 4] The case is particularly persuasive as it is one of the authorities on which our Code section was based. See Commissioner's note in Ann. Code 1872. *Butler et al. v. State*, 6 Ind. 165, 166, 167, *New Albany & Salem R. Co. v. Higman*, 18 Ind. 77, 78, 79, and *II Wood on Nuisances*, §§ 753, 757, 758, are to the same effect. Another authority cited by the commissioners is *First Baptist Church v. Utica & Sch. Railroad Co.*, 6 Barb. (N. Y.) 313. At page 318 the court said: "But that which is authorized by an act of the Legislature cannot be a nuisance. The reason that a private action will not lie for a common nuisance, unless there be special or particular damage, is not only because of multiplicity of suits, but the king is intrusted with the remedy. (*Iveson v. Moore*, Com. 59.) A party having this license from government may be liable civiliter for a misuse of his privileges on the principle *sic utere tuo ut alienum non laedas*, but not criminaliter; nor can the erection be abated as a nuisance. (*Sutherland, J. in Crittenden v. Wilson*, 5 Cowen, 167 [15 Am. Dec. 462]; *The People v. Platt*, 17 Johns. 195 [8 Am. Dec. 382].) Where a railroad corporation had authority by statute to make a railway on a given line, not deviating therefrom over 100 yards, and within that limit made their track about one rod from an ancient highway, and the horses of travelers were in consequence frightened by their trains, it was held that this interference with the rights of the public must be taken to have been sanctioned and contemplated by the Legislature; and that an indictment for a nuisance would not lie. (*Rex v. Pease*, 4 B. & Ad. 30.) And there are several authorities bearing upon the same point. (Citing long list of cases.)" See, also, *Stoughton v. State of Wisconsin*, 5 Wis. 291, 297; *Call v. Allen*, 83 Mass. (1 Allen) 137, 143; *Butler et al. v. State*, 6 Ind. 165, 166, 167; *New Albany & Salem R. Co. v. Higman*, 18 Ind. 77, 78, 79. The plaintiff cites and relies on *Adams v. City of Modesto*, 131 Cal. 501, 63 P. 1083; *Peterson v. City of Santa Rosa*, 119 Cal. 387, 51 P. 557; *People v. City of Reedley*, 66 Cal. App. 409, 226 P. 408; and *Lind v. City of San Luis Obispo*, 109 Cal. 340, 42 P. 437.

Those cases involved nuisances per se, but a dilapidated wooden building is not a nuisance per se. 46 C. J. 699, § 147. Again those cases involved cities, not counties, and the rights of the plaintiff are not the same. 43 C. J. 956, § 1734. The plaintiff also cites and relies on *Woodruff v. North Bloomfield Gravel Min. Co.* (C. C.) 18 F. 753, and *Indianapolis Water Co. v. American S. Co.* (C. C.) 57 F. 1000. Instead of being opposed to anything said by us, the two authorities are in accord. In no one of the cases cited by the plaintiff is it held that a public improvement which has been constructed in a manner not unlawful and for a purpose expressly authorized by law can be abated as a nuisance. If, as in this case, by reason of subsequent events, any part of the said public improvement becomes out of repair, broken down, or dangerous and for that reason a person is injured, such person has his remedy, but that remedy is not an action to abate the public improvement. It is an action for damages. *Stats.* 1923, p. 675; 2 *Wood on Nuisances* (3d Ed.) §§ 753, 757; 21 *Am. & Eng. Ency.* 718, note 8; 20 *R. C. L.* 500, note 7; *Crittenden v. Wilson*, 5 *Cow. (N. Y.)* 167, 15 *Am. Dec.* 462; *Eastman v. Amoskeag Mfg. Co.*, 44 *N. H.* 143, 82 *Am. Dec.* 201, 212, 213; *Louisville & N. T. Co. v. Lelleyett*, 114 *Tenn.* 368, 85 *S. W.* 881, 1 *L. R. A. (N. S.)* 49; *Zimmerman v. Gritzmacher*, 53 *Or.* 206, 98 *P.* 875, 1135, 21 *L. R. A. (N. S.)* 299; *Toledo Disposal Co. v. State*, 89 *Ohio St.* 230, 106 *N. E.* 6, *L. R. A.* 1915B, 1207; *Campbell v. Jackman*, 140 *Iowa*, 475, 118 *N. W.* 755, 27 *L. R. A. (N. S.)* 288; *Pickens v. Coal River Boom & T. Co.*, 66 *W. Va.* 10, 13, 65 *S. E.* 865, 866, 24 *L. R. A. (N. S.)* 354, at page 357. In the latter case, the Supreme Court of West Virginia said: "But for the charter the boom would be a public nuisance, but that makes it a lawful structure as to the state and the public. The state or an individual cannot abate it as a public nuisance; it cannot be indicted as a nuisance. (Citing cases.) An individual affected by a private nuisance may peaceably abate it. 1 *Am. & Eng. Enc. Law*, p. 79. But he cannot do so if the work is under charter rights."

[5-8] Looking at the question from a different angle, we come to the same conclusion. It is settled law that, in the absence of express words to the contrary, the state is not included within the general terms of a statute. *Whittaker v. County of Tuolumne*, 96 *Cal.* 100, 30 *P.* 1016; *Mayrhofer v. Board of Education*, 89 *Cal.* 110, 26 *P.* 646, 23 *Am. St. Rep.* 451. It may not be sued except it gives its consent. 23 *Cal. Jur.* 578. Statutes giving consent will not be construed in favor of a private litigant. *Berton v. All Persons*, 176 *Cal.* 610, 170 *P.* 151. That rule applies to each of the counties as agencies of the state. *Whittaker v. County of Tuolumne*, supra. The measure of any of those statutes is the measure of the right. If the statutes do not

expressly include the right to sue one of the counties to abate a nuisance, the power does not exist. 46 *C. J.* 749, § 344; 15 *C. J.* 569, § 273. Plaintiff has not cited any statute, and we know of none, that expressly gives him the right to maintain this action.

[9] If we view the action as one to recover damages, the complaint is insufficient. The plaintiff's rights are defined, as against these defendants, by chapter 328, p. 675, *Statutes* of 1923. The plaintiff has made no attempt to plead negligence or to plead the amount of his damages, if any.

We find no error in the record.

The judgment is affirmed.

We concur: KOFORD, P. J.; NOURSE, J

103 *Cal. App.* 329

PEOPLE v. ELLIOTT et al. (Cr. 1881.)

District Court of Appeal, Second District, Division 1, California. Jan. 22, 1930.

1. Criminal law ☞763, 764 (13)—Instruction on circumstantial evidence held not erroneous as comment on evidence.

In prosecution for attempted bribery, instruction to effect that law makes no distinction between direct and circumstantial evidence in proving guilt, and that conviction is warranted if jury is satisfied beyond reasonable doubt that words, acts, and conduct of defendants unmistakably carried import that it was bribe defendants were seeking, notwithstanding specific words asking for bribe might not have been used, *held* not erroneous, as violating constitutional provision forbidding comment on evidence.

2. Criminal law ☞823 (16)—Instruction warranting conviction of codefendant of attempted bribery if he aided and abetted defendant held not erroneous, in view of other instructions, covering same subject.

In prosecution for attempted bribery, instruction warranting conviction of codefendant if he aided and abetted defendant *held* not erroneous, in view of other instructions, defining word "abet" and requiring jury to be satisfied that codefendant knowingly and corruptly aided and abetted defendant.

3. Criminal law ☞1043 (2)—Appellate court need not make special examination of instructions to ascertain alleged inconsistency, where defendants did not point out inconsistency.

Where defendants, appealing from conviction for attempted bribery, contended that several instructions were inconsistent, but did not support contention by any specific statement regarding particular in which alleged inconsistency exists, appellate court *held* under no duty to make special examination of several instructions for purpose of ascertaining merits of claim.

4. Bribery ☞14—Instruction in prosecution for attempted bribery, warranting conviction if defendant negotiated bribe, provided codefendant aided and abetted, held not erroneous under information and evidence.

In prosecution for attempted bribery, instruction in effect warranting conviction if defendant negotiated bribe, provided jury also found codefendant aided and abetted defendant, held not erroneous, where information charged defendants with crime of attempted bribery and evidence showed that but one defendant actually suggested bribe.

5. Bribery ☞14—Instruction in prosecution for attempted bribery, defining what constitutes abetting another in commission of criminal offense, held not erroneous; "abet."

In prosecution for attempted bribery, instruction that to "abet" another in commission of criminal offense means to knowingly and with criminal intent aid, promote, encourage, or instigate, by act or counsel, commission of such offense, held not erroneous.

[Ed. Note.—For other definitions, see Words and Phrases, First, Second, and Third Series, Abet.]

6. Criminal law ☞755½—Instruction in prosecution for attempted bribery, defining what constitutes abetting commission of crime, held not erroneous as constituting instruction of fact (Const. art. 6, § 19).

In prosecution for attempted bribery, instruction that to abet commission of crime means to knowingly and with criminal intent aid, promote, encourage, or instigate, by act or counsel, or by both, commission of such criminal offense, held not erroneous, as constituting instruction of fact, in violation of Const. art. 6, § 19.

7. Bribery ☞13—Criminal law ☞1159(3)—Determination of truth of conflicting testimony in prosecution for attempted bribery held for jury, and its conclusion is final.

In prosecution for attempted bribery, determination of truth of conflicting testimony held for jury, and its conclusion is final.

Appeal from Superior Court, Los Angeles County; Walton J. Wood, Judge.

Orion L. Elliott and another were convicted of asking and agreeing to receive a bribe, and they appeal. Affirmed.

Joseph W. Ryan and Frank J. Ryan, both of Los Angeles, for appellants.

U. S. Webb, Atty. Gen., and James S. Howie, Deputy Atty. Gen., for the People.

HOUSER, J. Defendants (who were police officers), were convicted on the first count of an information wherein they were charged with the commission of the crime of asking and agreeing to receive a bribe. They appeal from the judgment and an order denying their motion for a new trial.

Appellants' principal complaint relates to several different instructions which, at the re-

quest of the prosecution, were given to the jury. The first two of such instructions should be considered together. After giving the definition of direct and of circumstantial evidence, in effect the jury was informed that, as to the degree of proof required for conviction, the law makes no distinction between the two kinds of evidence, and that if, upon consideration of the whole case, the jury should be satisfied to a moral certainty and beyond a reasonable doubt of the guilt of the defendants, it should so find, regardless of whether such conclusion was produced by either direct or by circumstantial evidence, or by both such kinds of evidence. The jury was also instructed that, if it was satisfied to a moral certainty and beyond a reasonable doubt "that the words, and acts, and conduct of the defendants unmistakably carried the import that it was a bribe that the defendants were seeking, at the time set forth in the information," it would be the duty of the jury to find accordingly, notwithstanding specific words asking for a bribe might not have been used.

[1] The first criticism of appellants to the combined instruction is that, as against the provision of the Constitution, which forbids the judge of the trial court to comment on the evidence, the instruction suggests that circumstantial evidence was introduced on the trial of the case which tended to prove the guilt of the defendants. Scanned with some particularity, it is possible that in some of its parts the instruction might be considered faulty in the particular to which attention has been directed; but, as a whole, it is most apparent that the instruction deals with definitions of legal terms and with abstract questions of law. As to that part of the instruction herein quoted, appellants contend that no evidence was introduced on the trial of the action upon which such instruction properly could be predicated. If such contention were to rest upon a consideration of the entire evidence in the case, the point suggested should receive serious and careful consideration. But an examination of the transcript discloses the fact that, although from the testimony adduced on behalf of the defendants only, the viewpoint of the appellants in the matter may be correct—from the testimony given by the several witnesses presented by the prosecution, "the words, acts, and conduct" of the defendants were of such character as to justify the conclusion reached by the jury that at the time stated in the information "it was a bribe that the defendants were seeking"—from which it follows that the point presented by appellants is lacking in substantial merit.

[2] Prejudicial error is also predicated upon another instruction, by which the jury was told that, if it found that "the defendant Lemmer aided and abetted the defendant Elliott,"

It would become the duty of the jury "to return a verdict of guilty as charged in the first count of the information." The point made by appellants is that the instruction contained nothing to the effect that, before a conviction of Lemmer would be justified in the law, it must appear beyond a reasonable doubt that he knowingly and with criminal intent aided defendant Elliott in the commission of the offense of which he was charged. The word "abet" is stronger in its implication than is the word "aid."

In the case of *People v. Dole*, 122 Cal. 486, 492, 55 P. 581, 584, 68 Am. St. Rep. 50, it is said: " * * * A person may aid in the commission of an offense by doing innocently some act essential to its accomplishment. * * * The word 'aid' does not imply guilty knowledge or felonious intent, whereas the definition of the word 'abet' includes knowledge of the wrongful purpose of the perpetrator and counsel and encouragement in the crime. * * * " The clerk's transcript of the record shows that by other instructions given by the court to the jury the rights of defendant Lemmer were fully protected as to the error suggested by him. For example, by one of such instructions the jury was informed that for one person to abet another person in the commission of a criminal offense simply means to knowingly and with criminal intent *aid*, promote, encourage, or instigate by act or counsel, or by both act and counsel, the commission of such criminal offense. The jury was also instructed that before it would become its duty to return a verdict of guilty against defendant Lemmer it must be satisfied that Lemmer "*knowingly and corruptly* aided and abetted the said Orion L. Elliott in said action and conduct."

[3] The point that the several instructions are inconsistent one with the other is not supported by any specific statement as to the particular in which the alleged inconsistency exists. In such circumstances it is not deemed the duty of this court to make special examination of the several instructions for the purpose of ascertaining the merit of the claim.

[4] As hereinbefore indicated, by count one of the information defendants were charged with the commission of the crime of asking and agreeing to receive a bribe. Appellants here complain of an instruction given by the court to the jury to the effect that "if the defendant Orion Elliott, a policeman, asked for a bribe and was then and there ready and willing to enter into a corrupt agreement or understanding with Leo Holland that his official conduct in and about his arrest for a violation of law should be influenced thereby, it will be the duty of the jury to return a verdict of guilty as charged in the first count of the information, provided you also find the defendant Lemmer aided and abetted defendant Elliott."

The objection presented by appellants to such instruction is that it does not harmonize with the accusation and that there was no evidence upon which the instruction might properly have been founded. In neither respect is this court able to agree with such contention. Even conceding the materiality of the question thus presented, it is plain that the information and the instruction are each based upon an identical situation, to wit, the asking and agreeing to receive a bribe. That the evidence introduced shows that but one of the defendants actually made the suggestion that he and his brother officer be compensated for their failure to arrest the prosecuting witness for his violation of the traffic ordinance is of no prejudice to the rights of either of the defendants, provided, as stated in the instruction, that the jury also find that "defendant Lemmer aided and abetted defendant Elliott."

[5, 6] Appellants assert error in that the trial court gave to the jury the following instruction: "For one person to abet another person in the commission of a criminal offense, simply means, to knowingly and with criminal intent, aid, promote, encourage or instigate, by act or counsel, or by both act and counsel, the commission of such criminal offense."

In the case of *People v. Matezusi*, 11 Cal. App. 465, 105 P. 425, this court approved an instruction nearly identical in language with the instruction of which appellants here complain. The only difference between the two instructions was that, instead of the words "knowingly and with criminal intent," which are contained within the instruction here under consideration, in the *Matezusi* Case the words "and with criminal intent" were omitted. It thus appears that the questioned instruction was more favorable to the defendants herein than was the approved instruction to the defendant in the case to which attention has been directed. Nor is this court in accord with appellants' suggestion that the questioned instruction constitutes an instruction of fact and thus violates section 19, article 6, of the Constitution. Its effect is a simple definition of a legal expression for the express purpose of enabling the jury to understand the law relating to the offense charged and the manner of its commission.

[7] Finally, it is contended by appellants that the evidence adduced on the trial of the action was insufficient to support the verdict and the judgment. To herein set forth the evidence upon which the judgment depends would serve no useful purpose. Although the witnesses produced by the people may not have been entirely consistent in some of their several statements of fact, and although the case for the defendants may have presented what might have been taken as satisfactory explanation of their "words, acts, and con-

duct" on the several occasions referred to in the testimony given by the witnesses for the prosecution, nevertheless the duty of determining where lay the truth rested with the jury. Its conclusion was final. This court is convinced that the evidence was sufficient to support the verdict.

The judgment and the order denying the motion for a new trial are affirmed.

We concur: CONREY, P. J.; YORK, J.

103 Cal. App. 235

PACIFIC FINANCE CORPORATION v. HENDLEY et al. (Civ. 3792.)★

District Court of Appeal, Third District, California. Jan. 22, 1930.

Rehearing Denied Feb. 21, 1930. Hearing Denied by Supreme Court March 20, 1930.

1. Carriers ⇨58—Title to automobiles shipped to dealer by motor company forwarding bills of lading with sight drafts for price to finance corporation passed to latter (Civ. Code, § 2129b).

Under Civ. Code, § 2129b, title to automobiles, shipped to retail dealer by motor company, which forwarded bills of lading with sight drafts for price thereof to finance corporation, reserving title until drafts were paid by latter, was transferred to finance corporation.

2. Chattel mortgages ⇨6—Bill of sale of automobiles, given to secure payment of note without changing possession, constituted mortgage only.

Bill of sale of automobiles and trust receipt, given as security for payment of note, without change in possession of property, constituted a mortgage only.

3. Chattel mortgages ⇨138(1)—Sales ⇨473 (1)—Owner may sell conditionally and deliver personalty, reserving title superior to that of subsequent innocent purchaser or mortgagee.

Owner of personal property may make a conditional sale and deliver possession thereof, reserving title until payment of agreed price, which title is superior to that of subsequent purchaser or mortgagee without notice of reservation.

4. Estoppel ⇨75—Seller delivering personalty under conditional sale contract to "buyer" displaying it for sale with similar property with seller's knowledge, is estopped to assert reserved title against bona fide "mortgagee"; "purchaser" (Civ. Code, § 1142).

Where personal property is delivered under conditional sale contract to buyer engaged in business of selling property of same kind and placed on display for sale with such other property with seller's knowledge, holder of reserved title is estopped to assert it against bona fide subvendee or mortgagee for value under Civ. Code, § 1142; word "buyer" in such section

being synonymous with word "purchaser," which includes "mortgagee."

[Ed. Note.—For other definitions, see Words and Phrases, First, Second, and Third Series, Purchaser; First and Third Series, Buyer; Mortgagee.]

5. Estoppel ⇨115—Mortgagee, not alleging estoppel to assert reserved title to automobiles under conditional sale contract in answer held not precluded from relying on such defense in finance corporation's action for possession (Civ. Code, § 1142).

Mortgagee, sued by finance corporation for possession of mortgaged automobiles, delivered to mortgagor under conditional sale contract, and displayed by him for sale with other automobiles, could rely on estoppel to assert reserved title under Civ. Code, § 1142, though answer contained no such defense, where complaint did not disclose basis of plaintiff's claim of title and right to possession, and it did not appear that defendant had knowledge thereof when answer was filed.

6. Estoppel ⇨75—Mortgagee's lack of notice or knowledge of seller's reserved title is necessary element of estoppel to assert it (Civ. Code, § 1142).

A necessary element of estoppel to set up reserved title under conditional sale contract as against subsequent mortgagee of automobiles, sold to dealer and placed on display by him for sale with other automobiles, under Civ. Code, § 1142, is mortgagee's lack of notice or knowledge of such title at time of transaction with mortgagor.

7. Partnership ⇨159—Either partner's knowledge is knowledge of partnership.

Either partner's knowledge of reserved title under conditional sale contract prior to execution of mortgage to partnership is the knowledge of the partnership.

8. Estoppel ⇨116—Burden is on party asserting estoppel to prove all elements thereof.

The burden rests on the party asserting an estoppel to prove all the elements constituting it.

9. Chattel mortgages ⇨177(4)—Mortgagee delivering automobiles to conditional seller, which resold them before trial of its action for possession thereof, could recover no more than value of its special interest therein (Code Civ. Proc. §§ 509-514).

Mortgagee delivering mortgaged automobiles, pursuant to Code Civ. Proc. §§ 509-514, to conditional seller, which resold them before trial of its action against mortgagee to recover possession thereof, could not recover more than value of its special interest in property, which court found was worth more than amount due mortgagee from mortgagor.

Appeal from Superior Court, Yolo County; W. A. Anderson, Judge.

Action by the Pacific Finance Corporation against J. T. Hendley, the Valley Investment Company, an association, and another. From a judgment for defendant investment company, plaintiff appeals. Reversed.

A. G. Bailey, of Woodland, for appellant.
Neal Chalmers, of Woodland, for respondents.

FINCH, P. J. In this action to recover possession of two automobiles, they were delivered to the plaintiff before trial, pursuant to the provisions of sections 509 to 514 of the Code of Civil Procedure. Judgment was entered in favor of the defendant Valley Investment Company for the return of the property or the value thereof, found by the court to be \$2,500. The plaintiff has appealed from the judgment.

[1, 2] At the time of the transactions described herein, the defendant Hendley was a retail dealer in automobiles at Woodland. He ordered a number of automobiles from the Pacific Nash Motor Company, including the two mentioned, and they were shipped by that company, which forwarded the bills of lading, together with sight drafts for the amount of the purchases, to the plaintiff, the motor company reserving title until the drafts were paid by the plaintiff. By these transactions the title to the automobiles was transferred from the Pacific Nash Motor Company to the plaintiff. Civ. Code, § 2129b; *Mohr v. First National Bank*, 69 Cal. App. 756, 232 P. 748; *Lawshe v. Norfolk Southern R. Co.*, 191 N. C. 473, 132 S. E. 160. The plaintiff then sold the automobiles to Hendley on conditional sale contracts, reserving title until payment of the agreed prices. By the terms of these contracts Hendley agreed "not to sell, * * * lease, mortgage, hypothecate, or otherwise dispose of said personal property * * * during the life" of the contracts. The plaintiff knew, however, that Hendley "was in the business of retailing automobiles"; that those sold to him by the plaintiff were placed "on his floor and in his show room"; and that he purchased the automobiles for resale. After the automobiles had been kept on display for a few months by Hendley, he borrowed \$3,000 from the Valley Investment Company, giving his promissory note therefor, and as security for the payment thereof he gave that company a bill of sale of three automobiles, including the two involved in this action, and also a trust receipt acknowledging that company's ownership of the property, but there was no change of possession thereof. The bill of sale and trust receipt constituted a mortgage only. *Bonestell v. Western Auto-Motive F. Corp.*, 69 Cal. App. 719, 232 P. 734. Hendley made a payment of \$900 on the promissory note, but it does not clearly appear whether he paid anything additional on account of the monthly installments of interest as they fell due. About three months after the execution of these instruments, Hendley abandoned his business and disappeared. The investment company thereupon took possession of the two

automobiles in question, and thereafter the plaintiff commenced this action.

The complaint alleges that the plaintiff is the owner and entitled to the possession of the automobiles. The answer of the defendant Valley Investment Company, which will be referred to as the defendant and respondent, denies that the plaintiff is the owner or entitled to possession of the property, and alleges that the defendant is the owner thereof and entitled to its possession. The court found the allegations of the complaint to be untrue and those of the answer to be true.

[3, 4] It is well settled in this state that the owner of personal property may make a conditional sale of the same and deliver possession thereof, reserving the title thereto until payment of the agreed price, which title will be superior to that of a subsequent purchaser or mortgagee without notice of the reservation. *Oakland Bank of Savings v. California P. B. Co.*, 183 Cal. 295, 297, 191 P. 524. It is equally well settled that, if personal property is delivered, under a conditional sale contract, to a buyer who is engaged in the business of selling property of the same kind, and, with the knowledge of the seller, is placed on display for sale with such other property, the holder of the reserved title is estopped to assert it against a bona fide subvendee for value. Civ. Code, § 1142; *Democrat-Herald Pub. Co. v. Pettit* (Cal. App.) 271 P. 910; *General Secur. Corp. v. Reo Motor Car Co.*, 91 Cal. App. 16, 266 P. 576; *State Finance Co. v. Isaacson*, 86 Cal. App. 113, 260 P. 580; *Rapp v. Fred W. Hauger Motors Co.*, 77 Cal. App. 417, 246 P. 1067; *Anglo-California Trust Co. v. Pacific Acceptance Corp.*, 70 Cal. App. 41, 232 P. 489; *Carter v. Rowley*, 59 Cal. App. 486, 211 P. 267. In such a case the rights of the innocent subvendee "do not depend upon the actual title or authority of the party with whom he deals directly, but are derived from the act of the real owner, which precludes him from disputing, as against the innocent party, the existence of the title or power which, through negligence or mistaken confidence, he has caused or allowed to be vested in the party making the sale." *Rapp v. Fred W. Hauger Motors Co.*, 77 Cal. App. 417, 422, 246 P. 1067, 1069. The word "buyer," as used in section 1142 of the Civil Code, is synonymous with the word "purchaser," and, in similar cases, it has been held that "purchaser" includes "mortgagee." *Hughes v. Bullen*, 209 Ala. 134, 95 So. 379; *Brunsdon v. Brunsdon*, 199 Iowa, 1099, 200 N. W. 823; *In re Gill's Estate*, 79 Iowa, 296, 44 N. W. 553, 9 L. R. A. 126; *Halbert v. McCulloch*, 60 Ky. (3 Mete.) 456, 79 Am. Dec. 556; *Snyder v. Hitt*, 32 Ky. (2 Dana) 204; *Jones v. Light*, 86 Me. 437, 30 A. 71; *Eason v. Garrison & Kelly*, 36 Tex. Civ. App. 574, 82 S. W. 800; *Allison v. Manzke*, 118 Wis. 11, 94 N. W. 659.

[5-8] Appellant contends that respondent cannot rely on the defense of estoppel, because the answer contains no such defense. The complaint does not disclose the basis of the plaintiff's claim of title and right to possession, and it does not appear that the defendant had any knowledge thereof at the time the answer was filed, and therefore the defendant was not called upon to plead an estoppel. The court, however, failed to find on the issue of estoppel, but found erroneously that title was in the defendant and not in the plaintiff. It further appears that the evidence is insufficient to prove an estoppel. A necessary element of the estoppel attempted to be proved is that the defendant, at the time of the transaction with Hendley, was without notice or knowledge of the plaintiff's title. The defendant is a partnership composed of two men named Foulks and Elliott. Foulks testified that he knew nothing of plaintiff's reserved title, but it does not appear whether or not Elliott had notice or knowledge thereof. The knowledge of either partner is the knowledge of the partnership. *Hazzard v. Johnson*, 45 Cal. App. 19, 27, 187 P. 121. "The burden rests upon the party asserting an estoppel to prove all the elements constituting it." 10 Cal. Jur. 656.

[9] The value of the property as found by the court exceeded the amount due the defendant from Hendley. The plaintiff resold the automobiles prior to the trial. In no event is the defendant entitled to recover a greater sum than the value of its special interest in the property. *Campbell v. Smith* (Cal. App.) 274 P. 758.

The judgment is reversed.

We concur: R. L. THOMPSON, J.; PLUMMER, J.

209 Cal. 7

FAHRENBRAKER v. E. CLEMENS HORST CO. et al. (Sac. 4212.)★

Supreme Court of California. Feb. 5, 1930.

Rehearing Denied March 3, 1930.

1. Mortgages ☞372(4)—Assignee under unrecorded assignment of rents takes only lessor's rights.

Rights of assignee under unrecorded assignment of rents as against subsequent purchaser of leased premises at sale under trust deed are no greater than, but the same as, lessor's would have been had no assignment been made.

2. Landlord and tenant ☞204—Rent accrues only on due date, and person then owning reversion is entitled to entire installment.

At common law, rent does not accrue from day to day, but only on day fixed for payment, so that person who owns reversion on that day is ordinarily entitled to entire installment due, though he owned reversion or rent only part of time elapsing since last rent day.

3. Vendor and purchaser ☞196—Grantee of reversion is entitled to all rent due at next rent day, in absence of contrary stipulation.

When the landlord conveys the reversion, grantee is entitled to all the rent which falls due at the next rent day, in the absence of a contrary stipulation.

4. Execution ☞281—Judicial sales ☞50(1)—Landlord and tenant ☞204—Mortgages ☞372(4), 548—Conveyance by operation of law, under trust deed or power of sale in mortgage, or under decree or execution valid against lessor, passes reversion and rent thereafter accruing.

A conveyance by operation of law, under a trust deed or power of sale in a mortgage, or by a master or sheriff under decree or execution valid against lessor, passes his reversion and rent thereafter accruing as effectively as a deed from him directly.

5. Mortgages ☞372(4)—Statute providing for apportionment of rent during redemption period does not apply to sales under trust deeds (Code Civ. Proc. § 707).

Code Civ. Proc. § 707, providing for apportionment of rent during period allowed for redemption of property sold under execution or foreclosure of mortgage, does not apply to sales under trust deeds.

In Bank.

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action by Frank C. Fahrenbraker against the E. Clemens Horst Company, Josephine A. Hunt, and others. From a judgment for plaintiff, defendant Hunt appeals. Reversed.

For opinion of District Court of Appeal, see 279 P. 172.

Brobeck, Phleger & Harrison, of San Francisco, and John R. Connelly, of Sacramento, for appellant.

Busick & Leeper, of Sacramento, for respondent.

PER CURIAM. A hearing in this case was granted by this court after decision by the District Court of Appeal of the State of California, in and for the Third Appellate District, Finch, P. J., writing the opinion. The following portion of said opinion is hereby adopted as and for the opinion of this court:

This is an appeal by the defendant Josephine A. Hunt from the judgment herein apportioning the rent of the lands described in the complaint for the year ending November 1, 1926.

[1] The defendant E. Clemens Horst Company holds the land under a lease from A. D. Murphy for a term of ten years, commencing November 1, 1919, at the annual rental of \$1,500, payable annually at the end of each year of the term. The lease was duly recorded. During the term of the lease, Murphy executed a trust deed to secure payment of his promissory note to the appellant and on September 4, 1926, the land was sold by the trustee to satisfy the indebtedness; the appellant becoming the purchaser for the amount of the debt and the expenses of sale. On September 17, 1926, the trustee conveyed the land to appellant. At the time of the sale, the plaintiff held an unrecorded assignment of all rents to become due under the lease as security for an amount due him from Murphy. The assignment was made prior to the execution of the trust deed, but the appellant had no knowledge thereof until after she had purchased and paid for the property and had received the trustee's deed therefor. The court apportioned the rent for the year ending November 1, 1926, awarding the plaintiff \$1,316.10 thereof and the appellant \$183.90. Appellant contends that she is entitled to all of the rent for the year. The plaintiff's rights under the unrecorded assignment are not greater than, but the same as, Murphy's would have been, if no assignment had been made.

[2, 3] "Rent is not, at common law regarded as accruing from day to day, as interest does, but it is only upon the day fixed for payment that any part of it becomes due. The result of this principle is that, ordinarily, the person who is on that day the owner of the reversion is entitled to the entire installment of rent due on that day, though he may have been the owner of the reversion or rent but a part of the time which has elapsed since the last rent day. * * * When the landlord makes a conveyance of the reversion, the grantee is entitled, in the absence of a contrary stipulation, to all the rent which falls due at the next rent day." Tiffany on Landlord and Tenant, § 176. In *Diepenbrock v. Luiz*, 159 Cal. 716, 115 P. 743, L. R. A. 1915C, 234, Ann. Cas. 1912C, 1084, the following language in section 389 of Taylor's Landlord and Tenant (9th Ed.) is quoted with approval:

"It is well settled that in all cases of periodical payments, accruing at intervals, and not de die in diem, there can be no apportionment, for rent will not be apportioned in respect of time, unless by force of a statute or of some special provision of the lease."

[4] "A conveyance by operation of law or under a trust deed or power of sale in a mortgage or by a master or sheriff under a decree or execution that is valid against the lessor, will be as efficacious as a deed from him directly. Whatever unqualifiedly passes his reversion will pass rent thereafter accruing." Underhill on Landlord and Tenant, § 318; Tiffany on Landlord and Tenant, § 180; 36 C. J. 366.

[5] In this state rent is apportioned during the period allowed for redemption of property sold under execution or in the foreclosure of a mortgage. Clarke and Cain v. Cobb, 121 Cal. 595, 54 P. 74. The decision last cited, however, is based on the special provisions of section 707 of the Code of Civil Procedure, relating to the redemption of property from sales on execution and foreclosure, which section has no application to sales under trust deeds.

The judgment is reversed.

208 Cal. 697

HENIGAN v. YOLO FLIERS CLUB et al.*
(Sac. 4093.)

Supreme Court of California. Jan. 24, 1930.
As Modified on Denial of Rehearing Feb. 20, 1930.

1. Abatement and revival ⇨69—Cause of action for fraud and deceit in sale and purchase of land survived plaintiff's death pending appeal.

Cause of action for damages for fraud and deceit in the sale and purchase of tract of land survived plaintiff's death pending appeal.

2. Limitation of actions ⇨197(2)—Finding that facts existed imputing to purchaser knowledge of fraud within three-year limitation held warranted by evidence (Civ. Code, § 19; Code Civ. Proc. § 338, subd. 4).

In action for damages for fraud and deceit in sale and purchase of land, evidence of existence of facts imputing knowledge of fraud under Civ. Code, § 19, within three-year limitation prescribed by Code Civ. Proc. § 338, subd. 4, held to sustain finding adverse to plaintiff.

3. Limitation of actions ⇨100(13)—Constructive notice of vendor's fraud within three-year limitation may exist where inquiry becomes duty and failure to make it constitutes negligent omission (Code Civ. Proc. § 338, subd. 4).

Though actual fraud based upon misrepresentation of material fact inhered in and if acted

upon in time vitiated sale of land, constructive notice of fraud may exist within three-year limitation prescribed by Code Civ. Proc. § 338, subd. 4, where circumstances are such that inquiry becomes duty and failure to make it constitutes negligent omission.

4. Limitation of actions ⇨100(13)—Where agency for sale of land was terminated, purchaser suing for fraud could not rely upon confidential relationship so as to preclude imputation of knowledge of fraud within three-year limitation (Code Civ. Proc. § 338, subd. 4).

In determining whether fraud inducing purchase of land was discovered more than three years prior to commencement of action under Code Civ. Proc. § 338, subd. 4, where sale had been consummated and agency of defendant terminated, plaintiff had no right as against seller of property to rely upon confidential relationship between himself and defendant, so as to preclude imputation of knowledge of fraud from existing facts.

In Bank.

Appeal from Superior Court, Yolo County; H. D. Burroughs, Judge.

Action by Andrew Wikstrom against the Yolo Fliers Club and another, in which Hiram Henigan, executor of Andrew Wikstrom, deceased, was substituted as plaintiff. Judgment for defendants, and plaintiff appeals. Affirmed.

Armfield & Eddy, Elmer W. Armfield, and Arthur B. Eddy, all of Woodland, for appellant.

Huston, Huston & Huston, Arthur C. Huston, and Arthur C. Huston, Jr., all of Woodland, for respondents.

PRESTON, J. Action by plaintiff against defendants for damages for fraud and deceit in the sale and purchase of a tract of land of 152.44 acres in Yolo county, Cal.

The action was begun more than three years after the alleged fraud was perpetrated. Plaintiff alleged a discovery thereof within the requisite period. Section 338, subd. 4, Code Civ. Proc. The court found the existence of the fraud as alleged, but sustained defendants' plea of the statute of limitations under the section of the Code above noted. In sustaining this plea, however, the court found that, as a matter of fact, plaintiff did make the discovery within the three-year period, but found that, as a matter of law, the existence of certain facts imputed prior knowledge of the fraud to him. Section 19, Civ. Code.

[1] Plaintiff appealed, but during the pendency thereof died. The cause of action, however, survived. Wikstrom v. Yolo Filers Club, etc. (Cal. Sup.) 274 P. 959.

It is not necessary to pass definitely upon the sufficiency of the evidence to sustain the finding that the fraud was perpetrated upon plaintiff in the transaction, for we are firmly

of the opinion that the action of the court below sustaining the statute of limitations must be upheld. Enough of the facts as gleaned from the findings will be stated to set forth this issue.

The whole case centers around the actions of the defendant O. W. H. Pratt, a real estate operator, who at the time in question had under execution a plan to cause the purchase of a large area of land known as the Wolfskill tract and to procure a sale of certain subdivisions thereof to various people, among whom were defendant Yolo Fliers Club, of which he was the active vice president. This was accomplished. It was the plan of the club, in turn, to subdivide the tract purchased by it and to sell a portion thereof, retaining the remainder for its own purposes, and to that end it had employed its said vice president, Pratt, upon a 5 per cent. commission, to procure a purchaser for the portion of said lands so to be sold.

At this point it is necessary to advert to a rather unusual situation. Said Pratt for more than seven years prior to said time had been the confidential agent of plaintiff in the purchase, subdivision, and sale of real property and through this relationship there had grown up the greatest confidence between them, and plaintiff relied upon him and trusted him implicitly, as the court found. It is also a fact that, during the negotiations with plaintiff for the purchase of a portion of said tract, as will be hereinafter noted, plaintiff empowered defendant Pratt to act as his agent in the consummation of the purchase, and, furthermore, during the pendency of the negotiations, empowered defendant Pratt as his agent to subdivide and sell the property about to be purchased; in fact, the sale was largely induced by the guaranty made by defendant Pratt to plaintiff that he would subdivide and sell a portion of the said property at a large profit to plaintiff. Not only is this true, but defendant Pratt did, in point of fact, become the agent of plaintiff pending the consummation of the sale for the subdivision and sale of said property and continued as such agent during practically all the time mentioned in the complaint. This relation was apparently known to defendant club, as it expressly consented that Pratt might receive, as a commission, \$1,000 from plaintiff for the consummation of the sale here under attack. The actual contract of sale and purchase between plaintiff and defendant club was entered into on October 20, 1919; defendant Pratt signing as vice president of the club and plaintiff signing in his own right.

The description of the tract so to be purchased was somewhat uncertain, and read as follows: "The part of the Rancho Gueis-soli of the Gordon Grant, bounded on the North by the center line of Cache Creek, on the East by the Exterior line of said Rancho,

on the South by the right of way of the Woodland and Moore Canal and on the west by a line drawn parallel to the East line of said Rancho and a sufficient distance therefrom to contain 148.3 acres of land between the ditch and the high bank of Cache Creek, together with that portion of the property lying in the low land and extending to the North boundary of the said Rancho. * * *

Subsequent to the execution of this contract, and prior to the execution of the deed therefor, both plaintiff and defendant club jointly engaged a civil engineer to make certain surveys respecting said property. The club sought to have its various subdivisions of the larger tract marked, and plaintiff had the tract being purchased by him subdivided into some six smaller tracts. After this survey had progressed to a certain point, a sufficient description was procured for the deed, and on November 17, 1919, defendant club conveyed to plaintiff said 152.44 acres of land, at a purchase price of \$32,012.40, or \$210 per acre for the entire acreage deeded. The deed was regularly spread of record and then returned to the bank which had loaned a certain amount of money on the property as security for its advancement of a portion of the purchase price to plaintiff. Within a very few days after the consummation of the transaction, the civil engineer completed his work, making for plaintiff a map showing the entire tract purchased by him and the subdivision thereof into lots, each lot having marked thereon the acreage therein. The total acreages marked in the subdivision comprised in the aggregate the exact number of acres purchased from the club. Plaintiff himself received a copy of this map and had it in his possession for a considerable period of time. He was cognizant of the number of lots into which the larger tract was subdivided; also of the number of acres in each lot, the aggregate number of acres, and of the price per acre desired by him therefor, which said price was largely in excess of the price per acre paid by him. He was also cognizant of the fact that no land was marked for donation to purchasers.

We will now set forth the facts alleged to constitute the issue of fraud. Across the northerly portion of said tract of land from east to west ran a fence. Plaintiff contends that, at the time he and defendant Pratt were upon the property during the negotiations, it was pointed out to him that all the land north of said fence was worthless, and that it would be donated to him, should he purchase the portion thereof south of said fence. Plaintiff claims that no deduction was made for the said waste area, and that he paid full purchase price for the whole thereof, thus paying some ten thousand odd dollars more than he should have paid for the entire acreage purchased. As above noted, the court sustained this contention as to the existence of

actionable fraud in the consummation of the transaction.

Plaintiff, while a man of advanced years, was by the court found to be a man of ordinary intelligence. He was a man who had had a considerable experience in the purchase and sale of real property, and knew something of deeds and mortgages and their functions. He had a splendid knowledge of farming properties, having lived upon and managed a large farm for a great many years. Admittedly, he had good judgment in estimating acreages of land, being able also to approximate the area by stepping it off and other methods commonly known to experienced farmers.

The map introduced in evidence by the defendant showed 109.20 acres south of said fence and 43.24 acres north thereof. Plaintiff knew also that the total acreage purchased was 152.44 acres and he knew the price he had paid therefor. If his contention is to be upheld, he must have thought that he was getting 152.44 acres of land in the area south of the fence.

[2] The issue as to the imputed knowledge found by the trial court was one of fact, and each case must rest upon its own peculiar facts. We are wholly unable to say that the conclusion of said court is not supported by the evidence. On the contrary, to us the evidence seems clear that plaintiff should have known of the existence of said fraud prior to the three-year period. In the first place, the fraud, if it existed, was not concealed. The means of ascertaining the number of acres paid for and the number donated, if any, were open to plaintiff at all times. The club had directly no dealings with him. Neither the club nor Mr. Pratt did anything to conceal the alleged fraud nor to in any wise prevent plaintiff from pursuing the knowledge the law declares him to have had so as to make complete discovery thereof. As above noted, during and at all times subsequent to the negotiations, Pratt was also the agent of plaintiff and not in all his actions the agent of defendant club.

A visit to the land, or a perusal of the deed, consultation of the map, the knowledge of the acreage bought, and the purchase price paid, the fixing of the values on the subdivisions of the tract or the totaling of the acreage in all the subdivisions, or a consideration of the question as to whether waste land was to be donated to purchasers from him, would have brought home to plaintiff full knowledge of the facts upon which he urges fraud.

[3] But counsel contends vigorously that, inasmuch as the court found actionable fraud based upon a misrepresentation of a material fact to have inhered in, and, if acted upon in time, to have vitiated, the sale, the rule of constructive notice cannot be applied. He grounds his contention on the rule often an-

nounced by this court, that "every contracting party has a right to rely on the express statement of an existing fact, the truth of which is known to the opposite party and unknown to him, as the basis of a mutual agreement; and he is under no obligation to investigate and verify the statements to the truth of which the other party to the contract, with full means of knowledge, has deliberately pledged his faith." *Spreckels v. Gorrill*, 152 Cal. 383, 92 P. 1011, 1017; *Teague v. Hall*, 171 Cal. 668, 154 P. 851; *French v. Freeman*, 191 Cal. 579, 217 P. 515; 12 R. C. L. p. 376.

But the full application of this rule does not meet the issue here, for, after consummation of the sale, facts abundant came to the notice of appellant that could not but have aroused an inquiry as to the true facts. The conscious fact that he had purchased 152.44 acres of land and paid the full price therefor and that no acreage appeared anywhere as donated land, either in the deed or in the map procured by him, and the further fact that, after subdivision, one tract thereof reaching the north line of the tract had been sold within a few days after his purchase and no worthless land was by him directed to be donated to the purchaser, speaks eloquently to the effect that he knew waste area had been bought by him and was being offered for sale at a profit. These facts, in view of the finding of the court thereon, bring into operation the doctrine recognized by the case of *Tarke v. Bingham*, 123 Cal. 163, 55 P. 759, 760, where, in discussing the facts under the statute of limitations here involved, it was recognized that the rule contended for by appellant here would give way in cases where the facts meet the following test: "The circumstances must be such that the inquiry becomes a duty, and the failure to make it a negligent omission."

The case of *Phelps v. Grady*, 168 Cal. 73, 79, 141 P. 926, 928, is applicable here. In that case the court, discussing laches in seeking relief because of a fraudulent misrepresentation as to value in the conveyance of real property, said in part: "While it is conceivable that a person under such circumstances might misrepresent to another at a distance the value of those lands, it is impossible that that person could have concealed [from the grantors] knowledge of the true value had the slightest inquiry been made. It cannot be said, therefore, and of course it is not alleged, that Mrs. Phelps ever did or attempted to do anything to conceal from these interveners knowledge of the true value of the land. If, under such circumstances, with every means of information open and patent before them, they may refuse to make inquiries for seven years, they may do so for seventy. There is an absolute failure to show not only due diligence but any diligence in seeking to discover during all this interven-

ing time whether or not they had parted with their property at a fair valuation."

We think the language of *Simpson v. Dalziel*, 135 Cal. 599, 603, 67 P. 1080, 1082, is applicable here: "Natural curiosity, as well as business prudence, would have compelled him to make the inquiry, and his failure to make it was inexcusable negligence; and it is well settled in this class of cases that 'one will be presumed to have known whatever with reasonable diligence he might have ascertained concerning the fraud of which he complains.'"

[4] We cannot accord weight to the contention that, by reason of the confidence appellant had in defendant Pratt, he is excused from the operation of the above doctrine. We have already made it clear that we are not dealing with a mere case of actual fraud. That such fraud was committed was found by the court, and such finding, for the purposes of this discussion, was accepted as true, but we are in fact here dealing with the finding of the court that the action is barred. The question is: Was the discovery of the fraud, as a matter of law, made more than three years prior to commencement of the action? The sale had been consummated and the agency of Pratt for that purpose had been terminated; hence, as against defendant club, appellant had no right whatsoever to rely upon such confidential relationship. Moreover, the court, in *Simpson v. Dalziel*, supra, recognizes a principle which would forbid plaintiff from relying upon this relationship, even as against defendant Pratt individually, for the court in that case held that the confidential relation between the appellant and his attorney did not excuse the duty to follow up the lead to full knowledge as to the acts and conduct of such attorney, which inquiry was required by known facts.

In closing the discussion, we would here note that we have not failed to consider the point strenuously urged that the high bank of the creek and the fence are practically the same line and, for this reason, appellant, in view of the deed and map, would be excused from the imputation of knowledge of the fraud. We cannot see how this contention, if true, would overthrow the finding of the court. It would, at most, go only to the weight of a portion of the evidence. If the court had made a finding in appellant's favor on the issue of imputed knowledge, we would be in an altogether different position. But in fairness it must be said that not all the witnesses understood the high bank line and the fence line to be practically the same. Certainly defendant Pratt did not so consider it, and his testimony and the contract of sale appear to agree, and would have sustained a finding that only a very much smaller area than the acreage north of the fence was to be donated.

We do not think further discussion is profitable as under well-settled rules we are bound by the finding of the trial court on this issue of imputed knowledge.

The judgment is affirmed.

We concur: WASTE, C. J.; RICHARDS, J.; CURTIS, J.; SEAWELL, J.; LANGDON, J.; SHENK, J.

208 Cal. 740

VAUGHAN v. STATE BAR OF CALIFORNIA.★ (L. A. 11618.)

Supreme Court of California. Jan. 29, 1930.

Rehearing Denied Feb. 27, 1930.

1. Attorney and client ☞61—Whether disbarment of attorney was warranted was settled by decision on appeal therein, precluding consideration of same contentions in application for reinstatement (State Bar Act).

Question relative to whether disbarment of attorney was warranted was settled by decision on appeal to Supreme Court, and precluded consideration of same contentions on subsequent application for reinstatement after refusal of the board of governors of the State Bar of California, acting under the State Bar Act (St. 1927, p. 38), to recommend petitioner for readmission.

2. Attorney and client ☞61—Question for determination on attorney's application for reinstatement is whether conduct since disbarment warranted readmission.

Question for determination on application of attorney at law for reinstatement is whether conduct since judgment of disbarment has been such as to warrant belief that he now possesses necessary qualifications, particularly as to integrity and character warranting his readmission to privileges of office of attorney at law.

3. Attorney and client ☞4—Those seeking admission to practice law must be possessed of unquestioned good character and be above suspicion in dealings with public.

One of the requirements for admission to practice law is that those seeking to so practice must be possessed of unquestioned good character and be above suspicion in their dealings with public at large, particularly those with whom they will come in closer relationship of attorney and client.

Langdon, J., dissenting.

In Bank.

Application by Arthur C. Vaughan for reinstatement as an attorney at law, after refusal of the Board of Governors of the State Bar of California to recommend petitioner for readmission. Application denied.

Frank R. Willis and Arthur C. Vaughan, both of Los Angeles, for petitioner.

R. P. Jennings, of Los Angeles, for respondent.

WASTE, C. J. Petitioner makes application for reinstatement as an attorney at law. On accusations filed by the Los Angeles Bar Association, Arthur C. Vaughan, an attorney, was disbarred on December 30, 1920, by order of the superior court of the state of California, in and for the county of Los Angeles; the grounds of disbarment being that the accused was guilty of the offenses and acts charged against him, each of which involved moral turpitude and dishonesty on the part of the accused. The facts on which the accusations were based were, among others: (1) That the attorney converted and appropriated to his own use money placed in his hands by a client for the special purpose of being used as expenses in preparing and printing a transcript and briefs on appeal; (2) that, for the purpose of obtaining an extension of time to file a supersedeas bond in a case pending before the Supreme Court, the attorney made and filed an affidavit containing statements that were untrue, and known by the attorney to be untrue; (3) that the petitioner recovered certain bonds for a client, but, instead of delivering them to the owner, used them as security for a personal loan of \$600. On appeal, the facts were carefully considered by this court, and it concluded that the evidence was sufficient on the three grounds noted to sustain the order of disbarment. The judgment was accordingly affirmed. *In re Vaughan*, 189 Cal. 491, 209 P. 353, 24 A. L. R. 858.

During the year 1927, petitioner filed in the District Court of Appeal for the Second Appellate District his petition for reinstatement. Subsequently the court entered an order dismissing the application without prejudice upon the ground that the court was of the view that, under the provisions of the State Bar Act (St. 1927, p. 38), it was without jurisdiction to act on the merits concerning the petition. Petitioner then filed a petition for reinstatement with the board of governors of the State Bar of California. After due notice to the applicant, a hearing was had before the board of bar examiners. As a result of this investigation, the board of bar examiners made its findings that the applicant "is not possessed of such moral qualifications as to entitle him to reinstatement," and refused to favorably recommend petitioner to this court for readmission as an attorney at law.

[1, 2] Petitioner has now filed with this court what he styles a petition for a writ of review, but which will be regarded as an application for admission to the bar. Decision of this court denying a hearing in *Re Mash*, 39 Cal. App. 551, 179 P. 898; *Brydon-jack v. State Bar* (Cal. Sup.) 281 P. 1018. In his application, the disbarred attorney alleges that since the date of his disbarment he has not attempted to and has not practiced law, and does not maintain an office of his own, although he seems to have rendered

some services for other attorneys. During all of that time, he alleges, he has maintained himself as an upright and honorable citizen. He presents testimonials as to his qualifications as an attorney at law and as to his good character signed by some one hundred members of the bar and other citizens of Los Angeles county. He alleges that he has been severely punished financially, and has suffered great humiliation and embarrassment by reason of his disbarment, judgment of which, he says, "has taught him a lesson he will never forget." In addition to these recommendations and general allegations, petitioner presents, in substance, the record of the evidence taken in the disbarment proceeding in the superior court in 1920, and analyzes the testimony in an effort to show that his conviction was not warranted. That question was settled by the decision on the appeal, *supra*, and the same contentions, now advanced, will not be again considered.

As to the other matters presented by the petition, the attitude of this court is well expressed in the following quotation: " * * * Where the present conduct of an attorney satisfies the court that the continuance of his disbarment is no longer necessary, it should not be required. * * * In considering an application such as the present, while of course we cannot ignore past delinquencies, we must accord prime importance to the present manner of life and conduct of the applicant; and if we are convinced that there really has been a reformation, and that the disbarred attorney will in the future be a law-abiding citizen, and show a proper regard for the duties and responsibilities of his profession, we will lift the ban that past lapses necessitated placing upon him." *In re Mash*, 39 Cal. App. 548, 550, 179 P. 897, 898. The question therefore to be now considered is whether the conduct of the attorney since the judgment of disbarment has been such as to warrant a belief that he now possesses the necessary qualifications, particularly as to integrity and character, to entitle him to the high regard and confidence of the public, warranting his readmission to the privileges of the high office of an attorney at law.

The petitioner testified before the board of bar examiners concerning his business affairs and the manner in which he has conducted himself since his disbarment, and introduced the testimonials as to his present good character. A number of those signing the testimonials appeared and testified for petitioner, with the result that usually follows the presentation of such indorsements bearing the signatures of a large number of persons: Many of those appearing and testifying, some of whom were former judges of courts of record in this state, admitted on cross-examination before the committee of bar examiners having merely a casual or "passing acquaintance" with the applicant,

and never having had that intimacy of association or contact which would enable them to give an opinion worthy of consideration in this special and important matter. We do not doubt for a moment that the signers of the indorsement of the petitioner, who, as petitioner avers, "were among the most distinguished gentlemen of Los Angeles," had the best interests of the bar at heart, but we do doubt that this array of persons could have had petitioner so closely under their observation as to enable them, en masse, and with no showing of fact except their general statement en masse, to say with assurance that the petitioner would make an honest and reliable attorney at law. See *In re Stevens*, 59 Cal. App. 251, 256, 210 P. 442. The evidence of those who testified before the examiners was, for the most part, materially weakened on cross-examination.

Entirely aside from these considerations, there are a number of matters in the long record brought here which we must assume contributed to the unfavorable report of the committee of bar examiners of the board of governors of the State Bar, to which we do not deem it necessary to particularly refer. Two matters, however, involving business transactions of the applicant, may have very largely influenced the adverse recommendation. It appears that since his disbarment petitioner became a bankrupt, and, during the proceedings in that behalf, failed to disclose to the court in bankruptcy certain assets which he claimed at the time he became bankrupt. The inference to be drawn from this transaction is that the petitioner omitted the real property in question from his list of assets in order to cover a transaction between himself and a client named Hillman. The explanation made by the petitioner, under the circumstances set forth in the transcript, fails to convince us that the analysis of the situation and the conclusion reached by the bar examiners was not the right one. Another transaction which no doubt weighed heavily with the examiners in determining whether or not the petitioner was sufficiently honest to entitle him to again practice law was one between petitioner and two elderly people named Henrich, whereby petitioner, through oral negotiations, became the record owner of property stated by him at one time in his proceedings for reinstatement to be of the value of \$125,000. The explanation by petitioner of these transactions was no doubt satisfactory to himself, but failed to impress the board of bar examiners. Nor are we so impressed with the showing made by petitioner before the examiners and here as to be willing to subscribe to an opinion holding that petitioner has shown such a reformation on his part as would convince, not only ourselves, but the general mind, that, if reinstated, he would discharge his duty as a lawyer with unswerving fidelity. Such consideration must be of controlling influence in

every such proceeding as this. *In re Stevens*, supra.

[3] We deem it unnecessary to further discuss the voluminous record. The board of governors of the State Bar, through its committees and board of bar examiners, has power under the State Bar Act to recommend to the Supreme Court for admission to practice law those who fulfill the requirements. One of the requirements, whether made by regulation of the State Bar or not, is that those seeking to practice law must be possessed of unquestioned good character and be above suspicion in their dealings with the public at large, particularly those with whom they will come in the closer relationship of attorney and client. The record brought here in this case, read alone and without the critical study and analysis made by the board of bar examiners in presenting its findings to the governors of the State Bar, would appear on the face to entitle the applicant to be again admitted to practice law. We can but feel, however, in view of the opposition which has been filed in behalf of the board of governors of the State Bar, based as it is upon a critical analysis of the record, and in which the attention of the court has been called to the various points of weakness which the record contains, that the applicant has not made a sufficient showing to entitle him to a favorable consideration of his application.

The application for admission to practice law is denied.

We concur: SHENK, J.; RICHARDS, J.; SEAWELL, J.; PRESTON, J.; CURTIS, J.

LANGDON, J. (dissenting). I dissent from the conclusion reached in the majority opinion. I am in accord with the first portion of that opinion, wherein it is held that the correctness of the judgment in the disbarment proceedings in 1920 is concluded by the decision upon appeal therefrom, and that that matter will not be again considered. I am also in accord with the general policy announced by the opinion in the quotation from the case of *In re Mash*, 39 Cal. App. 548, 550, 179 P. 897.

We now come to the action of the board of governors of the State Bar of California, in the present proceeding, in denying petitioner reinstatement as a member of the bar. Eight years after his disbarment, petitioner filed with the said board of governors his petition for reinstatement as an attorney at law and an order was made by said board referring the application to the committee of bar examiners, before whom a hearing was had. This committee filed with the board of governors their findings and recommendations, in which it was found in favor of petitioner's mental qualifications, but in which it was also found "that applicant is not in

possession of such moral qualifications as to entitle him to reinstatement."

As stated in the majority opinion, this court will regard petitioner's proceeding in this court as an application for admission to the bar, and we are not bound by the findings of the said committee nor the acceptance thereof by the said board. It is argued, in effect, however, by the attorney for respondent, that petitioner has not sustained the burden of showing such moral qualifications as to entitle him to reinstatement.

The argument is based upon but two matters revealed by the record. The first concerns an alleged concealment of assets in proceedings in bankruptcy. It is asserted by respondent that, at the time petitioner filed his schedule of assets in the bankruptcy proceeding, he believed, erroneously, it is conceded, that he had an equitable interest in a piece of real property of small value, located at Sawtelle, Cal., growing out of an unacknowledged and unrecorded deed to his son, which interest he did not list among his assets. Respondent concedes that petitioner had no such interest and that the finding of the referee, when the matter was reopened for hearing, that there were no assets of the bankrupt, was proper. However, it is not necessary to consider this matter and the explanation thereof made by petitioner, as it is immaterial here. It is not disputed that the date of the adjudication in bankruptcy was December, 1919, and that the date of the disbarment was December 30, 1920. Therefore any intent which petitioner may have had to deal unfairly in the bankruptcy proceeding before his disbarment is not pertinent upon the inquiry here, which is directed to ascertaining whether, since said disbarment, petitioner has developed sufficient moral strength to entitle him to reinstatement.

The other matter urged upon our attention by the respondent involves a business transaction with Mr. and Mrs. Henrich. The outstanding feature of the record is that these people are not only not complaining of this transaction, but are most emphatic in their expressions of satisfaction and of trust, confidence, and admiration for petitioner. They deeded to the sister of petitioner a valuable piece of property under a plan by which petitioner was to build thereon a hotel building and to pay Mr. and Mrs. Henrich \$1,000 a month from the rentals thereof for thirty years, after which time the property was to belong to petitioner or his estate. There are details of this transaction which probably would not appeal to the business sense of experienced people, but the fundamental thing is that the Henrichs are satisfied therewith; they intended to trust petitioner and still trust him; they were not misled nor deceived. They knew of his disbarment; petitioner told them to consult a lawyer, and they had an attorney who attended to their

business. They are entitled to freedom to contract as they wish and to trust whom they wish, without interference or suggestion by the board of governors of the State Bar of California. At the hearing it was pointed out to them that certain disastrous consequences to them were possible if petitioner and his sister did not deal honestly with them, and they replied that these matters and things had been explained to them previously by petitioner, that they understood the entire matter from its inception, and that they had been and were willing to trust petitioner and his sister, and that they had not been disappointed in so doing. They had in their exclusive possession a reconveyance of the property to themselves which they might effectuate as against all the world at any moment by placing it upon record. Petitioner was not acting as their attorney, and there is nothing in the record to show fraud or deceit on his part, nor a fiduciary relationship. Mr. and Mrs. Henrich are people of financial standing and of intelligence, as appears from their testimony at the hearing and from their statements on file in this case, and presumably of some business experience. They are not "two old people," as so effectively argued by respondent. The record discloses that they are about 50 years of age, strong and active; that they contemplated just such a business transaction as they entered into with petitioner with some other person previously. Since petitioner alleges that he graduated from the university in 1902, after having previously served as a minister of the Gospel, it is fair to conclude that he is as equally handicapped with age as are Mr. and Mrs. Henrich.

It is difficult for me to see how moral delinquency can be predicated upon a business transaction such as this one is, when all parties concerned are emphatically satisfied and indeed grateful and enthusiastic; when all parties, apparently, were well informed of every fact and circumstance and possible consequence attending the steps taken in the transaction and nevertheless elected to take such steps and still so elect; when no one has been injured, and the Henrichs can, at any time, by their own action, place themselves in statu quo.

While it is true that some of the character witnesses at the hearing did not intimately know petitioner, the record shows that many of them had observed him carefully and for a long period of time, and the characters of many of the men who signed his petition and who testified that they were satisfied with his qualifications for reinstatement should be most persuasive with this court, for these men are known to the court to be conscientious and scrupulous in every way and most exacting in their requirements of members of their own profession. It is inconceivable to me that such men would have recommend-

ed and urged the admission of an attorney at law to the bar of this state without substantial basis for such action.

While the action of the board of governors in disbaring erring attorneys is worthy and necessary for the protection of the public and should be supported when cause therefor exists, there is a correlative responsibility resting upon such board and upon this court not to close the door of hope and repentance to any man. When, after disbarment, with its consequent humiliation and difficulties, a man continues to live in one community for eight years, earning his living and handling transactions involving large sums of money and requiring trust and confidence upon the part of his clients, studiously and earnestly reading and studying law during these years, looking to a possible day of rehabilitation in his profession, and when, after that period of time, he has earned the recommendations of judges of the trial and appellate courts in his community, of lawyers who brought about his disbarment, and of others with whom he has worked and been associated during these years, and when the record contains absolutely nothing pertinent against his claim of moral fitness, I think he should be given another chance.

208 Cal. 749

STEPHENSON v. NORTHWESTERN PAC. R. CO. (S. F. 12692.)★

Supreme Court of California. Jan. 30, 1930.

Rehearing Denied March 1, 1930.

Railroads ⇨327(8) — Motorist approaching crossing without having looked for trains after reaching point opposite last obstruction held contributorily negligent.

Driver of automobile looking for approach of train from point opposite last obstruction, and failing to look thereafter, though view was increased and sun had not yet set and whistle was blown, *held* guilty of contributory negligence as matter of law, as regards injuries sustained in crossing collision.

Langdon, Richards, and Shenk, JJ., dissenting.

In Bank.

Appeal from Superior Court, Sonoma County; M. S. Sayre, Judge.

Action by John Stephenson against the Northwestern Pacific Railroad Company. Judgment for plaintiff, and defendant appeals. Reversed.

Superseding opinion 278 P. 263.

Rehearing denied; RICHARDS, SHENK and LANGDON, JJ., dissenting.

Eells & Orrick, Orrick, Palmer & Dahlquist, and R. W. Palmer, all of San Francisco, and Geary & Geary, of Santa Rosa, for appellant.

F. De Journal, Philip Conley, and Conley, Conley & Conley, all of Fresno, and W. F. Cowan, of Santa Rosa, for respondent.

PER CURIAM. We ordered a transfer of this cause to this court, after decision therein by the District Court of Appeal, for the reason that some of the members of this court were not in entire accord with the conclusion of the District Court of Appeal, holding that plaintiff was guilty of contributory negligence in the operation of his automobile, which collided with defendant's locomotive and train, and therefore, not entitled to recover in damages for the injuries sustained by him in said collision. After a further study of the evidence in the case and the decisions of the courts of this state applicable to the defense of contributory negligence we have reached the conclusion that the opinion of the District Court of Appeal correctly disposes of all questions arising under said defense, and we therefore adopt said opinion as the opinion of this court. Said opinion, written by Presiding Justice Koford, and concurred in by Justices Nourse and Sturtevant, is as follows:

"Respondent recovered a verdict and judgment against appellant for \$25,000 for personal injuries inflicted upon him by appellant's locomotive and train when it collided with his automobile at the Matheson street crossing in the city of Healdsburg. Appellant claims upon this appeal that the conduct of the respondent was negligent, barring his recovery, despite negligence of the appellant.

"The crossing is about one-fourth [$\frac{1}{4}$] mile north of the depot. The train left the depot at 4:50 p. m. February 4, 1925, and proceeded north towards the said crossing, where the collision occurred a few minutes later. The railroad track crosses Matheson street curving on a large radius, the inside of the curve being to the east. About 28 feet east of the track and south of Matheson street is a large packing house extending over 200 feet along the railroad right of way and about 125 feet along Matheson street. Respondent had parked his automobile on Matheson street at the north end of this packing house near the railroad track, but where the building blocked his view of the track south towards the depot. He went inside the building upon business for about 5 or 10 minutes. Then he came out and entered his automobile alone. He said, in substance: I could see the railroad track. I looked up and down it. I did not hear any train or see anything, so I started the automobile slowly, and I looked again and there was a little grade, a little dip there (in the street), and I started slowly across the track in low gear at not over five or six miles per hour and just all of a sudden there was a flash; that's all I saw. After looking from a point opposite the corner of the packing house I did not look any more because I had already looked. Respondent was never aware of the presence of the train until it struck him. He testified that he heard no bell, whistle, or noise. The positive testimony of witnesses

that the locomotive gave several short warning blasts of the whistle immediately following the regular crossing whistle of two long and two short blasts and that the bell was constantly ringing is deserving of mention, although the plaintiff and other witnesses testified negatively, having heard no bell or whistle. The point from which respondent last looked for a train prior to the collision was about opposite the corner of the packing house, which corner was the last obstruction to a clear view down the track in the direction from which the train came. At this point his vision down the track would be greatly increased or diminished by advancing towards the track or retreating from it a few feet. He estimated that when he last looked he could see down the track about 100 feet. The permanent objects on the ground there show that, after passing the corner of the packing house, one could see down the track in excess of 400 feet. During the time the last 20 or 25 feet was traversed by respondent just prior to the collision, the engine must have been plainly visible to him if he had looked. Had he seen the danger he could have stopped in safety because traveling in low gear at a slow rate of speed in an automobile in good condition. A train at 40 miles an hour would travel not over 200 feet, while a motorist travels 25 feet at 5 miles per hour.

"Counsel points to the curving track as an excuse for respondent's failure to see, but the curve was not sharp enough to conceal the train behind the packing house if the train was close enough to reach the automobile at the most favorable speeds found in the testimony. The engine was visible, therefore, despite the curve in the track, even assuming the train was coming at the speed of forty miles an hour. A 14 year old boy was the only witness who testified to such high speed. He estimated it at 30 to 40 miles per hour. None of the numerous other witnesses on this point estimated the speed of the train in excess of 14 miles per hour.

"Counsel for respondent also assigns poor visibility as an excuse for failure to see the train, but the evidence does not show this. The collision occurred between 4:50 and 5 p. m. February 4, 1925, which was about one-half hour before sunset. It was a cloudy and stormy day but not raining at the time. No witness testified that it was dark. The plaintiff himself testified the light conditions were pretty good, and that by 'pretty good' he meant 'not dark or anything.'

"The rough condition of the street surface where it approaches and crosses the railroad tracks is also assigned as an excuse. The respondent did not testify that his attention was diverted by the surface of the street, nor does the testimony indicate that the condition of the street was such as to require marked or more than ordinary attention.

"While there are conflicts in the evidence regarding other facts, such conflicts are not upon subjects which could alter the foundation upon which appellant lays its plea of contributory negligence. There seems to be no escape from the conclusion that respondent was negligent in failing to observe the approach of the train under the circumstances. The facts are not distinguishable in principle from the cases relied upon by appellant holding such conduct to be contributory negligence as a matter of law. *Griffin v. San Pedro, L. A. & S. L. R. R. Co.*, 170 Cal. 772, 151 P. 282, L. R. A. 1916A, 842; *Murray v. Southern Pacific Co.*, 177 Cal. 1, 169 P. 675; *Eddlemon v. Southern Pacific Co.*, 41 Cal. App. 340, 182 P. 811; *Thompson v. Southern Pacific Co.*, 31 Cal. App. 567, 161 P. 21; *Baltimore & Ohio Ry. Co. v. Goodman*, 275 U. S. 66, 48 S. Ct. 24, 72 L. Ed. 167, 56 A. L. R. 645.

"The authorities relied upon by respondent in which contributory negligence was held to be a question for the jury show much greater precautions taken by the one injured than in the instant case. They are: *Levings v. Pacific Electric Ry. Co.*, 178 Cal. 231, 173 P. 87; *Walker v. Southern Pacific Co.*, 38 Cal. App. 377, 176 P. 175; *McDonald v. Southern Pacific Co.*, 71 Cal. App. 656, 236 P. 172; *Badostain v. Pac. Electric Ry. Co.*, 83 Cal. App. 290, 256 P. 576."

The judgment is reversed.

LANGDON, J. I dissent. The evidence produced by the plaintiff is: That the train was traveling at an excessive rate of speed; that, when the plaintiff was within 28 feet of the track he looked to the left and to the right, and on the left, from whence the train came, he could see down the track for 75 to 100 feet; that he saw no train; that he listened for a bell or whistle and did not hear either; that no bell was rung nor was any whistle blown; that he then proceeded at a slow speed over the crossing, which was not paved, but was rough and contained ruts and puddles of water; that it was a dark, cloudy day and had been raining; that the plaintiff was unfamiliar with the crossing in question and had never been over it before; that he was familiar with the other main crossings in Healdsburg and knew that they were equipped with signaling devices, and, because of the lack of such equipment at the crossing in question, plaintiff believed it was not the main track, but a side track.

With all these facts and circumstances before the jury, I think the question of contributory negligence was one for its determination, and I do not think that, under the circumstances narrated above, it was negligence, as a matter of law, for the plaintiff, when within 28 feet of the track to divert his attention to his driving and not to look further for the train.

The question of contributory negligence having been submitted, properly, to the jury by the trial judge, the verdict should be binding upon appeal.

We concur: RICHARDS, J.; SHENK, J.

209 Cal. 1

CLARK v. HAMILTON DIAMOND CO.
et al. (L. A. 11916.)

Supreme Court of California. Feb. 1, 1930.

1. Sales $\Rightarrow$ 202(2, 3)—Delivery of ring to buyer giving worthless check therefor was conditional, and title remained in seller; sale being for cash.

Sale of ring to one giving worthless check in payment therefor being in effect a sale for cash, as distinguished from one on credit, delivery of ring to purchaser was conditional, and title thereto remained in seller, in absence of agreement that check was to be received as absolute payment.

2. Sales $\Rightarrow$ 234(5)—Seller giving buyer no indicia of title except possession of ring, for which buyer gave worthless check, could recover possession from subsequent innocent purchaser (Civ. Code, § 1142).

Seller, giving purchaser of ring no indicia of title other than possession thereof and taking immediate steps to recover it on learning that buyer's check, presented in due course of business, was worthless, held entitled to recover possession thereof from subsequent innocent purchaser; Civ. Code, § 1142, being inapplicable.

In Bank.

Appeal from Superior Court, Los Angeles County; Victor R. McLucas, Judge.

Action by Charles H. Clark against the Hamilton Diamond Company, a corporation, J. S. Cohen, and others. Judgment for plaintiff, and defendant Cohen appeals. Affirmed.

Superseding opinion in 280 P. 549.

Charles A. Bank, of Los Angeles, for appellant.

Henry M. Lee and Thomas A. Joyner, both of Los Angeles, for respondent.

WASTE, C. J. The plaintiff brought an action in claim and delivery for recovery of the possession of a diamond ring alleged to be of the value of \$500. Judgment went for the plaintiff, and the defendant Cohen has appealed, contending that he is a bona fide purchaser of the ring without knowledge of defect of title, and is entitled to a reversal of the judgment.

The appeal is on the judgment roll alone, and the findings show that plaintiff sold the ring to Harry Justice, who "fraudulently gave a worthless check in payment therefor." Justice traded the ring to one Dye as payment on a secondhand automobile. Dye

deposited the ring for sale with one Allen, a retail jeweler, who in turn placed the ring in the possession of one Friedman, who was in the business of going from store to store buying and selling jewelry. Friedman sold the ring to the defendant Cohen, doing business as Hamilton Diamond Company, who purchased it without knowledge of the transaction between plaintiff and Justice. Immediately upon receipt of the check from Justice the plaintiff deposited it, in due course of business, for collection, and it was returned marked "not sufficient funds." Immediately upon the return of the worthless check plaintiff brought this action for the recovery of the ring, and, by proper proceedings in claim and delivery, obtained possession from the defendant Cohen.

Further findings are that the sale of the ring to Justice was for cash; that plaintiff did not waive immediate cash payment, and gave no indicia or muniment of title to any one when the sale was made; and, in obtaining the ring, Cohen, the purchaser, did not rely upon any evidence of title in his grantor.

[1, 2] From these findings it follows that the sale of the ring by plaintiff to Justice was, in effect, a sale for cash, as distinguished from a sale on credit, payment to be made, as is customary in similar transactions, by check. As it was not agreed that the check was to be received as absolute payment, the delivery of the ring to Justice was also conditional, and, the check being dishonored upon due presentation, title to the ring remained in plaintiff. South San Francisco Packing, etc., Co. v. Jacobsen, 183 Cal. 131, 135 et seq., 190 P. 628. It seems to be very definitely settled by that case and the authorities there cited that, as between the parties, upon the check being dishonored, the seller is clearly entitled to resume possession of the property. As between the original seller and third parties, the relation is to be determined by what the vendor has done or has not done. In this case the plaintiff gave to Justice, the original purchaser, no indicia of title, other than the possession of the property. He followed the due course of business in attempting to secure payment of the check, and took immediate steps to recover the ring upon learning that the check was worthless. Appellant has not made it appear, in fact, apparently does not claim, that he was injured by any delay on plaintiff's part. It is very clear from the findings that in this case the plaintiff did not transfer the possession of the ring to Justice with a power to dispose of it. Therefore, section 1142 of the Civil Code does not apply, and any executed sale by Justice, or those purporting to claim under him, does not transfer plaintiff's title to them. Pacific Acceptance Corp. v. Bank of Italy, 59 Cal. App. 76, 80, 209 P. 1024. There was no other indicia of property than mere possession. That

was not enough. There must have been some act or conduct on the part of the real owner whereby the party selling was clothed with apparent ownership or authority to sell, and which the real owner will not be heard to deny or question to the prejudice of the innocent third persons dealing on the faith of such appearances. *Levi v. Booth*, 58 Md. 305, 42 Am. Rep. 332.

The judgment is affirmed.

We concur: SEAWELL, J.; RICHARDS, J.; SHENK, J.; PRESTON, J.; CURTIS, J.; LANGDON, J.

102 Cal. App. 783

R. G. MOORE, Plaintiff and Appellant, v. John ROGERS, Frank Carli, Frank Roach, as Constable of Township No. 3, County of San Mateo, State of California. (S. F. 13028.)

Supreme Court of California. Feb. 24, 1930.

In Bank.

For opinion of the District Court of Appeal, see 283 P. 840.

PER CURIAM. In denying the petition for a hearing in the above-entitled cause, we expressly withhold our approval of those certain portions of the decision, especially the last paragraph thereof, which seem to make laches a ground of the decision.

The petition is denied upon the other grounds appearing in the opinion.

208 Cal. 725

Ex parte EDWARDS. (Cr. 3279.)★

Supreme Court of California. Jan. 28, 1930.

Rehearing Denied Feb. 27, 1930.

1. Infants ☞19—Mere adjudication by juvenile court that minor is ward is insufficient to deprive parents of minor's custody (Juvenile Court Law, § 9b).

Mere adjudication by juvenile court that minor is ward thereof is insufficient to deprive parents of custody of minor child under Juvenile Court Law, § 9b (St. 1915, p. 1233), requiring finding that parent is incapable of providing for or has failed or neglected to provide for proper maintenance, training, and education for minor before ward can be taken from custody of parents.

2. Infants ☞19—Provisions of juvenile court law must be strictly complied with before juvenile court can take ward from parents' custody (Juvenile Court Law, § 9b).

Juvenile Court Law, § 9b (St. 1915, p. 1233), providing that no ward shall be taken

from custody of parents without their consent unless court shall find parent is incapable of providing or has failed or neglected to provide proper maintenance, training, and education for minor, must be strictly complied with before juvenile court can take ward from custody of parents.

3. Infants ☞19—Finding that minor has no parent or guardian actually exercising parental control and needs such control is insufficient to deprive parents of custody; "proper parental control"; "proper maintenance, training and education" (Juvenile Court Law, § 9b).

Mere statement in juvenile court order, if sufficient as finding of fact, that minor has no parent or guardian actually exercising parental control and that such child is in need thereof, held insufficient to take minor from custody of parents under Juvenile Court Law, § 9b (St. 1915, p. 1233), since phrase "proper parental control" and "proper maintenance, training and education" means practically same thing, and finding that child has no parent actually exercising proper parental control is not equivalent to finding that such parent was either incapable or failed or neglected to exercise parental control.

4. Infants ☞19—Upon final hearing upon petition to declare minor free from parents' custody and control, juvenile court may, if evidence warrants order, declare ward free from such custody and control.

Upon final hearing on petition to declare minor free from custody and control of parents, juvenile court may, if evidence warrants such order, declare ward free from custody and control of parents, and upon entry of order parents have no right to exercise further custody and control over child.

5. Infants ☞19—Pending hearing on petition to declare minor free from parents' custody and control, parents are entitled to custody, subject however to jurisdiction of juvenile court (Juvenile Court Law, §§ 9b, 14).

Pending hearing on petition to declare minor free from custody and control of parents under Juvenile Court Law, § 9b (St. 1915, p. 1233), parents are entitled to custody, subject, however, to jurisdiction of juvenile court to determine finally question whether minor shall be declared free, notwithstanding section 14 empowering juvenile court, pending hearing on petition to declare minor a ward, to retain minor in detention home or otherwise temporarily provide for him.

6. Infants ☞19—Juvenile court may make order depriving parents of custody and control upon proper notice, if best interests of minor will be promoted (Juvenile Court Law, § 9b).

Juvenile court, under Juvenile Court Law, § 9b (St. 1915, p. 1233), if it appears that best interests of minor will be promoted by parents being deprived of custody and control, is authorized to make such order upon proper notice to parents.

7. Habeas corpus ⇨92(1)—Whether facts alleged in petition to juvenile court are sufficient to support order depriving parents of minor's custody is immaterial in habeas corpus proceedings involving custody.

In habeas corpus proceeding to determine custody of minor child, question whether petition to juvenile court alleges sufficient facts to support order depriving parents of custody and control of minor will not be inquired into.

8. Infants ⇨19—Allegations of parents' abandonment held insufficient to support order declaring minor free from parents' custody and control (Juvenile Court Law, § 15, subd. 1).

Petition to juvenile court alleging minor within county has been abandoned by father and whereabouts of mother is unknown, that child was abandoned in custody of petitioner, and that father has contributed no money for child's support, *held* insufficient to support order declaring minor free from custody and control of parents on ground of abandonment under Juvenile Court Law, § 15, subd. 1 (St. 1915, p. 1236).

9. Infants ⇨16—Child receiving communication from either parent during year, abandoned by one parent only, or supported by mother, is not abandoned (Juvenile Court Law, § 15, subd. 1).

If communication has been received from either parent during year, or if mother has paid for child's care or made provision for its keep or child is abandoned by only one of parents, child is not an abandoned child within Juvenile Court Law, § 15, subd. 1 (St. 1915, p. 1236), precluding order declaring minor free from custody and control of parents on ground of abandonment.

10. Infants ⇨16—To warrant order adjudging minor free from parents' custody and control, both parents must join in acts of abandonment, or parent not joining must have consented to other's acts (Juvenile Court Law, § 15, subd. 1).

To warrant order adjudging minor free from custody and control of parents under Juvenile Court Law, § 15, subd. 1 (St. 1915, p. 1236), on ground of abandonment, parents must either join in acts of abandonment, or parent not joining therein must be shown to have given minor into custody of one committing acts or in some other manner expressly or impliedly consented thereto.

11. Infants ⇨19—Order on appeal in proceedings involving jurisdiction of juvenile court held to determine only that under facts juvenile court had jurisdiction over minor.

Order of District Court of Appeal, in proceeding involving jurisdiction of juvenile court over minor, that minor be restored to jurisdiction of juvenile court and to custody of petitioner, subject however to such further orders as may or shall be made by juvenile court, *held* not to confer upon juvenile court any jurisdiction over minor, but simply amounts to holding that, under facts before it, juvenile court has jurisdiction over said minor, and, so long as facts and conditions remain unchanged, order was conclusive.

12. Habeas corpus ⇨34—District Court of Appeal order in proceedings involving jurisdiction of juvenile court held not res judicata in habeas corpus proceedings in Supreme Court involving custody where facts were different.

In habeas corpus proceedings in Supreme Court to secure custody of minor child, decision and order of District Court of Appeal in proceedings involving jurisdiction of juvenile court over minor *held* not res judicata or conclusive of rights of parties to such proceedings, where different state of facts was presented to Supreme Court.

In Bank.

Application by Alice Akers for writ of habeas corpus prayed to be directed to the Superior Court of Imperial County, V. N. Thompson, Judge, sitting in exercise of its jurisdiction as a juvenile court, to secure custody of Damon Edwards, a minor child. Writ granted.

Everts, Ewing, Wild & Everts, Dan F. Conway, and C. M. Ozias, all of Fresno, for petitioner Alice Akers.

Utley & Nuffer, Elmer W. Heald, Dist. Atty., and C. B. Smith, Deputy Dist. Atty., all of El Centro, for respondent.

CURTIS, J. Petition for writ of habeas corpus was filed herein by Alice Akers, the mother of Damon Edwards, a minor child eight years of age. It is alleged therein that said minor is unlawfully detained and withheld from petitioner in the county of Imperial by the juvenile court of said county and by one Cornelia Stevens, a resident of said county, and that said juvenile court claims the right to the custody of said minor by virtue of certain proceedings had in said juvenile court. Petitioner has annexed to and made a part of her petition what is alleged to be "a true copy of the entire record, orders and proceedings of said juvenile court in the matter of said Damon Edwards upon and under which said claim of said juvenile court is based." It is further alleged that said Cornelia Stevens bases her claim to the care and custody of said minor under and by virtue of the orders in said juvenile court proceedings. Upon the filing of said petition this court granted a writ directed to the juvenile court of Imperial county and to the said Cornelia Stevens commanding them to produce the body of said minor before this court, together with the time and cause of his detention. The respondents, the juvenile court of Imperial county and said Cornelia Stevens, have each made separate returns to said writ. Neither of said respondents questions the record of the proceedings before the juvenile court of Imperial county as set forth in the petition herein. They show, however, that since the filing of said petition and since the issuance of said writ said juvenile court on September

11, 1929, made an order vacating and setting aside one of the orders of said juvenile court, a copy of which was made a part of said petition. The order which said juvenile court vacated and set aside was dated July 6, 1928, and purported to be an order declaring said minor free from the custody and control of his parents. It was vacated and set aside upon the application of the respondent Cornelia Stevens and upon the ground that it "was made by the court without proper service upon the parents of said minor child and without either of said parents having appeared personally in said action." In addition to vacating said order of July 6, 1928, said order of September 11, 1929, further provided: "It further appearing to the court that said minor child has no parent or guardian actually exercising proper parental control, and that said child has been left in the care and custody of Mrs. Cornelia Stevens by the father of said child, without any provision for his support, and good cause appearing therefor, it is further ordered, adjudged and decreed that said minor child, Damon Edwards, be and remain a ward of this court and be and remain in the care and custody of the said Cornelia Stevens, under the supervision and direction of E. D. Griffin, Probationer of the County of Imperial, State of California, pending the further order of this Court. And it is further ordered that a citation issue and be served upon the parents of said minor child as provided in sections 15a to 15e inclusive of the Juvenile Court Law directing them, the said parents, and each of them, and such other persons as may be interested in the custody and control of said child to appear in court and show cause, if any they have, why the said Damon Edwards should not be adjudged and declared to be free from the custody and control of his parents and deprive them, and each of them, of the right to the custody and control thereof, and show cause, if any they have, why said minor child should not be dealt with in other respects as provided in the Juvenile Court Law."

The return of the respondents further relies upon the order and decision of the District Court of Appeals in a proceeding involving the jurisdiction of said juvenile court over the said minor. This proceeding is entitled *Ex parte Edwards*, and is reported in 278 P. 910, 911. Respondents therefore justify their detention of said minor by the proceedings had in said juvenile court and also by said order of the District Court of Appeal.

We will first consider the proceedings in the juvenile court of the county of Imperial. They are entitled "In the matter of Damon Edwards, a person coming under the Juvenile Court Law." They were commenced by the filing of a petition by Cornelia Stevens, a copy of which, excepting the title and the verification, is as follows:

"The petition of Cornelia Stevens respectfully shows:

"That there is within the County of Imperial, State of California, a person named Damon Edwards, who has been abandoned by his father, Damon Barrett Edwards, the whereabouts of the mother of the child is unknown.

"That said Damon Edwards is under the age of twenty-one years, to-wit: of the age of five years, or thereabouts, his birthday being May 10, 1921.

"That said Damon Edwards is a person coming within the provisions of subdivision two, section one of that certain act of the legislature entitled:" (Juvenile Court Law, Stats. 1915, p. 1225; Deering's General Laws of 1923, p. 1535.)

"That the facts bringing said person within the provisions of said act are as follows:

"This child has no parent willing to exercise proper parental control; has no parent actually exercising proper parental control and he is in need of such control. The child was abandoned at Calexico in the custody of Mrs. Cornelia Stevens on July 5th, 1925, and since that time the father has sent no money to pay for the child's care, nor made any provisions for the said child's keep.

"That the names and residences of the parents of said Damon Edwards are unknown.

"That the person or persons having the custody or control of said Damon Edwards is Mrs. Cornelia Stevens, Calexico, Cal. Box 1063 or call at 514 Second Street.

"Wherefore, your petitioner prays that this honorable court make an order adjudging and declaring said Damon Edwards to be a ward of the juvenile court, and deal with said person as provided in the act of the legislature above referred to.

"Dated: Sept. 13, 1926. Cornelia Stevens, Petitioner."

The court made no formal or written order upon the filing of this petition declaring said minor a ward of the court. The only action taken, so far as the record before us shows, was an order made on March 29, 1927, to the effect "that the support of this child be continued as provided for in the Juvenile Court Law." The next steps taken therein were those which led up to the order of July 6, 1928, purporting to declare said minor free from the custody and control of its parents. This order, as we have stated above, was set aside by the court by its order of September 11, 1929. Therefore, the only proceedings taken by the juvenile court in said matter were the filing of the original petition, a provisional order for the support of the minor, and the order of September 11, 1929. The petitioner questions the right of said juvenile court to make said last-named order after the issuance of the writ in this proceeding

and during the pendency of this proceeding. We think it unnecessary for us to pass upon this question. We will assume that the action of the juvenile court in proceeding during the pendency of these proceedings was regular and legal.

[1, 2] The order of September 11, 1929, in addition to vacating the order of July 6, 1928, made two directions. First, it adjudged said minor to be a ward of said court and placed him in the case and custody of Cornelia Stevens; and, secondly, it directed a citation to be issued to his parents to show cause why he should not be declared free from their custody and control. Was this order sufficient to take said minor from the immediate custody of his parents? In other words, is a mere adjudication by the juvenile court that a minor is a ward of the court sufficient to deprive the parents of the custody of a minor child? Section 9b of the Juvenile Court Law would appear to answer this question in the negative. This section reads as follows: "No ward of the juvenile court as defined in this act shall be taken from the custody of his parent or legal guardian, without the consent of such parent or guardian unless the court shall find such parent or guardian to be incapable of providing or to have failed or neglected to provide proper maintenance, training and education for said person; or unless said person has been tried on probation in said custody and has failed to reform, or unless said person has been convicted of crime by a jury, or unless the court shall find that the welfare of said person requires that his custody be taken from said parent or guardian."

An examination of the orders of the juvenile court fails to disclose any finding of said court which brings said minor or his parents within the provisions of this section of the act. Without such a finding the court has no jurisdiction to take a minor who has been made a ward of the court from the custody of its parents. In *re Daedler*, 194 Cal. 320, 331, 228 P. 467. It is not the policy of the Juvenile Court Law to relieve the parents of minors of the responsibility of caring for their minor children nor to deprive them of the right to their custody and control so long as the parents are capable of discharging such responsibility or of exercising said right of care and custody. This policy is clearly enunciated in section 9b of the Juvenile Court Law, and its terms must be strictly complied with before a court can take one who has been made a ward of the court from the custody of its parents.

[3] The only semblance of any finding conforming to the requirements of section 9b of said act is to be found in the order of September 11, 1929, in the form of a recital in the following words: "It further appearing to the court that said minor child has no parent or guardian actually exercising proper

parental control over it and that such child is in need of such control." Assuming that a statement in an order in the form of a recital is sufficient as a finding of the fact recited therein, still we think this so-called finding is insufficient to meet the requirements of section 9b of the act. The finding is that the minor has no parent or guardian actually exercising parental control over it and that said child is in need of such control.

Section 9b requires that the court shall find the parent or guardian incapable of providing or to have failed or neglected to provide proper maintenance, training and education of said person. That these statements are not the same or in any manner similar is strikingly illustrated by the facts in this proceeding as they appear from the record before us and those recited in the decision of the District Court of Appeal. *Ex parte Edwards*, *supra*. These facts show that at the time said order of September 11, 1929, was made and for months before, the petitioner, the mother of said minor, a child of only eight years of age, had been endeavoring to secure the care and custody of said minor, but had been prevented from so doing by the respondents. We are not now questioning the right nor the motives of respondents in resisting petitioner's claims. These facts, however, show the truth of the recital made by the court in its order of September 11, 1929; that is, that petitioner had not exercised any parental control over her child and that the child was in need of it. On the other hand, these facts fail to show that petitioner was incapable of providing parental care for her child, or that she failed or neglected to provide such care for her child. They show that at the time of the making of said order, and for some months before, she had strenuously endeavored by legal means, and by means which were not at all times strictly legal, to gain control of her child that she might exercise parental control over him. We are following the court in *Re Gutierrez*, 46 Cal. App. 94, 188 P. 1004, in holding that "proper parental control" and "proper maintenance, training and education" are so alike in their import as to mean practically the same thing. Yet we cannot hold that a finding that the child has no parent who is actually exercising proper parental control over it is equivalent to a finding that such parent was either incapable or that she failed or neglected to exercise such parental control.

[4-6] It is further contended by respondents that by the filing by Cornelia Stevens of her petition therein, she has set forth, or at least attempted to set forth facts therein, sufficient to give to the juvenile court jurisdiction not only to adjudge said minor a ward of the court, but also to declare him free from the custody of his parents, and that the juvenile court by its said order has directed

a citation to be issued to his parents preparatory to a hearing upon that portion of said petition which purports to show that said ward should be declared free from the custody and control of his parents. Undoubtedly the filing of said petition has the effect contended for by respondents. Upon the final hearing on such a petition the juvenile court may, if the evidence warrants such an order, declare a ward free from the custody and control of his parents. Upon the entry of such an order, the parents of said minor will have no right to exercise further custody and control over him. But in the meantime as the court has made no finding of the existence of any of the conditions mentioned in section 9b of said act, the parents of said ward are entitled to his custody. They hold said minor, however, subject to the jurisdiction of said juvenile court to determine finally the question as to whether he shall be declared free from their custody and control. In holding that the juvenile court has no right to withhold the custody of said minor from his parents under the facts in this case as recited above, we have not lost sight of the provisions of section 14 of said act which empowers the court, after the filing of a petition against a minor alleging that such minor comes within the provisions of section 1 of said act, to order said minor, pending the hearing at any time before he is adjudged a ward, or otherwise disposed of, to be detained in a detention home or otherwise temporarily provided for. The provisions of this section evidently refer merely to the detention of the minor pending a hearing of the petition to have him declared a ward of the court. If on such hearing the court adjudges him to be a ward of the court, it may also with the consent of his parents or guardian, or without their consent upon making a finding of the existence of any of the conditions enumerated in section 9b, take said ward from the custody of his parents or guardian. Furthermore, should it thereafter be made to appear to the court that the best interests of the ward would be promoted by his parents being deprived of his custody and control, the court, under section 9b of said act, would be authorized upon proper notice to the parents to make such an order.

[7] There is some intimation of counsel that the original petition of Cornelia Stevens does not state sufficient facts to support an order, if the court should hereafter decide after a hearing to make such an order, declaring said minor free from the custody and control of his parents. Evidently there is an attempted statement of facts which would confer jurisdiction upon the court, and even if the petition is subject to demurrer for an insufficient statement of facts, the question is not one which will be inquired into in habeas corpus proceedings.

In re Gutierrez, supra: Matter of Ruef, 150 Cal. 665, 89 P. 605.

[8-10] However, as there may be further proceedings in the juvenile court under said petition, we deem it only fair to all parties to here state that in our opinion said petition is not sufficient to support an order declaring said minor free from the custody and control of his parents. The only allegations of said petition which would tend to support such an order are as follows: "That there is within the county of Imperial, state of California, a person named Damon Edwards, who has been abandoned by his father Damon Barrett Edwards, the whereabouts of his mother is unknown." "The child was abandoned at Calexico in the custody of Mrs. Cornelia Stevens on July 5th, 1925, and since that time the father has sent no money to pay for the child's care nor made any provisions for the child's keep."

In order for a minor to be declared free from the custody of his parents on the ground of abandonment, said minor must be a person "who has been left in the care and custody of another by his parent or parents without any provision for his support, or without communication from such parent or parents, for the period of one year with the intent to abandon said person. * * *" Section 15, subd. 1, Juvenile Court Law, Stats. 1915, p. 1236. A comparison of the allegations of the petition with the requirements of this section will show that the petitioner failed to allege that there was no communication from the parents for a period of one year, or that the mother had failed to pay for the care of the child, or that she had made no provision for its keep, or that the mother herself had abandoned the child. If a communication had been received from either parent during the year, or if the mother had paid for his care or made provision for his keep, then in the sense used in the act he was not an abandoned child, and the court under those circumstances would have no right to declare him to be free from the custody and control of his parents. Then again, a minor having two parents is not an abandoned child when he is abandoned by one only of said parents. It is true that section 15 of the Juvenile Court Law declares that the words, "persons who shall be declared freed from the custody and control of his parents" shall include any person, "who has been left in the care and custody of another by his parent or parents without any provision for his support * * * for the period of one year with the intent to abandon said person." The use of the words, "parent or parents" in said section was intended to refer to cases where if the minor had but one parent the acts of such parent enumerated in the section would warrant the court in declaring said minor free from the custody and control of said parent. How-

ever, when the minor has both parents, each of these parents must either join in the acts of abandonment or the parent not joining therein must be shown either to have given said minor into the custody of the one committing said acts, or in some other manner to have expressly or impliedly consented to said acts, before the court could take from them, or at least from the innocent parent, the custody of said child. Otherwise a father might surreptitiously take from the mother their minor child and leave him in some remote locality where the mother has no means of knowing and does not know of his whereabouts. Yet if such child is left by the father in the care of another under the conditions enumerated in section 15, said child becomes an abandoned child, and the mother, without any fault on her part, has forever lost the control and custody of her own child. Surely the Legislature could never have intended by the enactment of this section of the act to have created a situation which would lead to such dire results.

In these respects we think the petition lacking in those necessary allegations of facts essential to support an order declaring the minor to be free from the custody and control of his parents.

For the reasons above stated the proceedings in the juvenile court fail to show any legal or valid reason for the detention by respondents of said minor from the custody of the petitioner.

[11, 12] We come now to the consideration of the order of the District Court of Appeal made in *Ex parte Edwards*, supra. In that proceeding said court ordered that said minor "be restored by respondents to the jurisdiction of the juvenile court of Imperial county, and to the custody of petitioner, Cornelia Stevens, * * * subject, however, to such further orders as may or shall be made by the said juvenile court of Imperial county." Of course, this order did not confer upon the juvenile court of Imperial county any jurisdiction over said minor, nor did it purport to do so. The District Court of Appeal by said order simply held that under the facts then before it said juvenile court had jurisdiction over said minor and that said minor was then in the legal custody of Cornelia Stevens. In other words, it conferred no new nor additional jurisdiction upon the

juvenile court, but simply confirmed that which the court already possessed. The most that can be claimed for said order of the District Court of Appeal is that it determined the right between the parties then before it to the custody of said minor. So long as the facts and conditions remained the same as they were when the hearing was had and the order was made, said order is binding upon said parties. *Ex parte Bruegger*, 204 Cal. 169, 267 P. 101. However, the District Court of Appeal had before it the order of July 6, 1928, which purported to adjudge said Damon Edwards free from the custody and control of his parents. It was undoubtedly largely, if not wholly, due to the fact that the juvenile court had made said order that the District Court of Appeal decided that the mother of said minor had no right to the custody of said minor. Since said decision, as we have seen, this order of July 6, 1928, has been vacated and set aside by the respondent court at the request and with the consent of the respondent Cornelia Stevens and this order is no part of the record now before us. There is therefore a different state of facts before this court than was presented to the District Court of Appeal. Under these circumstances it cannot be said that the decision and order of the District Court of Appeal is *res adjudicata* or conclusive of the rights of the parties to the present proceeding.

The present proceeding must therefore be decided upon the record now before us without reference to the previous order or judgment of the District Court of Appeal. This record, as we have before stated, shows no valid reason for the detention or withholding from the petitioner of the custody of said minor.

It is therefore ordered that the respondents herein restore said Damon Edwards to the petitioner herein, the said Alice Akers, to be held by her subject to the final determination by the juvenile court of the county of Imperial of the proceeding instituted therein for the purpose of declaring said child to be free from the custody and control of its parents.

We concur: RICHARDS, J.; SEAWELL, J.; SHENK, J.; PRESTON, J.; LANGDON, J.

208 Cal. 705

UNITED DREDGING CO. et al. v. INDUSTRIAL ACCIDENT COMMISSION et al.**SAME v. INDUSTRIAL ACCIDENT COMMISSION.★**

(S. F. 13634, 13635.)

Supreme Court of California. Jan. 27, 1930.

Rehearing Denied Feb. 24, 1930.

1. Master and servant ⇨419—Industrial Commission's power to alter award upon good cause after affirmance, if existing, should be limited to exceptional cases, where deception or want of human foresight has deprived party of right (Workmen's Compensation Act, § 20(d)).

Where decision of Industrial Accident Commission upon legal point necessarily involved in proceedings before it has been sustained by appellate court, continuing jurisdiction of Industrial Commission under Workmen's Compensation Act, § 20(d), St. 1917, p. 850, if existing, to alter award upon good cause based upon incorrect view of law previously adopted should be limited to those exceptional cases in which deception or want of human foresight has deprived party of right under Workmen's Compensation Act.

2. Appeal and error ⇨195(1)—Legal principles necessarily involved and decided by appellate court are binding upon lower court in future proceedings in same case.

Principles of law necessarily involved and decided by appellate court are binding upon lower court in future proceedings in same case.

3. Appeal and error ⇨1097(1)—Appellate court on subsequent appeal will not inquire into correctness of principles formerly laid down, but will only determine whether such principles have been followed.

On subsequent appeal, appellate court will not inquire into correctness of principles of law laid down upon former appeal, but will only consider record to determine if principles laid down have been followed.

4. Appeal and error ⇨1097(1)—Supreme Court on second appeal generally will not inquire into merits of decision by appellate court on first appeal.

Where decision upon appeal has been rendered by District Court of Appeal and case is returned upon reversal, and second appeal comes to Supreme Court directly or immediately, generally Supreme Court, for reasons of policy and convenience, will not inquire into merits of first decision, but will regard it as law of case, since, if appellant was dissatisfied with first decision of District Court of Appeal, he should have applied to Supreme Court for hearing.

5. Master and servant ⇨417(9)—Decisions of appellate courts reviewing orders and decisions of inferior tribunals are mandatory and not advisory.

Decisions of appellate courts reviewing orders and decisions of inferior tribunals, such as Industrial Commission, under Workmen's Com-

pensation Act, § 67 (a), St. 1917, p. 875, are mandatory and not advisory.

6. Appeal and error ⇨1199—Decisions of District Court of Appeal are final unless taken over by Supreme Court.

Decisions of District Court of Appeal are final unless taken over by Supreme Court upon hearing granted.

7. Master and servant ⇨419—Continuing jurisdiction of Industrial Commission to alter award upon good cause held not to include power to annul award sustained on appeal based upon incorrect view of law (Workmen's Compensation Act, § 20(d)).

Where decision of Industrial Accident Commission that it had jurisdiction was sustained by District Court of Appeal as only correct conclusion legally deducible from evidence, continuing jurisdiction of Industrial Commission to alter its previous decision upon good cause under Workmen's Compensation Act, § 20(d), St. 1917, p. 850, held not to embrace power to amend its order based upon incorrect view of law previously adopted, since to permit Industrial Commission to exercise general powers to reopen case after award has been sustained on appeal and to reach conclusion at variance with original view and law previously stated by appellate court would abrogate doctrine of law of case, in so far as Industrial Commission is concerned, especially where no petition for hearing of original decision was filed in Supreme Court.

In Bank.

Application by the United Dredging Company, employer, and the Ocean Accident & Guarantee Corporation, insurer, for writs of certiorari and mandamus to compel the Industrial Accident Commission to reopen a proceeding previously determined by it and to annul its award of compensation to Ollie Kopke, surviving widow, for the death of Joseph Kopke, employee. Writs discharged.

R. P. Wisecarver and Redman & Alexander, all of San Francisco, for petitioners.

G. C. Faulkner and Edward O. Allen, both of San Francisco, for respondents.

SEAWELL, J. Petitioners seek by certiorari and mandamus to compel the Industrial Accident Commission to reopen a proceeding previously determined by it under the authority of section 20(d) of the Workmen's Compensation Act (St. 1917, p. 850) and to annul its award of a death benefit made in said proceeding in favor of Ollie Kopke, the widow of Joseph Kopke, who was drowned while in the employ of petitioner United Dredging Company, for which petitioner Ocean Accident & Guarantee Company is the insurance carrier. The parties have stipulated that the petitions for review and mandamus should be heard, considered, and decided as one proceeding.

The said award which petitioners seek to have annulled was affirmed by the District

Court of Appeal upon certiorari on May 22, 1928. *United Dredging Co. v. I. A. C.*, 92 Cal. App. 110, 267 P. 763. No petition for a hearing of said decision by this court was ever filed. On June 3, 1929, petitioners filed an application with the commission, praying that it reopen the case and annul its award theretofore made. The commission denied said application. It is the lawfulness of said order of denial which petitioners seek to have determined in the instant proceedings in certiorari and mandamus. Petitioners contend that the commission and the District Court of Appeal made a mistake of law in deciding that the Workmen's Compensation Act applied to the case and that it was subject to the jurisdiction of the commission, when as a matter of law it was within the exclusive jurisdiction of a court of admiralty, and that this error, made manifest by a decision of the United States Supreme Court (*London Guarantee & Accident Co. v. I. A. C.*, 279 U. S. 109, 49 S. Ct. 296, 73 L. Ed. 632), rendered subsequent to the District Court of Appeal's judgment of affirmance in the instant case, constitutes "good cause," within the meaning of section 20(d) of the Workmen's Compensation Act, for the commission's rescission of said award. Said section provides that for 245 weeks from the date of the injury "the commission shall have continuing jurisdiction over all its orders, decisions and awards made and entered under the provisions of sections six to thirty-one, inclusive, of this act and may at any time, upon notice, and after opportunity to be heard is given to the parties in interest, rescind, alter or amend any such order, decision or award made by it upon good cause appearing therefor."

In support of their contention that the commission has made a mistake of law which it may be compelled to correct by annulling the award, petitioners rely upon the recent decision of this court in *Bartlett Hayward Co. v. I. A. C.*, 203 Cal. 522, 265 P. 195. In that case, however, the correctness of the award had not been affirmed by the District Court of Appeal, as it had been in the instant case. The commission in said *Bartlett Hayward Company Case* computed compensation upon a 25 per cent. disability rating in favor of a workman who had lost the sight of one eye in an industrial accident, but was rendered sightless by said accident by reason of the fact that he had previously lost the sight of the other eye. No application was made for a rehearing by the commission or review by the courts under sections 64-67 of the act. Over three years after the entry of the award, this court held, in *Liptak v. I. A. C.*, 200 Cal. 39, 251 P. 635, that the proper rating in such cases is 100 per cent. or total disability. The injured workman in the *Bartlett Hayward Company Case* thereupon filed his petition with the commission, praying that it reopen his case and increase his award to conform

with the decision in the *Liptak Case*, citing section 20 (d) of the Workmen's Compensation Act as conferring the power upon the commission to make the change. The commission granted the relief prayed for, and upon certiorari its action was sustained by this court; the mistake of law there made being deemed "good cause" for opening the case and amending the award.

The facts of the case herein are without dispute. For a statement thereof we quote from the opinion of the District Court of Appeal affirming the commission's award (*United Dredging Co. v. I. A. C.*, 92 Cal. App. 110, 267 P. 763):

"* * * It appeared in evidence that the deceased, who was 22 or 23 years of age, was employed as an electrical helper, deck hand, and all-round man on a dredger operated by *United Dredging Company*, which was dredging in the navigable waters of San Francisco Bay, and particularly in that part known as *Richmond Inner Harbor*. The dredger was operating in water varying in depth from 21 to 31 feet and was proximately 700 feet from the shore. The dredger was anchored, and was used to suck up the bed of the bay and pump it on the adjacent land. From one corner of the dredger, in the direction of the shore, there ran a line of pontoons, on which lay a pipe through which the dredgings were pumped. On the day the employee met his death he had gone to work about 8 o'clock in the morning, and he was due to quit about 4:30 p. m. Part of the duties of the deceased were to take the men employed on the barge back and forth from the dredger to the shore. The skiff used by the deceased for this purpose was tied on the side of the first pontoon. In order to reach the skiff from the dredger, it was necessary to walk a distance of about 12 feet along a 14-inch plank, which was fastened to the dredging pipe running from the dredger to the first pontoon. On the day in question, *Kopke* was directed by one *Sundeen*, his immediate superior, to prepare the boat to take him and another employee to shore. *Sundeen* remained in the engine room changing some of his clothes, and, when he arrived upon deck, he discovered *Kopke* missing. The last seen of him alive was when he was leaving the engine room going outside to the outer part of the dredger. At that time he was walking toward the skiff. Investigation was made, and a cap was noticed floating on the water. Further search resulted in the finding of the body about midnight. It was in evidence that death was caused from drowning. On the 28th day of September, 1927, the commission made and entered its findings and award, wherein it granted to respondent *Ollie Kopke* a full benefit of \$4,596 against petitioners herein, and specially found that the accident occurred as follows:

"While proceeding to get ready a skiff which, under order of a superior, he was to row ashore from the dredger upon which he was employed, he accidentally fell overboard into deep water and was drowned."

The District Court of Appeal, in affirming the commission's finding that the case was within the jurisdiction of the commission, cited as authority, among other cases, *London Guarantee & Accident Co. v. I. A. C.*, 203 Cal. 676, 265 P. 825, 826. In that case the decedent was employed as an apprentice navigator and seaman by a company which maintained a small fleet of fishing vessels for the accommodation of the public seeking recreation in deep sea fishing. He was drowned in the navigable waters of Santa Monica Bay when a small boat capsized in which he and other employees of the company had put off in an effort to recapture one of the company's vessels which had broken loose from its moorings in a storm. The commission held the casualty subject to the local law, and its view was sustained by this court, which stated in its opinion that the trend of modern decision is "to permit the state law to operate where the employment has no direct relation to *interstate or foreign* commerce or navigation," although the accident occurred on navigable waters. (Italics supplied.) Upon a writ of error to the Supreme Court of the United States, our decision in said case was reversed, and the test adopted by this court in that case was declared to be based on a misconception of the law. Petitioners herein contend that the decision of the United States Supreme Court in said cause of *London Guarantee & Accident Co. v. I. A. C.*, supra, rendered after the District Court of Appeal had affirmed the award in the instant case, demonstrates conclusively the error in the decision of the commission and the appellate court, and that this court should now compel the commission to annul its award to conform to the law. The contention that error is apparent is not indisputable.

The District Court of Appeal in the instant case upheld the commission, because in its opinion the work which the deceased was doing was not so directly connected with navigation and commerce that to permit the rights of the parties to be controlled by the local law would interfere with the essential uniformity of the general maritime law. The court cited *Alaska Packers' Ass'n v. I. A. C.*, 191 Cal. 763, 218 P. 561, and *Oakland v. I. A. C.*, 198 Cal. 273, 244 P. 353, as well as the decision in the *London Guarantee & Accident Co. Case*. A relation to *interstate or foreign* commerce or navigation is not declared to be an essential to admiralty jurisdiction, as was erroneously held by this court in the overruled decision in *London Guarantee & Accident Co. v. I. A. C.*, supra. The effect of the decision of the federal Supreme Court in that case is not to repudiate the requirement of a direct

relation to commerce or navigation as an essential to exclusive admiralty jurisdiction, or to cast doubt upon all decisions of this court in which that test is applied, but only to inveigh against a rule requiring that the connection be with *interstate or foreign* commerce or navigation.

It is interesting to note that the Supreme Court of Oregon, in *Mark v. Portland Gravel Co.*, 278 P. 986, held that the rights and remedies of an engineer employed on a dredger engaged in scooping up sand from the bed of a navigable river for purposes of sale were to be governed by the Workmen's Compensation Act, and admiralty jurisdiction did not apply. The court there cited the decision of the United States Supreme Court in *London Guarantee & Accident Co.*, supra, but did not regard that case as requiring a decision that the case before it was within the exclusive jurisdiction of an admiralty court.

Attempts to define the limits of admiralty jurisdiction will ever be attended with difficulty. Each case is dependent largely upon its particular facts. The facts in the instant case differ from those in *London Guarantee & Accident Co. v. I. A. C.*, supra, and the case herein presented remains arguable, notwithstanding the pronouncements of the United States Supreme Court in *London Guarantee & Accident Co. v. I. A. C.*, supra. In the *Bartlett Hayward Company Case*, supra, upon which petitioners rely on the question of continuing jurisdiction, the error corrected by the commission in the exercise of said continuing jurisdiction, was pointed out in the *Liptak Case*, in which the material facts were identical.

The instant case further differs from the *Bartlett Hayward Company Case* in the important respect that the proceeding herein had passed beyond the commission to the District Court of Appeal and that court had upheld the commission's decision on the legal issue involved in the case, to wit, whether the case was one for the exclusive jurisdiction of an admiralty court. The recognition of a right in the commission to reopen, upon petition, a case which has been affirmed by the District Court of Appeal, on the theory that it had erroneously decided said case, gives rise to important questions not present in the *Bartlett Hayward Company Case*.

[1] We are not here considering cases where, after affirmance by the District Court of Appeal, evidence is produced showing that, since the affirmance of the award, the disability has either "recurred, increased, diminished or terminated." Nor are we dealing with a situation where, after an affirmance by the appellate court, new and additional evidence concerning the disability or some other material factor is brought to the attention of the commission of such a nature as to persuade it that its original conclu-

sion, arrived at without the aid of such evidence, is erroneous. Rather, we wish to confine the application of the remarks we here make to the situation presented by the instant case, where a decision of the commission upon a legal point necessarily involved in the case has been sustained by the District Court of Appeal and held by said court to be the only correct conclusion legally deducible from the evidence. In such a case, does the continuing jurisdiction of the commission to alter its awards upon "good cause" embrace the power to amend its orders based upon an incorrect view of the law previously adopted by it and in which it has been upheld by the District Court of Appeal?

We are of the view that such a power, if it exists at all, should be limited to those very exceptional cases in which deception or a want of human foresight has deprived a party of a right given by the act.

[2-4] It is generally accepted that the principles of law necessarily involved and decided by appellate courts are binding upon the lower courts in future proceedings in the same case, such as upon a new trial. *Estate of Baird*, 193 Cal. 225, 223 P. 974; *Young v. Southern Pacific Co.*, 189 Cal. 746, 210 P. 259; *McEwen v. New York Life Ins. Co.*, 187 Cal. 144, 201 P. 577; *Westerfeld v. New York Life Ins. Co.*, 157 Cal. 339, 107 P. 699; 2 Cal. Jur. 944; note, 34 L. R. A. 321. Upon a later appeal the appellate court will not inquire into the correctness of the principles of law laid down upon the former appeal, but will only consider the record to determine if said principles have been followed. Where a decision upon appeal has been rendered by a District Court of Appeal, and the case is returned upon a reversal, and a second appeal comes to this court directly or intermediately, for reasons of policy and convenience, this court generally will not inquire into the merits of said first decision, but will regard it as the law of the case. If the appellant was dissatisfied with the first decision of the District Court of Appeal, he should have applied to this court for a hearing. *Otten v. Spreckels*, 183 Cal. 252, 191 P. 11; *Hill v. Maryland Casualty Co.*, 28 Cal. App. 422, 152 P. 953; *McEwen v. New York Life Ins. Co.*, 187 Cal. 144, 201 P. 577; note, 41 A. L. R. 1078. While there is a modern tendency on the part of appellate courts throughout the country not to regard this doctrine of the law of the case as one to be adhered to in all cases, but rather to make exceptions where the decision is manifestly unjust, the doctrine has by no means been abandoned, but is still followed as a general rule of practice and procedure. *Johnson v. Cadillac Motor Car Co. (C. C. A.)* 261 F. 878, 8 A. L. R. 1023, with note; *Cluff v. Day*, 141 N. Y. 580, 36 N. E. 182; *Mangold v. Bacon*, 237 Mo. 496, 141 S. W. 650; *Gracey v. City of St. Louis*, 221 Mo. 1, 119

S. W. 949; *Chesapeake & Ohio R. Co. v. McKell (C. C. A.)* 209 F. 514; note, 1 A. L. R. 1267.

[5-7] To permit the Industrial Accident Commission to exercise a general power to reopen a case after the award has been sustained by the District Court of Appeal, and thereafter to reach a conclusion at variance with its original view and the law as stated by the District Court of Appeal, would abrogate the doctrine of the law of the case in so far as the Industrial Accident Commission is concerned. Section 20(d) of the act, as well as other sections, prescribe forms of procedure differing in important respects from the procedure in the trial courts. As pointed out in the *Bartlett Hayward Company Case*, supra, the effect of section 20(d) is to render the doctrine of *res judicata* inapplicable in certain respects to causes within the jurisdiction of the commission. But before we would judicially approve an innovation as far-reaching as to hold that the commission may reopen proceedings in which the award has been sustained by the District Court of Appeal for the purpose of re-examining a question of law determined by that court, we would require clearer evidence of legislative intent than we find in section 20(d) or any other section of the act.

The orderly administration of justice, as well as the private interest of the litigants, requires that there be an end to litigation. The reasons upon which the doctrine of the law of the case rests apply to proceedings before the Industrial Accident Commission.

The Workmen's Compensation Act provides that any party affected by a decision of the commission may apply to the Supreme Court or to the District Court of Appeal "for the purpose of having the lawfulness" of the decision or award "inquired into and determined." Section 67(a). Decisions of the appellate courts reviewing orders and decisions of inferior tribunals are intended to be followed, not disregarded. Said decisions are mandatory, not advisory. If, after the District Court of Appeal has determined an award to be lawful, the commission may reopen the case and reach conclusions at variance with the law of the case as pronounced in the opinion of the District Court of Appeal, the decisions of said court in industrial accident cases would be rendered impotent and unstable. The decisions of said courts are final unless taken over by this court upon hearing granted. If an aggrieved party fails to petition this court for a hearing after decision by the District Court of Appeal, he should not be permitted to secure the advantages, and subject the other party to the delays and expense, of a second appellate court review by means of petitioning the commission to reopen the case and seeking a review of a second order of denial.

A system of procedure which would tend to encourage successive reviews by appellate courts of questions once passed upon in industrial accident cases would certainly operate to the disadvantage of employees, the class for whose protection the act was adopted, and who, as a class, are much less able to bear the expense and delays incident to such a system than are their employers or their insurance carriers.

As intimated above, there may arise exceptional cases of manifest and far-reaching error where, to prevent injustice and oppression, this court would sustain the action of the commission in reopening a case for further consideration after decision by an appellate court, but this question we need not finally decide here, for such cases will arise infrequently, and the instant case is not one.

The writs are discharged.

We concur: SHENK, J.; RICHARDS, J.; CURTIS, J.; PRESTON, J.; LANGDON, J.

208 Cal. 753

HAIGHT v. MARIN MUNICIPAL WATER DIST. (S. F. 12430.)★

Supreme Court of California. Jan. 30, 1930.

Rehearing Denied Feb. 27, 1930.

1. Vendor and purchaser ⇨351(1)—Purchaser of municipal water district's realty on vendor's breach in bad faith could recover difference between agreed price and value of realty and expenses (Civ. Code, § 3306).

Where breach of contract by municipal water district to sell realty was willful, and in light of all facts warranted conclusion that vendor was guilty of bad faith, purchaser *held* entitled to recover as damages, under Civ. Code, § 3306, difference between price agreed to be paid and value of estate agreed to be conveyed at time of breach and expenses properly incurred in preparing to enter upon land.

2. Waters and water courses ⇨183½—Contention that purchaser could not accept secret profit because acting in fiduciary capacity held not available, where vendor water district ratified option with knowledge of purchaser's claims.

Contention that purchaser of realty, suing for damages for breach of contract to sell after exercising option, at inception of negotiations was agent of vendor water district and acting in fiduciary relationship, and therefore could not accept secret profit, *held* not available, where vendor's board of directors by two resolutions sustained option with full knowledge of purchaser's claims.

3. Waters and water courses ⇨183½—Contention that municipal water district was without power to execute option held without merit, where directors subsequently ratified option.

Contention that municipal water district was without power to execute option to prospective

purchaser of land in first instance *held* without merit, where water district through its board of directors subsequently ratified option with full knowledge of purchaser's claims.

4. Vendor and purchaser ⇨18(3)—Claim that optionee was unwilling and unable to perform held waived by vendor's deliberate default when purchaser had not defaulted.

Claim that purchaser exercising option to purchase land was without ability or willingness to perform *held* waived by vendor's deliberate failure to carry out agreement when concededly purchaser was not in any respect in default.

Shenk and Langdon, JJ., and Waste, C. J., dissenting.

In Bank.

Appeal from Superior Court, Marin County; Edward I. Butler, Judge.

Action by Charles O. Wellock against the Marin Municipal Water District, wherein Jessie Haight, as administratrix of the estate of Charles O. Wellock, deceased, was substituted as plaintiff. Judgment for plaintiff, and defendant appeals. Affirmed.

Superseding opinion of District Court of Appeal in 277 P. 525.

Rehearing denied; SHENK and LANGDON, JJ., dissenting.

George H. Harlan, of San Rafael, for appellant.

William Kehoe, of San Francisco, for respondent.

PRESTON, J. The judgment for plaintiff in the sum of \$10,500 is hereby affirmed. Plaintiff, Charles O. Wellock, having died during pendency of the action, and his administrator having been substituted in his stead, the use of the word "plaintiff" herein will refer to said Charles O. Wellock, deceased. The defendant has appealed.

The action is one to recover damages for the alleged breach by defendant of a contract to sell and convey to plaintiff a tract of land of 459 acres lying near Fairfax, Marin county, Cal. On April 3, 1925, defendant, upon payment to it by plaintiff of the sum of \$500, executed to him a 15-day option to purchase said land for the price of \$50,000. On the next day, April 4th, the option was confirmed, but amended to a certain extent by a letter from defendant providing the terms of payment of the purchase price. On or about the same day a proposed draft of the contract of sale and purchase was drawn up by the attorney for defendant and delivered to plaintiff optionee. Evidently it was the belief of defendant that plaintiff would either subdivide said property and sell same himself or would sell the property outright to another, who would subdivide.

On or about April 14th the board of directors of defendant district learned that

it was the purpose of plaintiff to resell the lands in question to certain purchasers for the price of \$60,000, whereupon a special meeting of the board of defendant was called on April 15th to consider the revocation of said option. Ten of the members of the board attended the meeting, and it was pointed out to them that the optionee would enjoy a profit of \$10,000 and would have a possible claim for a 5 per cent. commission in addition thereto upon sale of the property. A resolution to cancel and revoke the option was then introduced, but failed of passage by a vote of five to five, at least eight votes being required for affirmative action. On this day the optionee expressly waived any commission which might accrue to him and stood upon his rights under the option, claiming that he was dealing in his own right as principal.

Theretofore, and on April 6, 1925, plaintiff had sought and found purchasers who had given a check for \$22,500, and delivered same in escrow to be finally delivered upon assignment to them of said contract of sale signed by defendant district; they having approved the said form of contract submitted to them by plaintiff.

With matters in this condition the optionee, on April 18th, gave notice in writing to the district of his acceptance of the offer contained in the previous letters of April 3d and 4th. The board again met on April 21st, at which time it reconsidered the whole subject-matter, including the acceptance of the offer that had been made subsequent to its last meeting. Plaintiff and his attorney attended this meeting as did also the purchasers and their attorney. The meeting was thrown open to all present, and, after a general discussion by the parties and their attorneys, the board adopted a resolution by an eight to five vote, expressly confirming said option and directing the executive committee to take up the matter of the agreement of sale between plaintiff and said purchasers and report at the next meeting three weeks later. Plaintiff and said purchasers, all being present, protested against adjournment without authorizing the execution of the said contract of sale. The board, however, adjourned for three weeks. On April 23d the purchasers withdrew their check from escrow. This action followed.

[1] The complaint sets up in detail the successive steps had between the giving of the option on April 3d and the final adjournment of the board on April 21st and charges in a rather inapt but, we think, effective manner, that the market value of the property was at the date of breach \$60,000. It also charges facts sufficient to bring it within the purview of that portion of section 3306 of the Civil Code, which reads as follows: " * * * But adding thereto, in case of bad faith, the difference between the price agreed

to be paid and the value of the estate agreed to be conveyed, at the time of the breach, and the expenses properly incurred in preparing to enter upon the land." This is true because the facts detailed in the complaint show that the breach of the contract by defendant was willful and done in the light of all the facts; hence warranting the conclusion that it was done in bad faith. *Johnson v. Schimpf*, 197 Cal. 43, 48, 239 P. 401.

The court found that all the allegations of plaintiff's complaint were true. This implies that the court found the market value of the property to have been \$60,000 at the date of the breach, and that the breach was committed in bad faith. The evidence supports these findings as appears from the above recital of what are really undisputed facts.

[2, 3] This conclusion, either directly or impliedly, disposes of all the defenses urged by appellant, only a few of which need be specially noticed. First is the claim that at the inception of the negotiations plaintiff was the agent of defendant and was acting in a fiduciary relationship to it; hence he could not accept a secret profit. If this was true at that time, the contention is, nevertheless, of no avail against the two corporate acts, by resolution of the board, sustaining the option in the face of full knowledge on its part of all the claims of plaintiff. The further contention that defendant was without power to execute the option in the first instance is also disposed of by said two corporate acts.

[4] The claim that plaintiff was without ability or willingness to perform was waived by the deliberate failure of defendant to carry out the agreement on its part when concededly plaintiff was not in any respect in default. The further contention that plaintiff failed to show damage is answered first by the item of \$500 paid out by him for the option, and, second, by our conclusion above announced that the complaint pleaded bad faith on the part of defendant and also the market value of \$60,000 of the property at the time of breach, and that the implied finding to this effect is supported by the evidence. Indeed, in defendant's specifications of error there is no contention that the evidence was insufficient to prove this value for the property on the date of breach.

The excess of the market value over the option price and the item of \$500 comprise the amount given plaintiff by the judgment. Under our construction of the complaint and the issues, the so-called rule of consequential damages, commonly called the Baxendale rule (*Hadley v. Baxendale*, 9 Exch. 341), applied in *Hunt Bros. v. San Lorenzo Water Co.*, 150 Cal. 51, 87 P. 1093, 7 L. R. A. (N. S.) 913, and other cases, is not involved.

Further discussion is unnecessary.

We concur: RICHARDS, J.; SEAWELL, J.; CURTIS, J.

SHENK, J. I dissent. The majority opinion affirms a judgment for \$10,500 against the defendant district, based on the "bad faith" provisions of section 3306 of the Civil Code without sufficient proof of bad faith, and in the absence of a finding on the allegations of the answer charging the plaintiff with fraud and duplicity in his transactions, a finding which, if made, would necessarily have to be in favor of the defendant. When the word "plaintiff" is used herein it will refer to Charles O. Wellock, the original plaintiff.

During all of the times mentioned herein the defendant was and is a public corporation organized and existing under a statute (Stats. 1911, p. 1290, as amended), and was the owner of a tract of land near Deer Park, Marin county, consisting of 459 acres, and which it was willing to sell. The plaintiff was a duly licensed real estate salesman connected with the Bishop-Carlson Company, duly licensed real estate brokers.

In the latter part of 1924 the plaintiff went to John A. Burt, general manager of the defendant District, stated to him that he thought he had a customer for the Deer Park lands, and requested that the lowest cash figure for the same be quoted to him. The matter was placed before the board of directors of the district, which, on January 20, 1925, adopted resolution number 781 wherein it was "resolved that the board of directors of the Marin Municipal Water District will not consider any offer for said real property for a price less than \$50,000; and be it further resolved concerning the granting of options for the sale of said property at said figure that, if deemed advisable by the general manager an option or options may be given which in no event shall exceed a duration of sixty (60) days, the consideration for such option or options to be \$500 for a 15-day option, \$1,000 for a 30-day option, or \$2,000 for a 60-day option, the payment on such option to be applied to the purchase price in case the sale is consummated otherwise to be forfeited."

On April 3, 1925, the plaintiff paid to the district the sum of \$500 and received a document, signed only by the general manager, purporting to grant to the plaintiff by name an option to purchase said lands for \$50,000 cash. On the day following, to wit, on April 4, 1925, the general manager at the request of the plaintiff wrote a letter to the plaintiff in care of Mr. John A. Prentice, commencing as follows: "Further confirming the option granted to you dated April 3d from the Marin Municipal Water District relating to 459 acres at Deer Park, I beg leave to state that the Marin Municipal Wa-

ter District will grant the following terms of sale: Twenty-five per cent. of the purchase price to be paid by you upon delivery of an agreement of sale; the balance of the purchase price to be payable in three equal installments, one, two and three years after date. * * * " Then follow provisions appropriate to a contract for the purchase of lands to be placed on subdivision. Below the signature of the general manager a majority of the members of the board of directors appended their signatures to a statement that they affirmed the understanding set forth in the letter and that they "consent to the recommendation of its adoption by the board of directors." On April 7, 1925, the purported option of April 3d and the above letter of April 4th were assigned by the plaintiff to John H. Rice and J. J. Greisen, subdividers of land, who placed in escrow such assignments, together with a check for \$22,500, payable to the plaintiff and indorsed by him, with an abstract company in San Rafael, with instructions to surrender said check for \$22,500 to the plaintiff when the escrow should be completed. Upon failure to complete the escrow within 10 days the check was to be returned to Rice and Greisen. The defendant in no sense became a party to the escrow matter. On the order of the plaintiff \$10,000 of the \$22,500 was to be paid to John A. Prentice on behalf of both the latter and the plaintiff, and the balance of \$12,500 was to complete the cash payment on the installment contract of purchase and sale which the general manager purported to authorize by his letter of April 4th. The defendant contended at the trial, and now urges, that at all times prior to April 7th the plaintiff was acting as the agent of the district, and that it was not until April 7th when the check for \$22,500 was placed in escrow that the district, through its general manager, discovered that the plaintiff expected to make a profit of \$10,000 on the deal. When this fact was discovered the attorney for the district was notified thereof. A special meeting of the board of directors was called and held on April 15th, at which meeting the attorney for the district presented the situation to the board and recommended that the option made in the name of the plaintiff be canceled on the ground of the fraud and duplicity of the plaintiff in so maneuvering the transaction as to claim a profit of \$10,000, when in truth he was at all times acting as the agent of the district and entitled to a commission only. Rice and Greisen were also represented at that meeting. After hearing the matter a resolution to cancel said option was lost by a tie vote of five to five. An adjournment was then taken to April 21st. On April 18, 1925, the plaintiff addressed a communication to the defendant as follows: "I hereby accept the offer contained in your option to me for the purchase of the hereinafter

mentioned property dated April 3, 1925, as modified by your letter dated April 4, 1925, further confirming said option and modifying and extending terms relative to payment." The communication concludes with a description of the property. On April 21st the board met and further considered the matter of the sale of said property. At the meeting the plaintiff and Rice and Greisen were represented by their respective attorneys. After discussion a resolution was adopted reciting that the option of April 3d and the amplifying letter of April 4th had been signed by the general manager and resolving that the same be confirmed. At the same meeting a committee was appointed and "directed to take up the matter of the agreement to be executed between the Water District and purchaser of the Deer Park property and report back at the next meeting of the board." The plaintiff and the proposed purchasers objected to the continuance of the matter, insisting that the contract of purchase and sale in accordance with the terms of the documents of April 3d and 4th, which had not theretofore been approved by the board, be executed before the next meeting of the board. One of the main reasons for the continuance of the matter was that it appeared that street work was to be done by the proposed subdividers, and it was deemed necessary to have the proposed contract so framed that an adequate bond be provided for to protect the district against mechanics' liens. The proposed purchasers refused to pay their money or any thereof in reliance upon the assignments to them from the plaintiff on advice of their attorney that such a transaction would be set aside by a taxpayer because of the relationship of principal and agent between the plaintiff and the district and insisted on a contract direct from the district. The proposed purchasers refused to wait longer and withdrew their money from escrow on April 23d, and this action was commenced on April 29th.

The foregoing facts appear without conflict in the evidence. They do not constitute a statement of all of the facts, but are full and sufficient for the purpose of considering one of the major contentions of the district. The facts relating to the further major contention that the plaintiff was the agent of the district in his activities with reference to the sale of said land will later be elaborated upon.

It is the contention of the district that no contract binding on the district resulted from the signing of the documents of April 3d and 4th by the general manager of the district and the purported exercise of said options by the plaintiff. It may be conceded that, if said documents of April 3d and 4th were the act of the district and binding in all respects upon it, the exercise of the option by

the plaintiff on April 18th resulted in a contract sufficient in its details to constitute an agreement of purchase and sale, provided the same was not void or unenforceable by reason of the fiduciary relation of the plaintiff to the district, however inadequate the terms thereof might be as protecting the rights of the district.

It must be remembered that we are herein dealing with a public corporation whose directors are trustees of the taxpayers and inhabitants of the district, and we must measure the acts of the district with the yardstick of the statute of its creation. As stated, the district was organized under the statute of 1911 after an election duly held for that purpose. After providing the elaborate plan for the election and canvass of the vote, the act provides in section 8 that "the board of directors shall be the governing body of such municipal water district." Section 9 provides that "the board of directors shall act only by ordinance or resolution." Section 12, enumerating the powers of the district, provides, among other things, that the district shall have the power "to make contracts." Section 14 as amended (Stats. Ex. Sess. 1911, p. 103, § 12), provides: "The president shall sign all contracts on behalf of the district. * * * The secretary shall countersign all contracts on behalf of the district. * * * The general manager shall have full charge and control of the maintenance, operation and construction of the waterworks or waterworks system of said water district, with full power and authority to employ and discharge all employees and assistants at pleasure, prescribe their duties, and shall, subject to the approval of the board of directors, fix their compensation. The general manager shall perform such other duties as may be imposed upon him by the board of directors."

From the foregoing it is seen that the statute prescribes the method for the execution of contracts authorized by the board of directors by imposing the duty to sign and countersign the same on the president and secretary. It is elementary in the law applying to public corporations that when the method of contracting is prescribed by statute such method is the measure of the power to contract. *Zottman v. City and County of San Francisco*, 20 Cal. 97, 81 Am. Dec. 96; *Los Angeles Gas Co. v. Toberman*, 61 Cal. 199; *Frick v. Los Angeles*, 115 Cal. 512, 47 P. 250; *Foxen v. City of Santa Barbara*, 166 Cal. 77, 134 P. 1142; 18 Cal. Jur., p. 1002. If the president and secretary should refuse to execute a contract authorized by the board they could be compelled to do so as a duty especially enjoined by law. Section 1085, Code Civ. Proc. Since the law especially enjoined that duty on the president and secretary, it was not competent for the board of directors to transfer that duty to any other officer or person. *Meuser v.*

Risdon, 36 Cal. 239. If the statute had not prescribed who should sign contracts on behalf of the district, the situation would have been vastly different. See *Hayes v. Handley*, 182 Cal. 273, 187 P. 952. Nowhere in the statute is it made the duty of the general manager to sign contracts on behalf of the district. His powers and duties are laid down in the law. He has nothing to do respecting the sale of lands of the district, and the terms of the statute requiring him to perform such other duties as may be imposed on him by the board of directors could by no means be stretched to authorize the board of directors to transfer to him the duty specifically reposed by law in the president and secretary. It may not be disputed that when an option to purchase land, lawful and complete as to its terms, is accepted by the optionee, a binding contract results. But since the board of directors in the present case had no authority to transfer the duties of the president and secretary to the general manager, the purported contract arising out of the documents signed by the general manager on April 3d and 4th, and the purported acceptance thereof, was not a contract binding on the defendant district. It is settled law that language purporting to define the powers of a public corporation is strictly construed against the existence of the power. *Ex parte Daniels*, 133 Cal. 636, 192 P. 442, 21 A. L. R. 1172; 18 Cal. Jur., p. 801, and cases cited.

Assuming, however, that it was within the power of the board of directors to transfer the statutory duties of the president and secretary to the general manager in the matter of the execution of such an important contract, the record satisfactorily shows, first, that such power was not delegated with such definiteness as to bind the district, and secondly, that, if granted, the power assumed to be exercised by the general manager was not within the scope of the delegated power.

The authority of the general manager to sign the contract is based solely on the terms of resolution No. 781, adopted by the board on January 20, 1925, and on the language italicized in the following paragraph of the resolution: "*Be it further resolved concerning the granting of options for the sale of said property at said figure that, if deemed advisable by the general manager, an option or options may be given which in no event shall exceed a duration, * * **" etc. It is apparent that the language so emphasized does not assume to grant, except by the merest inference and conjecture, authority to the general manager to sign a contract on behalf of the district. It amounts to no more than authority to the proper officers of the district, to wit, the president and secretary, to sign the contract in case the general manager should recommend the same. It is quite natural that such an arrangement should be made for the reason that the general manager is more ac-

cessible to those interested in buying the land, and would be in a better position to talk with them, and in the event an attractive offer were made to communicate it to those authorized to sign the contract. In any event, the language of the resolution itself is not reasonably susceptible of a construction that it is a grant of any power. But assuming further that said resolution definitely authorized the general manager to sign the option, such authority would necessarily be measured by the terms of the resolution which specified \$50,000 as the minimum price, and, as no authority to sell the land on time for subdivision purposes had been given, the language of the resolution plainly means that any option signed thereunder must be for cash. Instead of confining the option to a cash sale as so plainly contemplated by any authority granted him, the general manager assumed by his supplemental letter of April 4th to grant an option for payment of one-fourth cash and the balance in yearly installments and to prescribe the details as to how the land should be handled on subdivision and with conditions and reservations attached which were not approved by resolution of the board of directors or otherwise according to law. Neither the plaintiff nor his assignees Rice and Greisen purported to accept the terms of the option of April 3d, but always and at all times conditioned their acceptance of the offer upon the terms of the unauthorized letter of April 4th. Especially was this true with reference to the plaintiff's action on April 18, 1925, when he purported to accept the offer to sell the property "dated April 3rd, 1925, as modified by your letter dated April 4th, 1925, further confirming said option and modifying and extending terms relative to payment," which acceptance of an unauthorized option forms the basis of the plaintiff's cause of action.

Want of power is always a defense available to a public corporation, and no act of ratification can breathe life into the lack of power. If the rule were otherwise, the public body could, by ratifying a void act, extend its powers without limit. The unvarying rule is that the act of a public body may be subsequently ratified only in case it could theretofore have been authorized. A void act cannot be the subject of ratification or estoppel. *Wichmann v. City of Placerville*, 147 Cal. 162, 81 P. 537; 18 Cal. Jur., p. 799. Therefore, when the board on April 21st purported to ratify the void acts of the general manager of April 3 and 4, 1925, the effect of the ratification was a nullity and could not form the basis of any right of action.

The next major contention of the defendant is that the plaintiff was acting as the agent of the district at all times in said transactions and as such is foreclosed from making a profit from the sale as against the interest of his principal. The evidence on this point is free from contradiction and is substantially as fol-

lows: On June 17, 1924, the board of directors adopted resolution No. 757, reciting that one or more real estate agents had applied for the privilege of attempting to secure a purchaser for the lands which the district desired to sell and to receive a commission for so procuring a purchaser. It was therefore resolved that the district "does hereby authorize the payment of a commission of five per cent of the selling price of any of its lands offered for sale hereafter and sold through the efforts of any bona fide licensed real estate broker or agent; and that such payment be made * * * only upon final confirmation of such sale by the board of directors and not otherwise." The district reserved the right to reject the bids of such real estate agents or any purchaser introduced by them. In the latter part of 1924 the plaintiff called on the general manager and stated that he thought he was in touch with some people who would be interested in the Deer Park lands. On January 19, 1925, the plaintiff wrote to the board of directors of the district as follows: " * * * I have been with interested parties over the tract of 459 acres adjoining Deer Park. I have reason to believe that my people are deeply interested in this tract and that there is a good chance for a sale. I will ask that the Board submit to me in writing the lowest cash price for this tract. I ask that a reasonable time be given me for a general survey and the completion of detailed negotiations. * * * This sale will be handled through an accredited real estate firm and if completed I will expect the commission established by resolution of the board of directors. Assuring the gentlemen of the board that I have a genuine prospect for a sale and asking cooperation, I am, Sincerely and cordially, [signed] C. O. Wellock."

In response to the foregoing letter the board of directors on the following day, January 20th, adopted resolution No. 781, naming \$50,000 as the lowest cash price for the lands in question. On January 22d the general manager mailed to the plaintiff a copy of resolution No. 781 and stated in an accompanying letter that it was adopted pursuant to plaintiff's letter of January 19th. In February, 1925, the plaintiff was introduced to John H. Rice and J. J. Greisen by Harold A. Willard. The plaintiff then proceeded to interest Rice and Greisen in the purchase of said lands for subdivision purposes. They would not pay cash, but would agree to pay \$60,000, one-fourth down and the balance on terms, provided suitable arrangements could be made for release of individual lots and the customary provisions be incorporated in a contract of purchase and sale. On March 27, 1925, the plaintiff signed a memorandum wherein he agreed to divide the "commissions and profits" from the sale of said lands equally with Harold A. Willard. On April 3d the plaintiff obtained from the general manager the

so-called option of that date. On the same day, and in order to be secure in the payment of his commission, the plaintiff exacted and received from the general manager a letter addressed to the plaintiff and signed in the name of the district, by John Burt, general manager, as follows: "In connection with your proposed sale of our property, be informed that the board of directors of the Marin Municipal Water District by resolution number 757 have provided that in the event of sale a commission of five per cent. shall be payable to the party negotiating the sale and in the event that sale is consummated through you a commission upon the full purchase price in the percentage of five per cent. will be paid to you." The defendant offered to prove that the so-called option of April 3d and the foregoing letter of April 3d were a part of the same transaction, and that the plaintiff stated at the time that he was negotiating with other parties as purchasers, but did not want to disclose their names, and therefore desired to take the option in his own name. The plaintiff was charged with fraud in the answer of the defendant in that he was claiming profits from the transaction when in fact he was acting as agent of the district. The court erroneously sustained the objection of the plaintiff's counsel to the offer of proof, but the record otherwise shows beyond cavil that the evidence was sufficient to prove the fact of such agency. As further proof it was in evidence that at the request of the plaintiff the attorney for the defendant prepared a tentative draft of an agreement for use in negotiating with the purchasers headed: "This agreement, made and entered into this ——— day of April, 1925, by and between the Marin Municipal Water District, a public corporation, the party of the first part, and ———, the parties of the second part. * * *" When this agreement was prepared and handed to the plaintiff he refused to disclose the names of the purchasers as "the parties of the second part."

As further evidence of the plaintiff's relation of agent for the district and his claim for commission and on April 10, 1925, he signed the following document: "Whereas I have secured a purchaser for a tract of land of 459 acres of the Marin Municipal Water District at Deer Park on which I will have a commission of \$2500 when the sale is consummated; and Whereas I have made a transfer of my right to one-half of said sum to Bishop-Carlson Co. and have still coming to me the other half thereof, or \$1250, Now therefore, and for a valuable consideration, I hereby assign and set over to Fairfax Bank my claim and interest in and to said one-half of said commission, being the sum of \$1250, and direct payment to be made of said sum to Fairfax Bank, and the receipt of said Fairfax Bank shall operate as a discharge to my claim to said sum." At the request of the

plaintiff the general manager signed the following, which was appended to the foregoing assignment: "The original of the above assignment, having been this day filed by the said Charles O. Wellock, is hereby accepted as an assignment pro-tanto, of said commission when the same becomes due, but if the same never becomes due, no obligation to pay is hereby recognized."

On April 7th, the plaintiff assigned to John A. Prentice his interest in said purported contract and in and to the plaintiff's commission in the following language: "I hereby assign to and appoint with like powers set out above, the said John A. Prentice to divide and distribute and take receipts for the commission on said sale due from the Marin Municipal Water District in the amount of five (5%) per cent. of the total purchase price of fifty thousand (\$50,000.00) dollars, to-wit: \$2,250.00, in connection with all claims, commissions and interests legally due for assistance in connection with said sale." The evidence is overwhelming and without conflict that the plaintiff was acting as the agent of the district at all times prior to and on April 18, 1925. It was not until the check for \$22,500 was placed in escrow by Rice and Greisen with the title company in San Rafael on April 7, 1925, that any one connected with the district was apprised of the fact that the plaintiff was claiming a profit of \$10,000 in the transaction as well as a commission. When the plaintiff was confronted with the fact that he was so claiming, it was stated by John A. Prentice, who had been authorized in writing to act in all respects in connection with the profits and the commission: "Well, we will withdraw the commission and we are going to hold it for the profit." The discovery of the plaintiff's duplicity provoked the controversy that ensued when the attorney recommended that the so-called option of April 3d be canceled. It is too plain for argument that the plaintiff has no standing in this case either in law or in equity. When the fiduciary relation was established between the plaintiff and the district, as it was in this case, the law stepped in and foreclosed the plaintiff from claiming any secret profit. The proposition is conclusively settled, and there are no exceptions to the rule that an agent is charged in full measure with the duty of good faith in his dealings with his principal touching the subject-matter of his authority. The law exacts perfect good faith on the part of an agent, not only in form, but in substance, and precludes him from obtaining an advantage over his principal in any transaction had by virtue of his agency. *Calmon v. Sarraille*,

142 Cal. 638, 76 P. 486; 1 Cal. Jur. pp. 789, 794, and cases cited. If the sale had been made for \$50,000 and the plaintiff's double dealing had not been discovered and the assignees of his commission had collected the commission of \$2,500, as they would have the right to do, and the plaintiff had obtained the \$10,000 secret profit, as he had planned, no one would have the hardihood to claim that the district could not have recovered a judgment from him for that amount.

The court failed to find on the allegations of the defendant's answer as to the foregoing relation of the plaintiff with the district, but did find that the contract alleged in the complaint had been made and breached, and inferentially found that the district had been guilty of bad faith in the commission of the breach, for it awarded damages in the sum of \$10,000 as the difference between the alleged price agreed to be paid and the value of the estate alleged to have been agreed to be conveyed, as provided for in section 3306 of the Civil Code. There was no evidence of bad faith on the part of the district. The evidence shows overwhelmingly that the directors of the district were proceeding in a manner commensurate with the importance of the transaction in hand. There was an offer of proof that before the next regular meeting of the board the committee had gone thoroughly into the terms and conditions which should be incorporated in a contract of purchase and sale and were ready to report the same to the board. The court sustained an objection to the offer on the ground that these transactions took place after the commencement of this action on April 29th. There was no error in law in sustaining an objection to the offer, but the record discloses that the plaintiff hastened to court before the defendant had a reasonable time to protect itself in the customary way by investigation and report of its committee.

On the record the evidence is insufficient to support the findings and judgment as to the item of \$10,000 damages. As to the item of \$500, it appears that the district still holds the same as the consideration for a void contract, and it should be returned. This court should find from the evidence that the allegations of paragraph X of the defendant's answer relating to the fiduciary relation of the plaintiff with the district are true. On these findings the judgment should be modified by striking therefrom the sum of \$10,000, and, as so modified, the judgment in the sum of \$500 should be affirmed.

We concur: WASTE, C. J.; LANGDON, J.

ARKELIAN et al. v. NATIONAL BANK OF VISALIA et al. (Civ. 90.) ★

District Court of Appeal, Fourth District, California. Feb. 7, 1930.

Rehearing Denied March 3, 1930.

1. Appeal and error ⇨1010(1)—Trial court's finding will not be disturbed, if there is material and competent evidence to support it.

Where there is any material and competent evidence in the record to support finding of fact by trial court, it will not be disturbed on appeal.

2. Sales ⇨181(12)—Finding that raisins tendered buyer complied with requirements of contract for delivery "in good marketable and merchantable condition" held sustained, in buyer's action to recover payment made.

In action by buyer to recover payment made on account of purchase price of raisins delivery of which buyer refused, finding that the raisins tendered by the seller were "properly dried and cured and graded as to size, * * * and in good, marketable and merchantable condition," as required by contract, held sustained by evidence.

3. Sales ⇨92—Seller's disposal of raisins in open market, after buyer's refusal without legal excuse to accept them, held not agreed rescission.

Where buyer refused, without legal excuse, to accept and pay for raisins tendered by seller which complied with quality described in contract, sale of raisins by seller in open market did not amount to rescission; rescission of contract being effected by mutual consent of parties.

4. Sales ⇨391(9)—Buyer who, without legal excuse, rejected goods, which seller thereafter sold on open market, could not recover down payment.

Where buyer, without legal excuse, breached his contract to purchase goods by refusal to accept and pay for them, though goods complied with contract, buyer could not recover down payment on purchase price, in action for money had and received, though seller, after breach, sold the property in the open market.

Appeal from Superior Court, Tulare County; Frank Lamberson, Judge.

Action by Ben H. Arkelian and R. Fair, co-partners doing business under the name of Ben H. Arkelian & R. Fair, against the National Bank of Visalia and L. C. Hyde, individually and as liquidating agent of the bank. Judgment for defendants, and plaintiffs appeal. Affirmed.

Conley, Conley & Conley, of Fresno, for appellants.

J. A. Chase, of Visalia, for respondents.

MARKS, J. In this action appellants brought suit against respondents for \$500 alleged to have been had and received by respondents for the use of appellants. Judgment was rendered in favor of the respondents,

and this appeal was taken upon the ground that the findings of the trial court do not support the judgment, and that, upon the findings, judgment should have been rendered for appellants, if not for the full amount claimed, then, at least, for the sum of \$250.

The evidence shows that appellants were co-partners engaged in the business of buying dried fruits, that the National Bank of Visalia was a national banking corporation, and that L. C. Hyde was its liquidating agent and acted for it in the transactions involved in this case. The bank owned a vineyard in Tulare county upon which were grown the grapes which were cured into the raisins involved herein.

On June 15, 1926, in a written contract, appellants agreed to buy from the bank, and it agreed to sell to them 25 tons of guaranteed soda dipped Thompson seedless raisins at the price of 6 cents per pound. The bank agreed "to properly dry and cure such fruit and to deliver the same, thoroughly and properly dried and cured, ungraded as to size, choice in quality, of good color, sound, and in original condition, without addition of water, free from defective fruit, slabs or damage of any kind, and in good marketable and merchantable condition," to the appellants at Fresno, Cal., either as a whole or in deliverable lots as soon as possible. Appellants paid the bank \$500 on account of the purchase price of the raisins, which is the subject of this action.

When part of the raisins were cured, respondents tendered delivery, which was refused by appellants upon the ground that a large percentage of the raisins were off color and so were not "choice in quality," and therefore not in a "good marketable and merchantable condition." The only question presented was as to the color of the raisins, appellants claiming that they were about 50 per cent. dark, and therefore not of choice quality as soda dipped raisins. Respondents presented evidence to the effect that only 8 or 9 per cent. of the raisins were dark, and that the balance were of the good amber color desired in soda dipped raisins. After the rejection of the raisins by appellants on account of their color, the parties conferred several times in an effort to reach a settlement of the difficulty. Appellants offered to take the raisins and sort them, accepting and paying for only the amber colored ones at the contract price, and either rejecting the others or selling them for the account of the respondent bank at the market price for such fruit. If this offer were not accepted by the bank, appellants advised it to sell the raisins at the market, which was then from 5 to 5½ cents per pound. The bank sold the raisins for 5½ cents per pound, which was the "top market" for soda dipped Thompson seedless raisins at the time. The trial court

found that the raisins tendered appellants were of the quality described in the contract, that appellants had refused to accept the same without lawful excuse, and rendered judgment for respondents. Appellants attack the finding of the court as to the quality of the raisins and maintain that there was a mutual rescission of the contract by the parties.

[1-3] Where there is any material and competent evidence in the record to support the finding of a fact by the trial court, it will not be disturbed on appeal. This is too elementary to need citation of authorities. There is ample evidence to support this finding. Respondents produced evidence to show that soda dipped raisins are never uniform in color, as some always fail to take the bleach, and that the percentage of dark raisins in the lot in question was not unusual, that soda dipped raisins were never sorted by the seller, and that those in question were of good color as the trade knew this term, and were choice in quality and in good marketable and merchantable condition as those terms were used by those dealing in this kind of dried fruit. Of course, there was other evidence produced by appellants flatly contradicting this, but it created a conflict which the trial court resolved in favor of the respondents. This finding will not be disturbed here, especially as the raisins were actually sold at the highest market price obtainable for soda dipped raisins at the time. As under this finding the appellants had no legal excuse for refusing to accept and pay for the raisins, the bank could sell them in the open market if it so desired, without subjecting itself to the claim of a rescission of the contract. A rescission of a contract is effected by the mutual consent of the parties, and such a consent on the part of the seller is not shown by the mere sale of the property where the buyer refuses to accept and pay for it. *Phillips v. Stark*, 186 Cal. 369, 199 P. 509; *Phillips v. Stark*, 65 Cal. App. 136, 223 P. 443; *Cincotta v. Catania*, 61 Cal. App. 38, 214 P. 451; *Tomboy Gold & Copper Co. v. Marks*, 185 Cal. 336, 197 P. 94, 95; *Little v. Kennedy*, 86 Cal. App. 324, 260 P. 890.

[4] The facts in the case of *Tomboy Gold & Copper Co. v. Marks*, supra, are so exactly similar to the case at bar that it will be unnecessary to extend this discussion further. In that case the Supreme Court held that a purchaser who had breached his contract of purchase of personal property could not recover money paid on account of the purchase price in an action for money had and received,

where there was no mutual rescission of the contract, even though the seller had later sold the personal property involved to another for the same price that was to have been paid by the original purchaser. The other cases hereinbefore cited, especially *Cincotta v. Catania*, supra, amply support this rule. In the case of *Tomboy Gold & Copper Co. v. Marks*, supra, the court said: "In the absence of a mutual rescission there can be no recovery by the vendee under such circumstances. No rule is more firmly settled with relation to contracts for purchase, whether concerning real or personal property, than that to the effect that a vendee who without lawful right refuses to go on with his contract, cannot recover from a vendor not in default, who is ready and willing to proceed and fulfill all his obligations, all or any of the money that he had paid to the vendor in accord with the terms of the agreement. This rule has been uniformly applied in California. It was declared in both opinions in *Glock v. Howard*, 123 Cal. 1, 10, 19, 20, 69 Am. St. Rep. 17, 43 L. R. A. 199, 55 P. 713, 716, 720, the opinion of Mr. Justice Henshaw saying that in such a case the vendor, 'still resting upon the contract, * * * may remain inactive, yet retain to his own use the moneys paid by the vendee, so that it is of no moment whether or not the contract declares that such moneys shall upon the breach be forfeited as liquidated damages,' and the opinion of Mr. Justice Harrison declaring it to be the law of the state that 'the vendee, who was himself in default in the payment of a portion of the money, could not against the will of the vendor repudiate the contract and recover the portion already paid.' Many cases might be cited in which this rule has been applied, but the rule is not disputed, and it is plain that plaintiff has no right of recovery here except upon the theory of mutual abandonment and rescission. Upon the facts of this case there is no other possible foundation for a right of recovery on the part of plaintiff. The single question presented, then, is whether the sale of the machine to another vendee by defendant corporation within a month after the final and definite repudiation of its contract by plaintiff must be taken as a consent to rescission on the part of defendant corporation. We think this question was squarely decided against the contention of plaintiff in *Rayfield v. Van Meter*, 120 Cal. 416, 52 P. 666."

Judgment affirmed.

We concur: SLOANE, P. J.; BARNARD, J.

103 Cal. App. 661

KIMBRO v. KIMBRO. (Civ. 3978.)

District Court of Appeal, Third District, California. Feb. 1, 1930.

Divorce $\S$ 130—Evidence sustained finding that husband was not entitled to divorce on ground of cruelty.

Evidence in action for divorce *held* to sustain finding that husband was not entitled to divorce on the ground of extreme cruelty.

Appeal from Superior Court, Los Angeles County; Henry M. Willis, Judge.

Action for divorce by Minnette S. Kimbro against Robert L. Kimbro, wherein defendant filed a cross-complaint. From a judgment denying either party a divorce and requiring defendant to pay support money, defendant appeals. Affirmed.

Willedd Andrews, of Los Angeles, for appellant.

John L. McGonigle, of Los Angeles, for respondent.

FINCH, P. J. This is an action for divorce. The plaintiff alleged extreme cruelty on the part of her husband. He denied the allegations of the complaint and filed a cross-complaint charging extreme cruelty on the part of the plaintiff. Judgment was entered denying either party a divorce and requiring the defendant to pay the plaintiff \$20 a month for her support. The defendant has appealed from the judgment.

The appellant contends that he should have been granted a divorce on the ground of extreme cruelty, specified in his cross-complaint as follows:

"That on or about the 15th day of May, 1919, * * * without reason and without justification, the cross-defendant accused this cross-plaintiff of having sexual intercourse with lewd and fast women."

The answer to the cross-complaint "admits that sometime during the year 1919, cross-defendant accused cross-complainant of having illicit relationship with other women but denies that said accusations so made were without reason and without justification."

At the trial the plaintiff testified that she accused the defendant of having illicit relations with other women "because I think he was. * * * I saw them at the beach and I knew what their character was. * * * He was with two women that I had been told were not of good character, and I had every reason to think they were not. * * * There was one woman there at the beach. * * * They would get away from the crowd and always were so interested talking to each other, and * * * she made little remarks that made me think everything was not all right. * * * He was always hang-

ing around her. * * * I asked him about being so familiar with her, and he said, 'I don't know anything about her. I never had anything to do or say to her,' and he was there all the time."

It appears that the plaintiff's accusation was made during one of the quarrels between them. The defendant was of the age of 76 years at the time of his alleged misconduct and the plaintiff was then 54. It is not deemed necessary to follow the parties through their charges and countercharges, as shown by the evidence, but it is sufficient to say that it does not appear as a matter of law contrary to the findings of the trial court, that the defendant is entitled to a divorce on the ground alleged in the cross-complaint.

The judgment is affirmed.

We concur: PLUMMER, J.; R. L. THOMPSON, J.

103 Cal. App. 552

KRAFT v. ROOKE. (Civ. 87.)

District Court of Appeal, Fourth District, California. Jan. 29, 1930.

1. Frauds, statute of $\S$ 53—Oral contract of employment for year to begin January 1, made on December 24, held within statute (Code Civ. Proc. $\S$ 1973, subd. 1).

Oral contract entered into on 24th of December, 1924, by terms of which period of service was to begin on 1st day of January, 1925, and to continue to December 31, 1925, *held* within provisions of Code Civ. Proc. $\S$ 1973, subd. 1, as oral contract not to be performed within a year and invalid because not in writing.

2. Frauds, statute of $\S$ 129(2)—Absent fraud or unfairness, rule which makes part performance bar to pleading statute held inapplicable in action for breach of oral employment contract.

In action on oral employment contract, which could not have been performed within year, where there was no evidence or claim of fraud or unfairness in employment, rule which sometimes makes part performance bar to pleading statute of frauds *held* inapplicable.

Appeal from Superior Court, Tulare County; J. A. Allen, Judge.

Action by C. Kraft against B. G. Rooke. Judgment for plaintiff, and defendant appeals. Reversed.

C. W. Braswell, of Long Beach, for appellant.

John Preston King, of Lindsay, for respondent.

SLOANE, P. J. Plaintiff brought this action to recover the stipulated amount of his services upon an alleged contract of employ-

ment which he claims was terminated without cause. The evidence discloses, and the trial court found: "That on December 24, 1924, defendant and plaintiff entered into a contract, whereby defendant employed plaintiff to work for defendant at defendant's packing house in Lindsay, California, for a period of one year; said employment to commence on January 1st, 1925, and end on December 31, 1925, said defendant to pay plaintiff for his services the sum of \$250.00 per month." And that by said contract defendant further agreed "to pay plaintiff at the end of said year of employment a bonus of \$50.00 per month on condition that plaintiff keep straight and fulfil his contract. That by 'keeping straight' was meant by the parties that plaintiff refrain from the use of intoxicating liquor."

It further appears from the findings sufficiently supported by the evidence, that said plaintiff entered upon the performance of said contract of employment on the 1st day of January, 1925, and continued to perform said contract until defendant on the 10th day of July, 1925, discharged plaintiff from said employment. The court further finds, and though the evidence is conflicting, the findings are sufficiently supported by the evidence, that there was no substantial breach of the agreement by the plaintiff, although he did not strictly keep his agreement not to indulge in intoxicating liquors; and that in any event defendant waived any delinquencies of plaintiff in performance of his duties, and finally discharged him because of certain changes in business plans; and that plaintiff was ready, able, and willing to carry out the terms of the agreement, and that his discharge was without sufficient justification.

The court rendered judgment for the plaintiff in the sum of \$701, together with costs and disbursements amounting to \$34.50. An appeal from the judgment was taken to the Supreme Court and afterwards transferred to this court for decision. The defendant in answer pleaded that the discharge of plaintiff was for sufficient cause to defeat plaintiff's claim, and that there was an accord and satisfaction between the parties. As we have stated, the evidence on these points was in substantial conflict, and the findings of the trial court will have to be sustained.

[1] The answer, however, sets up the further defense that the agreement of employment in question was entirely oral, and not supported by any contract or memorandum in writing, and comes within the provisions of section 1973 of the Code of Civil Procedure, subd. 1, which provides that an agreement that by its terms is not to be performed within a year from the making thereof is invalid, unless the same, or some note or memorandum thereof, be in writing and subscribed by the party charged, or by his agents. That the agreement herein relied upon was entirely a verbal agreement, and was entered into on

the 24th day of December, 1924, is not disputed, and by its terms the period of service was to begin on the 1st day of January, 1925, and to continue to December 31, 1925, covering a period of more than one year from the date of the agreement.

We are entirely without the aid of respondent in solving the question as to whether or not evidence in support of this alleged contract is barred by section 1973 of the Code of Civil Procedure, respondent's counsel having declined to file a brief on appeal and stipulated to the submission of the case without oral argument. This failure is explained by counsel for respondent on the ground that his client refused to pay for printing the brief on appeal.

We have, however, examined the authorities on the point involved, and are satisfied that the objection as to the sufficiency of the oral contract to support the judgment is well taken.

It is clear that this agreement of employment is one which was not to be consummated within a year from the date thereof, and although the excess period only covers a few days, it is not within the province of the courts to extend the limitations of the statute.

While the language quoted from an opinion of Lord Ellenborough that, "if we were to hold that a case which extended one minute beyond the time pointed out by the statute did not fall within its prohibition, I do not see where we should stop, for in point of reason an excess of twenty years will equally not be within the act," may be somewhat extreme, certainly a lapse of several days is a sufficiently obvious extension of the time of performance to bring the case within the statute.

The rule is laid down in 25 Ruling Case Law, page 477, as follows: "It has been held in this country, in at least one jurisdiction, that where the period of service is to commence on the day following the making of a contract, though the period is for a year, the contract is not within the statute"—citing *Dickson v. Frisbee*, 52 Ala. 165, 23 Am. Rep. 565. And the same rule has been laid down in a recent English case, citing 17 English Ruling Cases, 182. Other cases, however, take the view that a contract for a year's service, the period of service to commence on the day following the making of a contract, is within the statute. *Chase v. Hinkley*, 126 Wis. 75, 105 N. W. 230, 2 L. R. A. (N. S.) 738, 110 Am. St. Rep. 896, 5 Ann. Cas. 328.

On the other hand, though the period of service is only for a year, still, if the period is to commence in futuro and not on the day following the inception of the contract, it is held that the contract is within the statute. 25 R. C. L., p. 477; *Diamond v. Jacquith*, 14 Ariz. 119, 125 P. 712, L. R. A. 1916D, 880; *Gulfport Cotton Oil, etc., Mfg. Co. v. Reneau*, 94 Miss. 904, 48 So. 292, 136 Am. St. Rep. 607.

[2] Neither can this be said to be a transaction that comes within the equitable rule which sometimes makes a part performance a bar to pleading the statute of frauds, where there are elements of fraud involved. There is no evidence or claim of any fraud or unfairness in this employment to estop either party from taking advantage of the statute of frauds. As is said in *Seymour v. Oelrichs*, 156 Cal. 782, 793, 106 P. 88, 93, 134 Am. St. Rep. 154: "The claim of plaintiff is not that mere part performance of a contract for personal services which by its terms is not to be performed within a year, 'invalid' under our statute because not evidenced by writing, renders the same valid and enforceable. Such a claim would, of course, find no support in the authorities. *Browne on Statute of Frauds*, § 448. He necessarily is compelled to rely solely on the claim that the defendants by their conduct and promises, on which he was entitled to and did rely, having induced him to give up his life position in the police department in order to enter their employ for a term of years at \$300 a month, on the assurance from them that they would give him a written contract for such time and amount, and it being impossible for him to be placed in statu quo are estopped from now setting up the statute of frauds as a defense to his action on the contract. Under this claim, the fact of part performance by plaintiff plays no part whatever. It was the change of position caused by his resignation from the police department upon which his claim wholly rests, and this resignation was, of course, no part of the performance of the contract of service, but was something that must be done by plaintiff before he could begin to perform, as was known to the defendants. * * * The right of courts of equity to hold a person estopped to assert the statute of frauds, where such assertion would amount to practicing a fraud, cannot be disputed. * * * It was said in *Glass v. Hulbert*, 102 Mass. 24, 35, 3 Am. Rep. 418: "The fraud most commonly treated as taking an agreement out of the statute of frauds is that which consists in setting up the statute against its enforcement, after the other party has been induced to make expenditures, or a change of situation in regard to the subject-matter of the agreement, or upon the supposition that it was to be carried into execution, and the assumption of rights thereby to be acquired; so that the

refusal to complete the execution of the agreement is not merely a denial of rights which it was intended to confer, but the infliction of an unjust and unconscientious injury and loss. In such case, the party is held, by force of his acts or silent acquiescence, which have misled the other to his harm, to be estopped from setting up the statute of frauds.' This statement has been accepted as setting forth a plain and satisfactory ground for equitable jurisdiction, together with a clear indication of the proper limitation of its exercise."

In *Long v. Long*, 162 Cal. 428, 122 P. 1077, 1078, dealing with a contract not to be performed within a year, the court says: "The principal point made by the respondents in favor of the judgment is that the oral contract was partly performed, and that, in consequence thereof, it was taken out of the statute of frauds. This contention cannot be maintained. The case, in this particular, is not distinguishable from the case of *Seymour v. Oelrichs*, 156 Cal. 793, 106 P. 88, 134 Am. St. Rep. 154. In that case, the effect of an oral contract between Seymour and the defendants, whereby they agreed to employ him for the period of 10 years, and to put the contract in writing, was considered. Seymour had commenced the employment, and had served a number of months thereunder, for which he had received the stipulated compensation. The court declared that such part performance was not sufficient to make a case in equity for the enforcement of a contract of that character. This is the general rule laid down in all the authorities."

This statement of the rule in California is recognized in *Standing v. Morosco*, 43 Cal. App. 244, 184 P. 954; *Edgar Bros. Co. v. Schmeiser Manufacturing Co.*, 33 Cal. App. 667, 166 P. 366; *Herspring v. United Canneries Co.*, 54 Cal. App. 402, 201 P. 966.

Under the statute of frauds, the plaintiff could only enforce his contract by virtue of the oral agreement as an employment from month to month, and therefore cannot rely upon terms of the agreement not in writing as a basis for recovering the value of his services beyond the date of his discharge.

The judgment of the trial court is reversed.

We concur: BARNARD, J.; MARKS, J.

103 Cal. App. 297

McPHEETERS v. BOARD OF MEDICAL EXAMINERS OF STATE OF CALIFORNIA. (Civ. 6616.)

District Court of Appeal, First District, Division 1, California. Jan. 21, 1930.

1. Physicians and surgeons ⇨11(2)—Phrase "willful betrayal of professional secret," in Medical Practice Act, does not apply to all disclosures physician may intentionally make (Medical Practice Act, § 14, subd. 2, as amended).

Phrase "willful betrayal of professional secret," in Medical Practice Act (St. 1913, p. 732) § 14, subd. 2, as amended, cannot be held to apply to any and all disclosures that physician may intentionally make.

2. Physicians and surgeons ⇨11(2)—Statute authorizing revocation of license of physician for unprofessional conduct must be strictly construed in favor of accused (Medical Practice Act, § 14, subd. 2, as amended).

Medical Practice Act (St. 1913, p. 732) § 14, subd. 2, as amended, authorizing revocation of license of physicians for unprofessional conduct, being in its nature penal, must be strictly construed in favor of an accused.

3. Physicians and surgeons ⇨11(2)—Statute authorizing revocation of license of physicians for unprofessional conduct should be so construed as to carry out Legislature's intent and be given reasonable construction (Medical Practice Act, § 14, subd. 2, as amended).

Medical Practice Act (St. 1913, p. 732) § 14, subd. 2, as amended, authorizing revocation of physicians' licenses for unprofessional conduct, should be so construed as to carry out obvious intent of Legislature, and, with this end in view, it should be given a reasonable construction.

4. Physicians and surgeons ⇨11(2)—Word "willful," in statute authorizing revocation of physician's license for willful betraying of professional secret, means deliberately and with intent to do injury (Medical Practice Act, § 14, subd. 2, as amended).

Word "willful," in Medical Practice Act (St. 1913, p. 732) § 14, subd. 2, as amended, authorizing revocation of license of physician for unprofessional conduct in willful betraying of professional secrets, means deliberately and intentionally and with design and purpose, and implies deliberate intention for which no reasonable excuse can be given to do or refrain from doing some action, which good faith in performance of some duty requires, and it further implies that there must be some design or purpose and intent to do an injury and means an actual and conscious infraction of duty.

[Ed. Note.—For other definitions, see Words and Phrases, First, Second, and Third Series, Willful; Willfully.]

5. Physicians and surgeons ⇨11(1)—Power conferred to revoke license of physician must be under provisions of law which are reasonable and declared with certainty.

Power to revoke license of physician must be under provisions of law which are reasonable

and declared with such certainty and definiteness in act that physician may know exactly what they are.

6. Physicians and surgeons ⇨11(2)—Physician's writing to former office assistant regarding operations of ordinary character performed on patients and other matters held not unprofessional conduct warranting revocation of license (Medical Practice Act, § 14, subd. 2, as amended).

Physician's writing letters to former office assistant acquainted with his patients and familiar with their ailments, containing information that physician had performed operations of an ordinary character on certain patients and describing condition of patients and nature of operations and revealing that particular patient who was contemplating marriage had made certain inquiries concerning sex relations generally, held not to be unprofessional conduct by willful betraying of professional secrets so as to warrant revocation of license under Medical Practice Act (St. 1913, p. 732) § 14, subd. 2, as amended.

Appeal from Superior Court, Fresno County; Charles R. Barnard, Judge.

The Board of Medical Examiners of California revoked the license of G. Carl McPheeters to practice medicine, but the court annulled and set aside the judgment and order of the board, and it appeals. Affirmed.

Melvin & Sullivan, Bradford M. Melvin, and Wm. J. De Martini, all of San Francisco, for appellant.

Arthur Allyn, of Fresno, for respondent.

TYLER, P. J. Appeal from a judgment of the superior court annulling and setting aside a judgment and order of the Board of Medical Examiners of the State of California, revoking the license of respondent herein to practice medicine and surgery.

The complaint filed with the clerk of the Board of Medical Examiners alleged that respondent had been guilty of unprofessional conduct in violating section 14, subdivision 2 (St. 1913, p. 732), and acts amendatory thereof, authorizing the revocation of the license of a physician for unprofessional conduct. This section is commonly known as the Medical Practice Act. It declares "unprofessional conduct" to mean "the willful betraying of a professional secret." The misconduct complained of by the board consisted in the writing of certain letters by respondent to a young lady who had formerly been employed in his office as an assistant, and who was acquainted with his patients and familiar with their ailments and physical disabilities. These letters reveal the fact that respondent and his former office assistant were on very intimate terms with each other. Some of these letters contained the information that the accused had performed operations of an ordinary character upon certain of his patients, and

they described the condition of such patients and the nature of the operations. Another letter revealed the information that a particular patient, who was contemplating marriage, had made certain inquiries concerning sex relations generally, with which she was apparently unfamiliar. Respondent described in this letter the nature of the inquiries and the knowledge he was able to impart to her upon the subject. The charges made were not filed or pressed by any of the persons whose secrets are alleged to have been willfully betrayed, but were filed by the medical examiners who acquired possession of the letters after the death of the recipient. The letters contained nothing which would in any manner tend to disgrace, embarrass, or incriminate any of the patients, as they referred to ordinary operations, one of which was the delivery of a child. It was stipulated at the hearing before the board that the patients would not, if called to testify, make any objection whatsoever to the disclosures made by the accused. Under all the facts, the trial court was of the opinion that no evidence was adduced at the trial of respondent before the board proving or tending to prove that he was guilty of unprofessional conduct in willfully betraying any professional secrets. It was the further opinion of the court that the portion of the statute upon which said accusation was based is contrary and repugnant to and in violation of section 1, article 1, and section 13, article 1, of the Constitution of the state of California, and that it was likewise violative of section 1, article 14, of the Amendments to the Constitution of the United States.

[1-6] Assuming that portion of the act in question to be constitutional, we are of the opinion that the acts complained of do not come within the ban of the statute. The phrase "willful betrayal of professional secrets" cannot be held to apply to any and all disclosures that a physician may intentionally make. If this were so, it would be a transgression under the act to divulge the fact that a patient was suffering from a bruise or fracture or of one of the many common diseases that human flesh is heir to. The statute is in its nature penal, and such laws are to be strictly construed in favor of an accused. Nothing is regarded as intended that is not within the letter as well as the spirit of the act; nothing that is not clearly and intelligibly described in the very words, as manifestly intended by the Legislature. Crimes built up by courts or boards with the aid of inference, implication, and strained construction are repugnant to the spirit and letter of the law. It would be extremely wrong that one should be reasoned into a penalty when the words of an act do not warrant or justify it. Statutes of this character should be so construed as to carry out the obvious intent of the Legislature, and with this end in view

they should be given a reasonable construction. No rule of statutory construction is violated by adopting the common sense meaning of words which best harmonize with the object and intent of the Legislature. By the use of the word "willful" the Legislature without doubt intended to mean an act that implied an actual and conscious infraction of duty, and it would be a harsh and unreasonable construction to hold otherwise and to say that the disclosures here involved were of that character intended to be remedied by the prohibitory enactment, and common humanity requires that it should not be construed in this limited and strict sense. If such a construction was imperative any disclosures, though harmless, and innocently made without objection from the patients and regardless of their nature, would deprive a physician of his right to practice medicine, a right which has taken him years of study and a large expenditure of money to acquire. Legislation of the character embraced within the general scope of the act in question, in so far as it provides for the revocation of the certificate of a physician, can be sustained only upon the ground that the Legislature has authority under its general police power to provide all reasonable regulations that may necessarily affect the public health, safety, and morals. The power thus conferred must be under provisions of law which are reasonable and declared with such certainty and definiteness in the act that a physician may know exactly what they are. *Hewitt v. State Board of Medical Examiners*, 148 Cal. 590, 84 P. 39, 3 L. R. A. (N. S.) 896, 113 Am. St. Rep. 315. That the Legislature did not intend the restriction to apply to all disclosures is evidenced by its use of the word "willful." It has been held that such word means "deliberately and intentionally, and with design and purpose." *State v. Smith*, 199 N. W. 427, 159 Minn. 429, 511. It implies a deliberate intention for which no reasonable excuse can be given to do or refrain from doing some act which good faith in the performance of some duty requires, as the case may be. It further implies that there must be some design or purpose and intent to do an injury. The word sometimes means "with a bad purpose and with the intention designedly and purposely to cause injury." So it has been held that an act, though intentional, is not willful unless done with a wrongful purpose, or with the design to injure another, or committed out of mere wantonness or lawlessness. *People v. Martinitis*, 168 App. Div. 446, 153 N. Y. S. 791; *Ex parte Cote*, 93 Vt. 10, 106 A. 519. It means "bad motive or purpose with the direct effect of injuring another" and involves the idea of premeditation and determination to do the act, though known to be forbidden. *King v. Empire, etc., Co.*, 148 Va. 585, 139 S. E. 478, 58 A. L. R. 193; *Gildersleeve v. Newton Steel Co.*, 109 Ohio St. 341, 142 N. E. 678. Given a rational and reasonable construction,

we do not think that the acts complained of come within the ban of the statute. The act was never designed or intended to seal the lips of a physician against any and all disclosures, irrespective of their harmless character, nor was it designed to embrace facts not connected with the practice of the profession.

This conclusion renders unnecessary a discussion and decision upon the question of the constitutionality of the act.

The judgment annulling the order of revocation of respondent's license made by the Board of Medical Examiners is affirmed.

I concur: CASHIN, J.

103 Cal. App. 572

Ex parte MAGUTH. (Cr. 1870.)

District Court of Appeal, Second District, Division 1, California. Jan. 30, 1930.

1. Criminal law ☞1192—Generally, appellate court's judgment in criminal case, accompanied by directions regarding further proceedings in matter, is mandatory.

Generally, judgment of appellate court, accompanied by directions to lower court as to further proceedings in matter, is mandatory in character, admits of no deviation therefrom, and any proceedings by lower court contrary to directions contained in remittitur are of no validity.

2. Criminal law ☞1192—On receipt of remittitur from superior court after affirmance of conviction, jurisdiction of municipal court, except as limited by remittitur, is restored.

On receipt by municipal court of remittitur from superior court after appeal from conviction on charge of reckless driving, jurisdiction of municipal court is restored, except as limited by terms of remittitur, and thereafter, unless affected by appeal or some proceeding of analogous effect, its orders within its jurisdiction are binding and conclusive.

3. Criminal law ☞1192—Trial court having jurisdiction may pass on application for probation after affirmance of conviction any time prior to execution of judgment.

Trial court may hear and determine defendant's application for probation after affirmance of conviction by appellate court at any time prior to execution of judgment so long as it has jurisdiction.

4. Criminal law ☞1001—Defendant having been placed on probation before execution of judgment and not having violated terms thereof held not subject to arrest under same judgment.

Where municipal court, after affirmance of conviction in superior court for reckless driving, and before execution of sentence in whole or in part, released defendant on probation, and terms thereof had not been violated in any re-

spect, defendant held not subject to arrest and detention on account of judgment and sentence theretofore imposed.

Original application by Edward Maguth for a writ of habeas corpus prayed to be directed to the Chief of Police of the City of Los Angeles to secure release of petitioner from custody. Petitioner discharged.

Ivan Kelso, J. Allen Davis, L. D. Stahl, and Thomas J. White, all of Los Angeles, for petitioner.

Lloyd S. Nix, City Prosecutor, F. W. Fellows and Joe W. Matherly, Deputy City Prosecutors, all of Los Angeles, for respondent.

HOUSER, J. The record herein discloses that, pursuant to the conviction of Edward Maguth in the municipal court of the city of Los Angeles, on a charge of reckless driving of an automobile, and following a judgment and sentence of the defendant to a term of ten days in the city jail of said city, he appealed from said judgment to the superior court, where the judgment was affirmed. As a part of said judgment of affirmance, by order of the superior court, a five-day stay of execution was granted to the defendant, at the termination of which time he was ordered to appear before the municipal court for further proceedings. Before the expiration of the five-day stay of execution granted to the defendant, the municipal court issued a commitment of the defendant to said city jail "for the term of ten days, and the said defendant be discharged at the expiration of said term." On the day following the date of such commitment, and before the judgment had been executed either wholly or in part, the defendant appeared before the municipal court and was granted a further stay of execution for a period of ten days, with leave also granted to him to file an application for probation. At the same time the defendant was ordered to appear in said court eight days later for hearing on said application for probation. When said application came on for hearing, the court sentenced the defendant to serve ten days in the city jail of the city of Los Angeles, and then and there granted him probation by suspending the execution of the sentence thus imposed upon him. Thereupon the defendant was released from custody. More than five months later on a second commitment issued by the municipal court on the judgment theretofore rendered against the defendant, he was arrested and placed in the city jail of the city of Los Angeles to serve the term of ten days specified in the said judgment. It is because of such last-named consequence, arising from the facts hereinbefore set forth, that, through the medium of a writ of habeas corpus, the defendant has sought his release from cus-

tody. No claim is made that at any time following the date of the order by which the defendant was granted probation he violated the terms of his probation; nor is it shown that for any reason or cause not appearing from the foregoing facts was the defendant restrained of his liberty.

[1, 2] From a consideration of the facts in the case, the first situation to which attention becomes directed is that, as a part of the judgment or order rendered by the superior court in affirmance of the judgment rendered by the municipal court, an order was made by which the execution of the judgment in the municipal court was stayed for a period of five days. The general rule is that a judgment rendered by an appellate court, which is accompanied by directions to the lower court as to further proceedings in the matter, is mandatory in character, admits of no deviation therefrom, and that any proceedings by the lower court contrary to the directions contained in the remittitur from the appellate court are of no validity. 2 Cal. Jur. 1051; 8 Cal. Jur. 640, and cases there cited. Applying such rule, and remembering that, before the expiration of the five-day stay of execution of the judgment granted by the superior court, the municipal court issued its commitment of the defendant, at once it appears that such order of commitment, having been issued in violation of the order of the superior court, if not a nullity, at least was incapable of legal enforcement. But aside from and irrespective of the effect of such order by the municipal court, on receipt of the remittitur from the superior court, except as limited by its terms, the jurisdiction of the municipal court of the action was restored to it. Thereafter, unless affected by appeal, or some proceeding of analogous effect, its orders, within its jurisdiction, were binding and conclusive.

[3] In the case of *Lloyd v. Superior Court*, 283 P. 931, the Supreme Court of this state has unqualifiedly recognized the legal right and authority of the trial court to hear and determine an application by a defendant for probation after an affirmance of its judgment by an appellate court of his conviction, at any time prior to the execution of the judgment, and so long as the trial court has jurisdiction of the case.

[4] As from the statement of facts in the instant case it is apparent that at the time probation was granted to the defendant the judgment had never been executed either wholly or in part, and that in hearing and determining the application of the defendant for probation the municipal court was acting within its powers, it follows that, in the absence of any violation of the terms of his probation, the defendant was not properly

and legally subject to arrest and detention on account of the judgment and sentence which theretofore had been imposed upon him. Accordingly, without consideration of other pertinent reasons urged by petitioner in the matter, it is ordered that petitioner be, and he is hereby, released from custody.

We concur: CONREY, P. J.; YORK, J.

In re FINLEY.

103 Cal. App. 694

FINLEY v. FINLEY et al.

(Civ. 6270.)

District Court of Appeal, Second District, Division 2, California. Feb. 4, 1930.

1. Husband and wife ⇨14(3)—Spouses held not owners in joint tenancy of money deposited in escrow with instructions to assign land purchase contract to them as joint tenants (Civ. Code, § 683; Land Title Act).

Husband and wife depositing money saved by their joint efforts in escrow with instructions to assign contract for purchase of realty to them as joint tenants held not owners of fund in joint tenancy within Civ. Code, § 683, so as to vest fee-simple title to realty in wife on husband's death and entitle her to registration of equitable title under Land Title Act (Deering's Gen. Laws 1923, Act 8589).

2. Life estates ⇨8—Widow devised life estate in realty covered by contract to purchase, assigned to spouses partly in consideration of their assuming payments, which continued after husband's death, held not owner by adverse possession.

Widow to whom husband's will devised life estate in realty covered by contract to purchase, assigned to them partly in consideration of their assuming payments to vendor, which continued for some time after husband's death, held not owner thereof by adverse possession.

3. Life estates ⇨8—Life tenant's possession is not adverse to that of remaindermen.

The possession of the life tenant cannot be considered adverse to that of the remaindermen, who have no right of entry during continuance of life estate.

Appeal from Superior Court, Los Angeles County; Hartley Shaw, Judge.

Application by Ellen Genevieve Finley for initial registration of land, contested by Frank Finley and another. From a judgment denying the application, petitioner appeals. Affirmed.

James W. Bell, of Los Angeles, for appellant.

Hewitt, Ford, McCormick & Crump and J. F. Moroney, all of Los Angeles, for respondents.

IRA F. THOMPSON, J. The petitioner sought initial registration of a parcel of property which she alleged to own in fee. The court below denied her application, and she is here on an appeal from that judgment.

The facts appearing from the record before us are as follows: On and prior to June 7, 1920, the property was owned by one Rosalie C. Fuller, who on that date contracted to sell it to H. C. Frederick for \$3,362.50, payable in installments. Thereafter and on January 7, 1921, Frederick, in consideration of \$2,650 paid to him and the assumption by the assignees of the payments to Rosalie C. Fuller, assigned the contract to Thomas Finley and Ellen Finley, who entered into possession of the property on February 1, 1921. Thomas Finley died on June 22, 1921. The escrow instructions of Thomas Finley and his wife, Ellen Finley, the appellant, to the escrow holder of the papers and funds involved in the assignment from Frederick to them, called for the assignment to be made to them as joint tenants with the right of survivorship, but for some reason not appearing from the meager record before us this was not done. The money paid to Frederick was taken from funds brought into this state from an eastern state and represented savings from their joint efforts. After payment of the balance to Rosalie C. Fuller, the appellant demanded of her a deed which the former refused to execute in favor of petitioner. By the terms of the last will of Thomas Finley, deceased, a life estate in the property was devised to the appellant and the remainder to the respondents, who are children of appellant and deceased. One further item should be noted. The appellant was appointed, and the trial court found that she had continued at all times to act as executrix of the last will and testament of the deceased, Thomas Finley.

Under these facts the appellant asserts that she established the existence of a joint tenancy and therefore, as the survivor, owns the property in fee simple. Assuming otherwise, she claims to have established title by adverse possession, and finally, though she did not prove a deed from the former record owner, that she is the equitable owner of the fee, and the provisions of the Land Title Act (Deering, Gen. Laws, 1923, p. 3611) are sufficiently comprehensive to allow the registration of an equitable as well as a legal title.

[1] The argument that appellant proved the existence of an estate in joint tenancy is based upon the proposition that she succeeded in establishing that the first payment of \$2,650 was a fund, title to which was held by herself and her husband in joint tenancy. The only evidence contained in the record in any way supporting this contention consists of the instruction calling for the assignment of the contract of purchase to be made in their names as joint tenants. We are not un-

mindful of the authorities which declare that where a fund is owned by two people as joint tenants and it is used for the purchase of real property that the real property is held in like tenure. We must, however, deny the sufficiency of the evidence to establish that title to the money deposited in escrow was held in joint tenancy. Certainly it was not so held at the time it was deposited by the parties in the escrow, and unless the instructions can be construed to operate as or constitute a transfer, the title to the money was not altered. In our state the common-law rule respecting the creation of estates in joint tenancies has been abrogated by section 683 of the Civil Code, which at the time of the transaction here in question read as follows: "A joint interest is one owned by several persons in equal shares, by a title created by a single will or *transfer, when expressly declared in the will or * * * transfer to be a joint tenancy*, or when granted or devised to executors or trustees as joint tenants." (Italics ours.) Very early in California jurisprudence the substance of the section just quoted was under the scrutiny of the Supreme Court. In *Bowen v. May*, 12 Cal. 348, decided in 1859, it was said: "Joint tenancies are not favored by our system—the statute having abrogated the common law rule of conveyances in this respect—so that in order to constitute a joint estate in lands in two or more persons, such estate must be expressly declared in the conveyance itself, otherwise the estate conveyed will be held by the grantees as tenants in common." We have been unable to find an instance where this declaration has ever been questioned or disputed. In fact, in *Denigan v. San Francisco Savings Union*, 127 Cal. 142, 59 P. 390, 391, 78 Am. St. Rep. 35, it is affirmed in substance. There the contest revolved around an account in the defendant bank "in the name of Francis and Ellen Denigan, payable to either." The court, after referring to the section we have quoted, said: "The money deposited by Ellen was up to that time her separate property, and it cannot be said that she then acquired any interest therein; and, if it could be assumed that by reason of the form in which the deposit was made Francis acquired any interest therein, it was acquired at a different time and by a different title from that of Ellen. There was no declaration that the money should be held in joint tenancy, and the words, 'payable to either,' placed in the account, take away the claim of a joint interest." So here, in so far as the money is concerned, there was no transference of title from the appellant to her husband, or vice versa, nor was there a declaration that the fund should thereafter be held by them as a joint tenancy. To put the question beyond the bounds of legitimate debate, let us assume that for some reason the escrow had failed and the sum of \$2,650 had been returned to the depositors. Can it be serious-

ly argued that the parties would not have owned the sum under the same title by which they held it prior to the time it was placed in escrow?

[2, 3] It is of course obvious that appellant has not established a title by adverse possession, at least by the facts which are brought to us in the record. Her possession was not adverse to that of her husband prior to his death. Nor was it adverse to Rosalie C. Fuller, the seller of the property, until after the payments to her had been completed, the date of which does not appear; it being fairly inferable, however, from the findings that they continued for some time after the death of Thomas Finley. By the will of the deceased the petitioner became a life tenant as to the undivided one-half interest owned by decedent, and the contesting children occupied the position of remaindermen. Under the authority of *Pryor v. Winter*, 147 Cal. 554, 82 P. 202, 109 Am. St. Rep. 162, and cases there cited, the possession of the life tenant cannot be considered adverse to that of the remaindermen. In other words, no right of entry exists in the remainderman during the continuance of the life estate. The third and last point advanced by appellant, that she is entitled by reason of being the equitable owner of the property to have the title registered, is founded upon the assumption that the title was held by her and her husband as joint tenants. Our disposition of the first point makes further comment unnecessary.

Judgment affirmed.

We concur: CRAIG, Acting P. J.; BURNELL, Justice pro tem.

103 Cal. App. 607

**STATE COMPENSATION INSURANCE
FUND et al. v. ROTHWELL.**
(Civ. 3984.)

District Court of Appeal, Third District, California. Jan. 30, 1930.

1. Appeal and error ⇨728(1)—Exceptions to rulings upon admissibility of unfavorable evidence and specifications that no evidence supported findings and decision held too general (Code Civ. Proc. § 648).

Bill of exceptions, specifying as errors of law occurring at trial of action for personal injuries and excepted to by plaintiffs each and every ruling of court upon admission or rejection of evidence applicable to defendant, specifying absence of evidence to support any of findings, and that decision is against law because findings do not support judgment, *held* to set forth specifications too general in nature to permit District Court of Appeal to go into the subject, since Code Civ. Proc. § 648, provides that

objection must specify particulars in which evidence is alleged to be insufficient.

2. Judgment ⇨256(2)—Findings that State Compensation Insurance Fund paid coplaintiff suing for injuries compensation and \$144.40 for medical expense supported judgment for Fund of over \$144.40.

Where complaint, in action by State Compensation Insurance Fund and injured person for injuries, alleged in appropriate terms that Insurance Fund had paid and become obligated to pay coplaintiff amount due him for compensation, and court found that plaintiff had paid to coplaintiff compensation in sum of \$537.08 and for X-ray medical treatment the sum of \$144.40, findings supported judgment in favor of State Compensation Insurance Fund in excess of \$144.40.

Appeal from Superior Court, Los Angeles County; J. A. Smith, Judge.

Action by the State Compensation Insurance Fund and M. F. Tillery against Dr. V. D. Rothwell. Judgment for plaintiffs, and the defendant appeals. Affirmed.

Herbert Moore, of Long Beach, for appellant.

A. G. Ritter, of Los Angeles, for respondents.

BURROUGHS, Justice pro tem. This is an action for damages for personal injuries alleged to have been suffered by the plaintiff M. J. Tillery by reason of the alleged negligent operation of an automobile by the defendant. It is also alleged in the complaint that at the time of the accident the plaintiff Tillery was working as a watchman for the Atkinson Merchants' Police and Fire Patrol and that said organization was at the time of the accident insured by the State Compensation Insurance Fund, the other plaintiff herein.

The court awarded the plaintiffs a judgment in the sum of \$1,750. The defendant appeals. The case has been brought to this court by a bill of exceptions, and defendant seeks to review the insufficiency of the evidence to sustain the court's findings of fact.

It is the contention of the respondent that the bill of exceptions does not contain any specifications of the insufficiency of the evidence to support the findings. In this behalf the bill of exceptions reads as follows: "Defendant now specifies as errors of law occurring at the trial and excepted to by plaintiffs, each and every ruling of the court upon the admission or rejection of evidence offered which was unfavorable to defendant as set forth in the foregoing bill of exceptions and defendant specifies that there is no evidence to support any of the findings above mentioned and further specifies that the decision is against law in this, that the findings do not support the judgment." Such specifica-

tions have many times been held to be too general in their nature to permit a court to go into that subject. Section 648 of the Code of Civil Procedure provides that the objection must specify the particulars in which the evidence is alleged to be insufficient. In *Mills v. Brady*, 185 Cal. 317, 320, 196 P. 776, 777, in construing section 648 of the Code of Civil Procedure, and holding that general specifications of the insufficiency of the evidence similar to the specifications in the case at bar are insufficient, the court says: "The only pertinent specifications are the general ones that the evidence is insufficient to support the judgment and the judgment is contrary to it, and that it 'is insufficient to justify the findings' and 'the findings of the court are contrary to the evidence.' Where, as here, there are specific findings, the Code has been construed to require no more than a specification of the particular finding or findings which it is claimed are not supported, but this at least must be done, and a general specification that the evidence does not support 'the findings' is not a compliance with the Code requirement that the particulars wherein it does not support them must be stated, and is wholly insufficient." In the case of *Crow v. Crow*, 168 Cal. 607, 143 P. 689, it is held that particular specifications are necessary to convey fair and correct knowledge both to the adverse party and to the trial court the precise findings excepted to as not being sustained by the evidence. It is further held in the case last cited that the court cannot consider the insufficiency of the evidence to sustain the findings, unless there has been a substantial compliance with the terms of the law to bring the question to the attention of the court. The latest expression of our courts upon this subject, to which our attention has been called, are *Schultz v. City of Venice*, 200 Cal. 50, 251 P. 913, and *Mazuran v. Stefanich et ux.* (Cal. App.) 272 P. 772. Both of these cases are in harmony with the rule enunciated by the cases above cited.

[1] In the instant case, there being a lack of proper specifications to review the evidence, we may not go into that question.

[2] One other question is presented for determination. Appellant claims that the findings do not support the judgment in favor of the State Compensation Fund in excess of the sum of \$144.40. The complaint alleges, in appropriate terms, that the said plaintiff had paid and become obligated to pay its coplaintiff the amount due him for compensation. The court found that said plaintiff had paid to its coplaintiff compensation in the sum of \$537.08, and in response to another allegation of the complaint, had paid for X-ray and medical treatment for its coplaintiff the further sum of \$144.40. We are of the opinion that the findings do support the

judgment. The prayer of the complaint asked for a judgment of \$5,144.50. The judgment was in the sum of \$1,750, and was less than the amount of the judgment which the court was legally entitled to render.

The judgment is affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

103 Cal. App. 738

Ex parte GURY. (Cr. 1902.)

District Court of Appeal, Second District, Division 1, California. Feb. 6, 1930.

1. Habeas corpus $\Rightarrow$ 34—Prior adjudication is conclusive in habeas corpus involving minor's custody.

In habeas corpus, in which custody of minor child is involved as between or among the same parties, and especially where no new facts are presented, prior adjudication by court of competent jurisdiction is conclusive.

2. Habeas corpus $\Rightarrow$ 117(1)—Judgment of superior court denying habeas corpus to secure child's custody held *res judicata* of similar application, where facts were same except for record entry as to modification of judgment affecting custody.

Judgment of superior court denying mother's application for writ of habeas corpus to secure child's custody held *res judicata* of subsequent application for habeas corpus in District Court of Appeal, where the facts presented were identical, except that in the second application there appeared minute entry of trial court by which judgment affecting child's custody was modified and stay of execution granted.

Application by Zaida Gury for writ of habeas corpus to secure the custody of a minor child, opposed by the child's father. Writ denied.

Ida May Adams, of Los Angeles, for petitioner.

Marion P. Betty and John L. Bland, both of Los Angeles, for respondent.

HOUSER, J. In substance, the facts herein appear to be as follows: By an interlocutory decree rendered in a suit for divorce, the custody of an infant son of the parties to the action was awarded to the husband. Pursuant thereto the mother voluntarily executed the judgment by surrendering possession of the child to the father. No appeal from that judgment was ever taken by either of the parties to the action. One week after said interlocutory judgment was rendered, the mother filed a notice of motion to modify "the interlocutory decree and judgment of divorce." When the motion came on for hearing, although two witnesses were sworn and testified in the matter, no "new evidence" was introduced, nor any relevant

circumstances shown, differing in any material degree from what appeared on the trial of the action. With reference to such motion, the amended minutes of the court show that "judgment heretofore entered is now modified by the court, and the findings are modified by the court. Custody of minor child, David Gury, is awarded to the plaintiff. The defendant is hereby granted a stay of execution on said judgment for the period of ten days in which to start his appeal." Nearly a month thereafter a so-called "amended interlocutory decree of divorce" was signed by the court and regularly entered, which decree contained a provision by which the custody of the child was awarded to the mother.

Following the entry of such "amended" decree, the father appealed to the Supreme Court therefrom, and said appeal is still undetermined. After the rendition of said latter decree, and before the expiration of the ten days' stay of execution from the date of the entry of the "judgment" ordered by the trial court (however, not within ten days from the date of the minute order thereof), but preceding the date of the appeal therefrom, the mother, aided by two strangers, "without legal authority, without any execution issued on account of said order, or legal process of any kind or nature whatever," forcibly took the child from the possession of the father; and some weeks thereafter the father peaceably regained the possession of the child. Thereupon, through the medium of a writ of habeas corpus issued out of the superior court, the mother sought to obtain the possession of the child. On the return to the writ and a hearing in said matter, the superior court denied any relief to the mother, but affirmed the legal right of the custody of the child in the father. It is in such circumstances, as shown by the records and files herein, and (on stipulation of the parties) as produced from a like source in the superior court, that again, through the offices of a writ of habeas corpus, the mother seeks from this court an adjudication by which the child may be restored to her possession and custody.

[1, 2] From a consideration of the foregoing facts it at once becomes apparent that several important legal questions may be presented; but, whatever may be the cor-

rect conclusions of law with reference to each of the various questions which in this matter might be submitted to this court for determination, the authorities are in practical accord that in proceedings of this character, and particularly where the custody of a minor child is involved as between or among the same parties, especially where no new facts are presented, a prior adjudication by a court of competent jurisdiction is conclusive. In *re Beers* (Cal. App.) 280 P. 1033; *Ex parte Marshall* (Cal. App.) 279 P. 834; In *re McDaniel*, 90 Cal. App. 307, 265 P. 884; In *re Gille*, 65 Cal. App. 617, 224 P. 784; In *re Frazier*, 50 Cal. App. 45, 194 P. 510; In *re Holt*, 34 Cal. App. 290, 167 P. 184.

A review of the respective facts which were introduced in the habeas corpus proceeding before the superior court, and what are presented in this court, shows that the only possible difference was that, in addition to what was before the superior court, in this court there appeared the minute order of the trial court (heretofore quoted herein) by which the interlocutory judgment originally rendered by the latter court and its findings of facts were "modified"; the custody of the child "awarded to the plaintiff"; and the defendant granted "a stay of execution on said judgment for the period of ten days in which to start his appeal." That such fact or facts could have no bearing on the "res adjudicata" rule is well established.

In the case entitled In *re Frazier*, 50 Cal. App. 45, 194 P. 510, it is held that, in an original habeas corpus proceeding in an appellate court, the conclusiveness of a former judgment in a similar proceeding in the superior court is not affected by the presentation in the appellate court of facts which existed at the time of the hearing of the habeas corpus proceeding in the superior court, but which were not there introduced in evidence. To the same effect, see: *Ex parte Marshall* (Cal. App.) 279 P. 834; In *re McDaniel*, 90 Cal. App. 307, 265 P. 884; In *re Gille*, 65 Cal. App. 617, 224 P. 784; *Borland v. Borland*, 56 Cal. App. 638, 206 P. 478.

It follows that the petitioner is entitled to no relief, and that the writ should be discharged. So ordered.

We concur: CONREY, P. J.; YORK, J.

103 Cal. App. 518

SHERMAN v. CONTINENTAL CASUALTY CO. (Civ. 6641.)

District Court of Appeal, First District, Division 1, California. Jan. 29, 1930.

1. Insurance $\S$ 524.—To constitute "total disability" within accident policy, it is sufficient if injuries are such that common prudence requires insured to desist from employment so long as reasonably necessary to effect speedy cure.

To constitute total disability within accident insurance policy, insured need not be absolutely helpless, and attempt to perform few occasional trivial acts relating to duties of employment does not deprive insured of right to claim total disability; it being sufficient if injuries are of character and degree that common kind and prudence requires him to desist from labors so long as reasonably necessary to effect speedy cure.

[Ed. Note.—For other definitions, see Words and Phrases, First, Second, and Third Series, Total Disability.]

2. Insurance $\S$ 668(13).—Whether insured falling down cement steps was totally disabled within accident policy held for jury to determine from circumstances.

In action upon accident insurance policy, whether insured falling down five cement steps to pavement was totally disabled *held* question of fact for jury to decide from all circumstances surrounding employment.

3. Appeal and error $\S$ 1091(1).—Evidence being legally sufficient to sustain jury's finding on fact question, appellate court cannot interfere therewith.

Where evidence is legally sufficient to sustain jury's finding on question of fact, appellate court cannot interfere therewith on appeal.

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action by Anna Sherman against the Continental Casualty Company. Judgment for plaintiff, and defendant appeals. Affirmed.

J. Hampton Hoge, of San Francisco, for appellant.

Ford, Johnson & Bourquin, of San Francisco (M. Bourquin, of San Francisco, of counsel), for respondent.

PER CURIAM. Defendant appeals from a judgment in an action to recover on a policy of insurance issued in the year 1921, insuring plaintiff against loss of time resulting from accident or sickness.

On July 20, 1925, and while the policy was in force, plaintiff was injured by falling down five cement steps to the pavement, following which she was sick for a long period of time. Indemnity was claimed under each feature of the policy, the complaint containing two counts; the first relating to the accident indemnity, whereunder the amount sued for

was \$1,575; and the second relating to the health indemnity, whereunder the amount sued for was \$1,370. The action was tried before a jury and a verdict rendered in plaintiff's favor for the sum of \$1,575, the verdict being evidently based on the first count. If, therefore, no grounds for reversal exist as to the first count, it is unnecessary to consider the points raised as to the second.

With respect to the payment of accident indemnity, the policy provided as follows: "If injury * * * shall at once and continuously after the occurrence of the accidental event wholly disable the insured from performing each and every duty pertaining to his occupation, the company will pay said accident indemnity (of \$105 a month) for such period, not exceeding five years, as the insured shall be so disabled." Also that: "If injury as is before described shall not at once wholly and continuously disable the insured but shall thereafter within ninety days wholly disable him, or shall, either at once after the injury or at once after a period of total disability, prevent him from performing work substantially essential to his duty or duties the company will pay one-half said accident indemnity (amounting to \$52.50 a month) for such period not exceeding six months as he shall be so disabled. * * *" It was alleged in the first count that in falling down the steps plaintiff injured "her chest, side and back and herself internally; that said injuries induced and produced a pleurisy of plaintiff's left side and a persistent metrorrhagia," and that as a result of the accident she "was at once and continuously thereafter for a period of one year, wholly disabled from performing each and every duty pertaining to her said occupation; and thereafter and for a further period of more than six months was prevented from performing work substantially essential to the duty and duties of her said occupation."

The evidence adduced at the trial discloses the following facts: Plaintiff was 39 years of age and was employed as an automobile saleswoman in Burlingame, working on commission. Immediately following the accident she was confined to her bed for two days, after which she arose and remained about the house for a day or two. For the next few days she visited her place of business daily, for an hour or two, for the purpose of looking after her commissions and meeting prospective buyers; but on July 29th she was compelled to give up entirely. Shortly afterwards she called in a physician and was under his care from August 14th to September 10th, at which time she went to live with her parents near Bakersfield and was placed under the care of three physicians. She remained there until September, 1926, and then came to San Francisco, where she endeavored to work as a "food checker" in a hotel, but after

working 10 days was compelled to quit because of her impaired physical and mental condition. On cross-examination of plaintiff it was disclosed that on Sunday morning, July 26th, she drove an automobile to the residence of a Mr. Snyder, in Burlingame, for the purpose of interesting him in the sale of it, and that she drove around with him for an hour and a half, part of which time she drove the automobile; also that about the same time she gave Mrs. Snyder and her daughter each a lesson in driving. It was also shown that during the same week she drove an automobile to the home of a Mrs. Lynes, in Burlingame, and made an appointment for a demonstration.

[1] Appellant contends that because of plaintiff's activities above mentioned she was not entitled to full indemnity for one year under the total disability clause of the policy, and that therefore the verdict which is based thereon is excessive. While there appears to be some conflict in the authorities as to what shall constitute total disability within the meaning of a clause of insurance such as we have here, there is ample authority to be found both in the decisions and the textbooks to the effect that, in order to constitute total disability, it is not necessary that the insured be absolutely helpless, and that an attempt by the insured to perform a few occasional trivial acts relating to the duties of his employment, though in fact he ought not to have made such attempt, does not deprive him of the right to show that he was totally disabled (Cooley's Briefs on Insurance [2d Ed.] pp. 5538, 5539, citing United States Casualty Co. v. Perryman, 203 Ala. 212, 82 So. 462); it being held sufficient if the injuries are of a character and degree that common kind and prudence requires him to desist from his labors so long as it is reasonably necessary to effect a speedy cure (Kerr on Insurance, p. 385; Joyce on Insurance, vol. 4, p. 303; Continental Casualty Co. v. Mathis, 150 Ky. 477, 150 S. W. 507; Harasymczuk v. Mass. Accident Co., 127 Misc. R. 344, 216 N. Y. S. 97; Pacific Mutual Life Insurance Co. v. Branham, 34 Ind. App. 243, 70 N. E. 174; Booth v. U. S. Fidelity & Guaranty Co., 130 A. 131, 3 N. J. Misc. R. 735; American Liability Co. v. Bowman, 65 Ind. App. 109, 114 N. E. 992; Jones v. Fidelity & Casualty Co., 166 Minn. 100, 207 N. W. 179, 182). In the case last cited, in dealing with the question of total disability, it was said:

"Should the insured be penalized because, in total ignorance of the serious character of the injury he had received, he undertook to perform, as best he could, under distressing conditions, some of his professional duties, when he might reasonably not have attempted to do any work at all, and thus, without question, have held the insured liable for loss from disability?" * * *

Cal. Rep. 284-286 P.—17

"We think it may be said to be a matter of common knowledge that in a great many, perhaps in a large majority of, instances in which bodily injuries are received, the real nature and extent of said injuries do not reveal themselves until a greater or less time in the future and after the first pains from the hurt shall have passed away. The injured part often lies dormant for an indefinite period, with but little or no consciousness of its existence by the person injured, although from the very moment of the accident, perhaps, the processes of nature may be busily engaged in developing what may have seemed to be but a slight hurt into a most serious and perhaps fatal injury. In such a case it cannot be said that the injury is not continuous and from the date of the accident, * * * because the injured party enjoys a brief respite from pain and suffering, only to be endured to a greater degree when perverted nature again asserts itself."

[2, 3] In the present case plaintiff testified that from the time of the accident she suffered from severe headaches and pain in her chest and left side; that she could not eat or sleep; that her body was numb and that in 20 days she lost 21 pounds in weight. She further stated that after making desperate effort for a few days to resume some of her duties, she could not "stick it out any longer" and therefore quit. Under such circumstances we think her case was brought within the total disability clause of said policy. In any event it was a question of fact for the jury to decide from all the circumstances surrounding the employment (Provident Life Ins. Co. v. Anding, 144 Miss. 277, 109 So. 670), and, the evidence being legally sufficient to sustain its conclusion thereon, it is beyond the power of this court on appeal to interfere therewith.

Further contention is made that the disability from which plaintiff suffered did not result from the accident, but from natural causes peculiar to her sex. It is sufficient to say, however, that there is ample evidence in the record to support a contrary conclusion.

Instruction V, given at the request of plaintiff, to which objection is made, amplifies the provisions of section 1654 of the Civil Code; and while, as appellant claims, the construction of the insurance contract is to be left to the court, we think that, in view of the disputed question of fact arising under the total disability clause of the policy, the giving of the instruction complained of was justified. Nor is there any merit in appellant's point relating to the exclusion of the so-called McNamara report, for the reason that the report was not sufficiently identified.

In view of the conclusions we have reached as to the first cause of action, it becomes unnecessary to consider the merits raised as to the second.

The judgment is affirmed.

RINALDI v. BARASCH et al. (Civ. 7095.)★

District Court of Appeal, First District, Division 2, California. Jan. 28, 1930.

Rehearing Denied Feb. 27, 1930. Hearing Granted by Supreme Court March 27, 1930.

Brokers ⇐4—Surety on real estate broker's bond was not liable under statute, where broker sold his own property; "real estate transaction" (Real Estate Brokers' Act, § 2, as amended by St. 1925, p. 600, § 1).

Plaintiff directed defendant, a real estate broker, to apply some of plaintiff's money in defendant's possession to purchase of a one-sixth interest in the real estate business owned and operated by defendant. Plaintiff thereafter demanded return of his money, and a settlement was agreed upon in accordance with which defendant gave a note which he failed to pay. *Held*, in action for money had and received, this was not a "real estate transaction" within Real Estate Brokers' Act (St. 1917, p. 1579), § 2, as amended by St. 1925, p. 600, § 1, which provides that the act shall not apply to any person selling property owned by himself, and therefore the surety on defendant's real estate brokers' bond was not liable.

Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

Action by Matthew Rinaldi against Harry D. Barasch and others for money had and received. From a judgment granting insufficient relief to plaintiff, he appeals. Affirmed.

A. M. More and E. B. Mering, both of San Francisco, for appellant.

J. G. De Forest, of San Francisco, for respondents.

KOFORD, P. J. Plaintiff obtained judgment for damages for \$900 against defendant Barasch, a real estate broker, but was denied judgment against defendant American Surety Company, the surety on Barasch's real estate brokers' bond. Plaintiff appeals.

The finding of the court was that this action was not upon a real estate transaction within the meaning of the Real Estate Brokers' Act, and that therefore the defendant surety was not liable in this action.

The evidence shows that: On June 1, 1926, the defendant Barasch sold to appellant an undivided one-quarter interest in the furniture business of one of appellant's clients for \$1,850. Appellant paid \$1,500 on account of the purchase price. On June 3, 1926, appellant withdrew from said transaction and agreed to the purchase of an undivided one-sixth interest of the Golden Gate Sales & Rental Bureau, which was the real estate business owned and operated by Barasch, and directed Barasch to apply the \$1,500 in his possession to the purchase price of the said real estate business. Thereafter appellant demanded the return of his \$1,500. A

settlement and compromise was then made between the parties. Appellant agreed to accept \$1,200 in full settlement; Barasch paid appellant \$600 in cash; gave his note for the further sum of \$600; and further agreed to pay the full sum of \$900 if the note was not paid. Barasch having defaulted in the payment of his note, appellant brought this action to recover the \$900.

The Real Estate Brokers' Act (St. 1917, p. 1579, as amended in 1925, p. 600, § 1) provides in section 2 that the provisions of the act shall not apply to any person selling property owned by himself.

Barasch in selling his own property to appellant was not acting as a real estate broker within the terms of the act, and therefore his surety was not liable upon his bond. St. 1923, p. 96, § 4, adding § 9a to St. 1919, p. 1252, as amended.

The judgment is affirmed.

We concur: STURTEVANT, J.; NOURSE, J.

104 Cal. App. 15

In re LEE'S ESTATE. (Civ. 7254.)†

District Court of Appeal, First District, Division 2, California. Feb. 11, 1930.

Rehearing Denied March 12, 1930. Hearing Denied by Supreme Court April 10, 1930.

1. Wills ⇐675—Precatory expressions are presumptively indicative of nothing more than request, unless context shows intention to create trust (Civ. Code, § 1322).

Mere precatory expressions in will are presumptively indicative of nothing more than request or expectation, unless context or circumstances surrounding testator at time of making will show that testator intended to create trust and to leave legatee no option in the matter, especially under Civ. Code, § 1322.

2. Wills ⇐675—Will leaving one-fifth of estate to each of four brothers and sisters, with instructions to take care of brother, did not create trust.

Holographic will, leaving one-fifth of estate to each of four brothers and sisters, with instructions to "take care of brother Will," *held* not to create trust in favor of Will, especially in view of fact that deceased left seven brothers and sisters beside Will.

Appeal from Superior Court, City and County of San Francisco; Frank H. Dunne, Judge.

In the matter of the estate of Milton A. Lee, deceased. From an order sustaining a demurrer to objections to the petition of the executor for final distribution of the estate, William F. Lee appeals, opposed by Ernest A. Lee and others. Affirmed.

Edwin V. McKenzie, of San Francisco (J. H. Sapiro and Frank J. Mahoney, both of San Francisco, of counsel), for appellant.

Raymond Perry, Olin L. Berry, and Delbert L. Berry, all of San Francisco, for respondents Hattie Larkins and Maud Larkins.

NOURSE, Acting P. J. Written objections to the petition of the executor of the last will and testament of Milton A. Lee for the final distribution of the estate were filed. The probate court sustained a demurrer to these objections, and this appeal is taken from that order.

The will, which was olographic in form, reads as follows:

"San Francisco, 4/1/1925.

"I, Milton A. Lee, do make this will in my own handwriting. At my death I leave the following to each named.

Minnie Lee	my wife one fifth of my estate.
Earnest Lee	" brother one fifth of my estate.
James Lee	" brother one fifth of my estate.
Maud Larkins	" sister one fifth of my estate.
Hattie Larkins	" sister one fifth of my estate.

"Instructions to Brothers & Sisters. Take care of Brother Will.

"I appoint as administrator the Master of my Lodge Oriental #144 F.A.M.

"Sig. Milton A. Lee."

[1, 2] The sole question involved on this appeal is whether the precatory words addressed to the brothers and sisters of deceased, "take care of Brother Will," are such that they would create a trust in favor of Will over the four-fifths of the estate devised to the brothers and sisters named in the will. The subject of precatory trusts is fully discussed in an elaborate note found in 49 A. L. R. pp. 10 to 103, wherein it is said (page 22): "The crucial test, then, is whether the wish, desire, or recommendation expressed by the testator, is meant to govern the conduct of the one to whom it is addressed, or whether it is merely an indication of that which he thinks would be a reasonable exercise of the discretion of such person, leaving it, however, to the person to exercise his own discretion. Where a bequest is given, coupled with precatory words which leave the legatee free to act or not to act, such words are to be treated as an appeal to the conscience and affections of the legatee, and nothing more." In the same note, reference is made to the history of the two rules: The early English rule, which has been followed to some extent in the courts of this country, held that mere precatory expressions were deemed to raise a trust unless it appeared from the context to be to the contrary. In other words, the use of precatory words was held to create a presumption that a trust was intended. This rule, it is explained, is based upon the historical fact that all trusts, no matter how expressed, were only of precatory force, and imposed no binding obligation. The other rule, which is based upon later English cases and most of the American cases, reverses this presumption, and holds that mere precatory

expressions are presumptively indicative of nothing more than request or expectation, unless the context, or the circumstances surrounding the testator at the time of the making of the will, show that the testator intended to create a trust and to leave the legatee no option in the matter. Though the early English rule is still followed in some American jurisdictions, the instances in which a trust has been held to exist have been decidedly outnumbered in the cases in which it was held that no trust was created.

The California courts have adopted the later rule in line with the great weight of authority. The cases following the rule are so numerous that the only difficulty is in selecting the citations. The opinion in *Estate of Browne*, 175 Cal. 361, 362, 165 P. 960, 961, aptly states the situation as follows: "Whatever may be the rule elsewhere, 'it is the settled law in California that precatory words are not to be regarded as creating a trust unless it appear that the testator intended to impose an imperative obligation and to exclude the exercise of discretion on the part of the person to whom the recommendatory words are addressed.' *Estate of Purcell*, 167 Cal. 176-179, 138 P. 704, 705. This rule is derived from and supported by numerous authorities, including *Estate of Mitchell*, 160 Cal. 618, 117 P. 774; *Estate of Marti*, 132 Cal. 666, 61 P. 964, 64 P. 1071; and *Kauffman v. Gries*, 141 Cal. 295, 74 P. 846. It is to be observed that the testator's desire is expressed not to his executor, but to one of the beneficiaries under his will. Under such circumstances it may only be regarded as a mere request, and not as partaking of the nature of a command. *Estate of Marti*, supra; *Estate of Pforr*, 144 Cal. 121, 77 P. 825."

Appellant relies upon *Colton v. Colton*, 127 U. S. 300, 8 S. Ct. 1164, 1167, 32 L. Ed. 138, where the testator after making a gift of all his property to his wife, recommended to her "the care and protection of my mother and sister, and request her to make such * * * provision for them as in her judgment will be best." In interpreting the will, the Supreme Court held that it created a trust over all the property of the decedent in favor of the mother and sister of the testator. The *Colton* Case has been cited in numerous decisions, both in our courts and in other jurisdictions where the later rule of construction is followed. It repeatedly has been rejected in these jurisdictions as out of harmony with this later rule, and in some of the cases it has been distinguished on the narrow ground that the precatory expressions were joined in the same sentence with the words of conveyance, and this was taken as an indication of the intention of the testator to create a trust. Any uncertainty as to the authority of the *Colton* Case in this state was set at rest in the *Estate of Mitchell*, 160 Cal. 622, 117 P. 774, 776, where the Supreme Court said: "If

that decision was in any particular inconsistent with our own decisions on the subject, it would not be binding authority. The interpretation of wills is not a question upon which the federal courts control the state courts."

This rule of decision is recognized and approved in section 1322, Civil Code, which provides: "A clear and distinct devise or bequest cannot be affected by any reasons assigned therefor or by any other words not equally clear and distinct. * * *" Here the unconditional devise of one-fifth of the estate to each of the brothers and sisters was clear and distinct, whereas the instructions to his brothers and sisters "to take care of Brother Will" were not equally clear and distinct, and they cannot, therefore, under the provisions of this section, affect the unconditional devises found in the will. This is emphasized by the admitted fact alleged in the petition that the deceased left seven brothers and sisters beside his brother Will; that the admonition to take care of Will was addressed to his brothers and sisters generally, whereas devises were made to but four of them. It may be added that here lies the distinction in a large number of cases cited by appellant. Where the precatory expressions are found in the same sentence or clause with the words of devise or gift, this frequently has been taken as indicating the intention of the testator to make a conditional gift. But in examining those cases it will be found that almost invariably the precatory expressions are directed to the executor or administrator, who is also made a devisee under the will.

Without analyzing these cases at length, we are satisfied that the rule applicable here is that found in *Estate of Browne*, supra, and for that reason the order is affirmed.

We concur: STURTEVANT, J.; DOOLING, Justice pro tem.

103 Cal. App. 583

BITTER v. BITTER. (Civ. 7105.)

District Court of Appeal, Second District, Division 2, California. Jan. 30, 1930.

1. Divorce $\S$ 182—Final judgment entered prior to disposition of appeal from interlocutory judgment must be reversed (Civ. Code, $\S$ 132).

In divorce suit, final judgment must be reversed where made and entered prior to disposition of appeal from interlocutory judgment contrary to provisions of Civ. Code, $\S$ 132.

2. Divorce $\S$ 27(1)—To support judgment for divorce for extreme cruelty, court must find that conduct wrongfully inflicted on innocent party grievous bodily injury or grievous mental suffering or both.

To support judgment for divorce on ground of extreme cruelty, it is essential that court find

that conduct characterized by findings as cruel wrongfully inflicted on innocent party grievous bodily injury or grievous mental suffering or both, since injury or suffering is ultimate fact, entitling injured party to severance of marital ties.

3. Divorce $\S$ 27(12)—Refusal of sexual intercourse cannot be regarded as cruelty, except where without cause, and when condition of both spouses justifies intercourse.

In divorce suit, defendant husband's refusal of sexual intercourse cannot be regarded as cruelty, unless without just or proper cause, and when health and bodily condition of both spouses would justify such intercourse.

4. Divorce $\S$ 27(8)—Accusations of improper conduct cannot amount to cruelty, unless unwarranted.

In divorce case, accusations by one spouse of improper conduct on part of the other cannot amount to cruelty, unless unwarranted.

5. Divorce $\S$ 150(2)—Findings held not to justify divorce for desertion for persistent refusal to have reasonable matrimonial intercourse (Civ. Code, $\S$ 96).

In divorce case, findings held insufficient to justify divorce for desertion for refusal to have reasonable matrimonial intercourse within Civ. Code, $\S$ 96, where there was no finding that refusal was persistent, that health or physical condition of plaintiff did not make such refusal reasonably necessary, or that there was no just cause for such refusal.

6. Appeal and error $\S$ 662(3)—Bill of exceptions, settled and allowed by trial judge, is deemed correct statement of what took place (Code Civ. Proc. $\S$ 650).

When bill of exceptions has been settled and allowed by judge before whom proceedings were had, it must, for all purposes of reviewing action of court, be deemed to be correct statement of what took place, it being assumed that bill as originally drafted was served on respondent, and that respondent, if dissatisfied with statement of evidence, had opportunity to propose amendment under Code Civ. Proc. $\S$ 650.

7. Divorce $\S$ 127(4)—Testimony of children of parties as to occupancy of separate rooms held insufficient corroboration in proving refusal of intercourse in divorce suit.

In proving defendant husband's refusal of intercourse in action for divorce, testimony of children of parties as to occupancy of separate rooms was not character and degree of evidence required with regard to corroboration in divorce cases.

8. Divorce $\S$ 127(4)—Testimony of one party cannot be taken to corroborate other's to prove cause of divorce.

Testimony of one party cannot be taken in corroboration of that of the other for purpose of proving cause of divorce.

9. Divorce $\S$ 182, 227(2)—\$750 attorney's fees and \$250 on account of costs on appeal held not excessive in divorce case.

\$750 attorney's fees and \$250 on account of costs on appeal in divorce case held not excessive.

sive, where bill of exceptions did not set forth any of evidence on which court acted.

10. Divorce ⇨223, 286—Trial court has wide discretion as to amount allowed wife, and its rulings are reversed only for abuse of discretion.

Wide discretion is vested in trial court as to what amount, if any, is to be allowed wife to enable her to prosecute action for divorce or to defend against appeal prosecuted by husband, and it is only plain abuse of such discretion which warrants appellate court in setting aside order made for such purpose.

11. Continuance ⇨20(1)—Refusing continuance and proceeding with hearing respecting attorney's fees and costs of appeal in divorce case, in absence of defendant's attorneys, held not abuse of discretion.

In divorce suit, refusal of continuance because defendant's attorneys were engaged in trial in another department of court and action of court in proceeding with hearing respecting allowance for attorney's fees and costs of appeal, in absence of defendant's attorneys, held not abuse of discretion; such matter being within sound discretion of trial court.

12. Divorce ⇨225—Allowance of \$25 attorney's fee for appearance of plaintiff's counsel at contempt hearing for defendant's failure to pay alimony held proper, notwithstanding payment before hearing.

In divorce case, allowance of \$25 attorney's fees for appearance of plaintiff's counsel at hearing of order to show cause why defendant should not be adjudged in contempt for failure to comply with previous alimony order held not improper, though defendant made up payment before matter came on to be heard.

Appeal from Superior Court, Los Angeles County; L. T. Price, Judge.

Action by Mabel E. Ritter against Clyde E. Ritter. From an interlocutory decree and final judgment, and from orders requiring payment of alimony and counsel fees, defendant appeals. Judgments reversed, and orders affirmed.

James R. Jaffray and LeRoy Reames, both of Los Angeles, and John T. Houser, of Long Beach, for appellant.

William E. Fox and Brooks Gifford, both of Pasadena, for respondent.

BURNELL, Justice pro tem. [1] This appeal is from an interlocutory judgment of divorce, from certain orders thereafter made, and from the final judgment. As to the last mentioned, it is evident that the same must be reversed, for the reason that it was made and entered prior to the disposition of the appeal from the interlocutory judgment, contrary to the provision of section 132 of the Civil Code that, "if any appeal is taken from the interlocutory judgment or motion for a new trial made, final judgment shall not be entered until such motion or appeal has been

finally disposed of. * * *" *Carp v. Superior Court*, 76 Cal. App. 481, 245 P. 459; *Newell v. Superior Court*, 27 Cal. App. 343, 149 P. 998. The interlocutory judgment must also be reversed, for reasons which we shall now elucidate.

[2-5] The plaintiff set up three causes of action: Willful neglect, extreme cruelty, and desertion. As to the first of these, the court found against the plaintiff. The findings as to cruelty were as follows: "[T]he court finds that the defendant, Clyde E. Ritter, has treated the plaintiff in an extremely cruel and inhuman manner and in particular as follows: That said defendant has refused to have sexual intercourse with plaintiff since the 1st day of February, 1927, and that said defendant had the ability to have such sexual intercourse; that said defendant accused plaintiff with improper conduct with Dr. Frank Ashmore and that defendant told plaintiff that he would castrate the said Dr. Frank Ashmore; and that said defendant showed plaintiff the knife with which he would do the act; that said defendant accused plaintiff with improper conduct with William E. Scotten; that said defendant has belittled plaintiff's mother frequently stating that she was narrow-minded and tricky and that plaintiff was just like her; that said defendant has never taken plaintiff to a place of entertainment, with the exception of two or three times, during their whole married life; that for more than two years last passed [sic] defendant has never shown any love and/or affection for plaintiff and that said defendant has not kissed plaintiff more than three times during the last year passed and prior to the bringing of this action." The findings as to desertion were: "[T]he court finds that said defendant willfully and without cause deserted and abandoned plaintiff for over a period of one year prior to the bringing of this action, in that said defendant refused to have sexual intercourse with plaintiff since the first day of February, 1927, although having the ability to have such sexual intercourse. * * * [T]he court finds that the defendant, Clyde E. Ritter, would stay in Buena Park, California, during the week, returning to his home in Pasadena generally for the week-end, but that on such occasions said defendant and said plaintiff would not have sexual intercourse; and that this condition existed ever since the first day of February, 1927, and up to the time of filing this action."

Directing our attention first to the findings as to cruelty, it is to be noted that the court did not find that the conduct of the defendant had caused plaintiff either bodily injury or mental suffering. Neither did it find that defendant's refusal to have sexual intercourse with plaintiff was without just cause, or that the accusation of improper conduct on plain-

tiff's part was without foundation, or was falsely and maliciously made by defendant, or that the failure to take her to places of entertainment or to kiss her was without cause or contrary to plaintiff's desires. To support a judgment for divorce upon the ground of extreme cruelty, it is essential that the court find that the conduct characterized by the findings as cruel, "wrongfully inflicted upon the [innocent party] grievous bodily injury or grievous mental suffering, or both." *Nelson v. Nelson*, 18 Cal. App. 602, 123 P. 1099, 1102; and this is so because the injury or suffering is the ultimate fact entitling the injured party to a severance of the marital ties. *Sallee v. Sallee*, 63 Cal. App. 54, 218 P. 69, 70; *Smith v. Smith*, 124 Cal. 651, 57 P. 573.

The other omissions above noted are equally fatal. A refusal of intercourse can be regarded as cruelty only when without just or proper cause, and when the health and bodily condition of *both* spouses would justify such intercourse. Accusations by one spouse of improper conduct on the part of the other cannot amount to cruelty, unless unwarranted. *Brandt v. Brandt*, 178 Cal. 548, 174 P. 55. "Of course, if they were true, and justified, it was not cruelty to make them." *Sallee v. Sallee*, *supra*. It is true that the court found certain allegations of the cross-complaint as to specific instances of improper conduct on the part of the plaintiff and the two men mentioned in that portion of the findings which we have quoted to be untrue, but this is not tantamount to finding that the *general* accusation of improper conduct which it was found defendant had made was untrue or unwarranted.

As to the findings on the issue of desertion, it is apparent that the court intended to find that the defendant had been guilty of that form of desertion manifested by a persistent refusal to have reasonable matrimonial intercourse as defined by section 96 of the Civil Code. But here again the findings lack certain essential elements. For instance, there is no finding that the refusal was persistent, or that the "health or physical condition" of the *plaintiff* did "not make such refusal reasonably necessary," or that there was no just cause for such refusal. In *Fink v. Fink*, 137 Cal. 559, 70 P. 628, the court found, on the issue of desertion, "that for more than one year immediately preceding the suit the plaintiff refused to have matrimonial intercourse with the defendant and that the refusal was not on account of health or physical condition of either party, nor was it reasonably necessary on such account," and as a conclusion of law "that the plaintiff has been guilty of willful desertion of the defendant." We quote further from the opinion: "One of the grounds urged for reversal is the insufficiency of the evidence to justify the finding of 'willful desertion'; but we do not perceive there is any such finding. The supposed finding is mere-

ly a legal conclusion from the specific facts found, as to which there is no specification. The question involved is, therefore, as to the sufficiency of the specific facts found on the issue of desertion to justify the conclusion inferred from them by the court. With regard to this, we are of the opinion that the qualifying clause in section 96 of the Civil Code (reading, 'when there is no just cause for such refusal') equally applies to either of the refusals therein specified. The language of the section is, indeed, in this respect ambiguous, or rather amphibolous; but the reason of the qualification applies equally to both of the cases provided for in the statute, and the maxim applies: 'Idem ratio idem lex.' The finding must, therefore, be regarded as insufficient." The necessity for a finding as to absence of just cause was reiterated in *Mayr v. Mayr*, 161 Cal. 134, 118 P. 546, and in *Ingraham v. Ingraham*, 40 Cal. App. 578, 181 P. 234.

[6] The findings are manifestly insufficient to support the conclusion of law that the respondent-plaintiff is entitled to a divorce or to support the judgment in her favor, but she suggests that this court may make additional findings as permitted by section 956a of the Code of Civil Procedure. The evidence as contained in the bill of exceptions would not, should we feel desirous of availing ourselves of this provision, justify us in supplying the omissions from the findings above noted. Respondent refers to certain evidence as having been given at the trial, and says: "Appellant does not include this evidence in his appeal but, on the contrary, leaves it entirely out of the record." The transcript contains a bill of exceptions settled by the trial judge, and reciting that as to the several specifications in the findings therein mentioned "the following evidence and none other was given." In the absence of anything in the record to the contrary it must be assumed that the bill, as originally drafted by appellant, was served on respondent and that the latter, if dissatisfied with the statement of the evidence therein contained, had the opportunity provided by the statute to propose amendments thereto setting forth such evidence, or a statement thereof, as had been omitted from the proposed bill. Section 650, Code Civ. Proc. "When the bill of exceptions has been settled and allowed by the judge before whom the proceedings were had, it must, for all purposes of reviewing the action of the court, be deemed by this court to be a correct statement of what took place." *Hyde v. Boyle*, 89 Cal. 590, 26 P. 1092; *Estate of Marre*, 127 Cal. 128, 59 P. 385. We must therefore accept as the evidence in the case, for all purposes of this appeal, the statements contained in the settled bill of exceptions.

[7, 8] From these it appears that, as to the refusal of intercourse, both as an element of the charge of cruelty and as amounting to de-

sertion, the testimony was as follows: Plaintiff testified that the defendant "did not have sexual intercourse with her since the first day of February, 1927." The defendant admitted this fact, and testified that he neither requested nor was refused such intercourse, and that he was not physically incapacitated from having the same. A daughter of the parties testified that she had slept with her mother, the plaintiff, continuously from the 1st day of February, 1927, and that her father had occupied a separate room. A son testified that his sister and mother occupied one room and his father another, while it was stipulated that another son "slept with his father in a room separate from that of his mother at the times and occasions when the defendant * * * would be at the home of plaintiff." The testimony of the children of the parties as to their occupancy of separate rooms "was not the character and degree of evidence required by the Code with regard to corroboration in divorce cases." *Lemberger v. Lemberger*, 55 Cal. App. 231, 203 P. 786, 787; *Ingraham v. Ingraham*, supra. Further, and apart from the insufficient attempt at corroboration by the testimony of the children, there was no testimony on the part of any witness corroborating that of the plaintiff other than that of the defendant; and in denying a petition for a hearing after judgment in this court the Supreme Court, in *Lemberger v. Lemberger*, held unequivocally that "the testimony of one party cannot be taken in corroboration of that of the other for the purpose of proving a cause of divorce."

As to the issues with regard to cruelty other than the refusal of intercourse, there was no testimony as to the falsity of the charges of improper conduct on the part of the respondent, and, as to two instances at least, no corroborating evidence other than the admission of the defendant that he had made such charges. Without going into the matter at length, suffice it to say, that the balance of the evidence as set forth in the record is in an equally unsatisfactory condition and entirely insufficient as a foundation upon which to base any findings to support the judgment of divorce.

[9-11] Appellant also seeks a reversal of two orders made after the entry of the interlocutory judgment. By the first of these he was required to pay to respondent \$750 as attorneys' fees and \$250 on account of costs on appeal. It appears from the engrossed bill of exceptions that respondent filed an affidavit reciting the entry of judgment in her favor, the making and denial of a motion for new trial, the taking of an appeal and the lack of funds on her part with which to compensate her attorneys for representing her on said appeal and with which to defray the costs thereof. On this affidavit the court issued an order for the defendant to show cause why he should not be ordered to pay a desig-

nated sum to plaintiff for costs and counsel fees. On the return day specified in the order defendant served and presented to the court an affidavit to the effect that his attorneys were engaged in a trial in another department of the court, and requesting a short continuance of the hearing on the order to show cause. The court, however, proceeded to hear the same, the defendant himself being present, and made the order above referred to, considerably reducing the amount asked for. Appellant's objection thereto is that the amount allowed is excessive, and that it was error to have refused the continuance and to have proceeded with the hearing, in the absence of his counsel. Neither of these points is well taken. As to the amount allowed, the bill of exceptions does not set forth any of the evidence on which the court acted, and we cannot say as a matter of law that the allowance of the sums specified was excessive. A wide discretion must of necessity be vested in the trial court as to what amount, if any, is to be allowed the wife to enable her to prosecute an action for divorce or to defend against an appeal prosecuted by her husband, and it is only a plain abuse of such discretion which warrants an appellate court in setting aside an order made for such purpose. *Stewart v. Stewart*, 156 Cal. 651, 105 P. 955; *Rose v. Rose*, 109 Cal. 544, 42 P. 452; *Whiting v. Whiting*, 62 Cal. App. 157, 216 P. 92. As to the refusal of a continuance and the action of the court in proceeding with the hearing in the absence of defendant's attorneys, that also was a matter within the sound discretion of the trial judge. *Berentz v. Belmont Oil Min. Co.*, 148 Cal. 577, 84 P. 47, 113 Am. St. Rep. 308; *Peachy v. Witter*, 131 Cal. 316, 63 P. 468; *Corbin v. Howard*, 61 Cal. App. 715, 215 P. 920; *Flynn v. Fink*, 60 Cal. App. 670, 213 P. 716.

[12] The other order of which appellant complains was one directing him to pay \$25 attorneys' fees for the appearance of plaintiff's counsel at the hearing of an order to show cause why defendant should not be adjudged in contempt for failure to comply with a previous order for the payment of alimony for the support of the minor children of the parties. At the time the order to show cause was issued, October 5, 1928, the defendant was in arrears two months, but, when the matter came on to be heard on the return day specified therein, it appeared that he had made up his payments after being served with the order to show cause. Plaintiff's attorneys had drawn up the affidavit, prepared the order, and appeared in court on the return day, and the allowance of a small attorneys' fee was, under the circumstances, proper.

The judgments are reversed, and the orders appealed from are affirmed.

We concur: CRAIG, Acting P. J.; IRA F. THOMPSON, J.

103 Cal. App. 775

BACKUS v. DUFFY. (Civ. 6992.)

District Court of Appeal, First District, Division 2, California. Feb. 8, 1930.

1. Landlord and tenant ⇨79(3)—Tenure of tenant's assignee must be identical with tenant's tenure to terminate privity with landlord.

To terminate tenant's privity of estate with his landlord, term transferred by tenant to his assignee must be for period of time equal to remainder of term of original lease, and cover all of premises demised by original lease, and must include all of estate and interest of tenant under the original lease.

2. Landlord and tenant ⇨79(1), 204—Lessee's assignment reserving smaller rental than original lease, with privilege of installing side line in store and of re-entry, held sublease, permitting suit for rent by original lessee.

Lessee's transfer of term under instrument which reserved rental in less amount than that reserved by original lease, and provided that the assignor of the term should have privilege of installing certain side line in store, which line was to be sold by assignee on division of profits, and which provided that assignee should be governed by covenants and agreements contained in original lease, and thus adopted reversionary clause of original lease, giving lessor right to re-enter on breach of condition, held not an assignment of the full term of the original lease, but merely a sublease, and therefore original lessee could maintain suit thereon for rent.

Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

Action by W. Orrin Backus against Agnes Duffy. Judgment for plaintiff, and defendant appeals. Affirmed.

Fred A. Watkins, of San Francisco, for appellant.

Arthur L. Shannon, of San Francisco, for respondent.

STURTEVANT, J. This is an action brought to recover rent. On the 26th day of February, 1923, R. L. Collins leased to W. O. Backus the premises known as 667 Geary street. By the provisions of the lease the term commenced May 1, 1923, and ended May 1, 1928. The rental reserved was \$150 per month during the time from December 1, 1924, to the end of the lease. It contained many covenants. One of those covenants was to pay the rent promptly, and continuing it provided: " * * * And in the event of the failure of the lessee so to do, or in the event of a breach of any of the other covenants or agreements herein contained, on the part of the lessee to be kept or performed, or in the event the lessee shall abandon or vacate the said premises, the lessor may, without demand or notice, declare the said term ended,

and may reenter into and upon said premises and remove all persons and things therefrom, and repossess the said premises as in the first and former estate of the lessor, or the lessor may, at the lessor's option, pursue any other remedy which he may have, either at law or in equity, for collection of rent or breach of covenant."

On December 1, 1924, the plaintiff wrote to the defendant a letter as follows:

"San Francisco, Calif., December 1st, 1924.

"Miss Agnes Duffy, 330 Sutter Street, San Francisco, Calif. Dear Madam: Confirming our conversation of this afternoon regarding your renting of all that certain store and basement contained in that certain one-story and basement concrete building, situate on the southerly line of Geary Street, between Jones and Leavenworth Street, and known and designated as #667 Geary Street, size approximately 12:6x69; we wish to advise that the following conditions will be acceptable to us:

"This article to act as an agreement of tenancy between us, under which the lessee shall be governed by all the covenants and agreements contained in that certain lease, made and entered into on the 26th day of February, 1923, by and between Roy L. Collins and W. Orrin Backus.

"The term of tenancy to be the unexpired portion of the above mentioned lease at a rental of \$100 per month for the first twelve months and \$125 per month for the balance.

"It is further understood that the lessee shall deposit no security on the above tenancy. It is also understood that the lessor shall have the privilege of installing certain side-lines, such as ready-made dresses, furs, lingerie, etc., which the lessee agrees to sell upon a division of the profits.

"Very truly yours,

"W. Orrin Backus Lessor.

"W. F. Murphy Witness."

Under the terms stated in said letter, the defendant entered into possession of the premises mentioned therein, and continued to occupy the premises until the end of the term. During that period of time she paid to the plaintiff rent in the total sum of \$3,250. The plaintiff gave her credit for the payments made, and in this action sought to recover an alleged balance, \$1,575. The trial court made findings in favor of the plaintiff, and awarded him judgment for the amount prayed, and the defendant has appealed, bringing up a typewritten transcript.

[1, 2] The defendant makes one point. She claims that the letter above set forth was an assignment of the full term, and therefore the original lessee could not sue, but that the original lessor could have sued her as for rent. *Salisbury et al. v. Shirley*, 66 Cal. 223, 5 P. 104; *Bonetti v. Treat*, 91 Cal. 223,

27 P. 612, 14 L. R. A. 151; *Jefferis v. Easton*, Eldridge & Co., 113 Cal. 345, 45 P. 680; *Lutton v. Rau*, 37 Cal. App. 429, 173 P. 1111; *Cross v. Thiele*, 51 Cal. App. 780, 197 P. 974. In this connection she claims that the letter above quoted, although in form a sublease, was a transfer of the entire term, and contained no reversion, and was therefore in law an assignment. *Smiley v. Van Winkle*, 6 Cal. 605; *Jordan v. Scott*, 38 Cal. App. 739, 744, 745, 177 P. 504. That claim is not quite exact, as it involves a misconception of the technical meaning of the word "term" as applied to leases. 38 Cyc. 185, note 39. The authorities cited support the claim when the period of time for which the lessee holds coincides with the period of time which the sublessee holds, and the other provisions in the contract do not show that the parties intended to create a sublease. In *Barkhaus v. Producers' Fruit Co.*, 192 Cal. 200, at page 206, 219 P. 435, 437, Mr. Justice Myers said: "The term which a tenant must assign, in order to terminate his privity of estate with the landlord, may be regarded as having three dimensions analogous to the special dimensions of length, breadth, and thickness. The term to be transferred to his assignee by such a tenant must be for a period of time at least equal to the remainder of the term of the original lease. It must cover all of the premises demised by the original lease, and it must include all of the estate and interest in said premises possessed by the lessee under the original lease. 'To constitute an assignment of a leasehold interest, the assignee must take precisely the same estate in the whole or in a part of the leased premises which his assignor had therein. He must not only take for the whole of the unexpired time, but he must take the whole estate, or, in other words, the whole term; for, in the language of Blackstone, "the word 'term' does not merely signify the time specified in the lease, but the estate also and interest that passes by that lease. * * *"' If by the terms of the conveyance, be it in the form of a lease or an assignment, new conditions with a right of entry, or new causes of forfeiture are created, then the tenant holds by different tenure, and a new leasehold interest arises, which cannot be treated as an assignment or a continuation to him of the original term.' *Dunlap v. Bullard*, 131 Mass. 161, 162. See, also, *United States v. Hickey*, 17 Wall. (84 U. S.) 9, 21 L. Ed. 559 [see, also *Rose's U. S. Notes*]; *Davis v. Vidal*, 105 Tex. 444, 42 L.

R. A. (N. S.) 1084, 151 S. W. 290; 1 Taylor, *Landlord and Tenant* (9th Ed.) § 16."

One of the questions involved is, Was the tenure of the plaintiff under his lease the same as the tenure of the defendant under her contract? A comparison of the two instruments shows that it was not. The plaintiff was bound to pay the landlord \$150 per month. The defendant contracted to pay the lessee \$100 per month during a part of the time and \$125 per month during the rest of the time, and she also agreed "that the lessor shall have the privilege of installing certain side-lines, such as ready-made dresses, furs, lingerie, etc., which the lessee agrees to sell upon a division of the profits." It thus appears that the rent reserved in the one instrument and the tenure of the plaintiff was not identical with the tenure of the defendant. Furthermore, under the terms of her contract, the defendant adopted the reversionary clause contained in the original lease. That instrument retained the right to re-enter before the expiration of the term on the breach of condition. The right of reversion was continued, but on conditions quite different as to the amount of rent and carrying plaintiff's "lines." When the lease contains such a covenant, there is a conflict of authorities as to the effect. One line of cases holds that the insertion of such a covenant deprives the instrument of its character as an assignment. *Essex Lunch, Inc., v. Boston Lunch Co.*, 229 Mass. 557, 118 N. E. 899; *Davis v. Vidal*, 105 Tex. 444, 151 S. W. 290, 42 L. R. A. (N. S.) 1084; *H. L. Null & Co. v. J. S. Garlington & Co.* (Tex. Civ. App.) 242 S. W. 507. In *Saling v. Flesch*, 277 P. 612, the Supreme Court of Montana cites and follows those cases. Continuing, on page 614 of 277 P., the court says: "We agree with the conclusion stated by the court in *Wilson v. Cornbrooks*, 137 A. 819, 5 N. J. Misc. R. 614, where it is said: 'The better view, it seems to me, is that, where the tenant reserves the right of re-entry upon failure of his transferee to pay rent or upon violation of covenants, he does not part with his entire term or estate, and that the retention of such contingent reversionary interest creates a subtenancy.'" The claim of the defendant as stated by her is not applicable to the facts. It cannot be sustained.

The judgment is affirmed.

We concur: NOURSE, J.; DOOLING, Justice pro tem.

103 Cal. App. 783

PETERSON v. CHORLEY et al. (Civ. 6091).

District Court of Appeal, First District, Division 1, California. Feb. 10, 1930.

- 1. Interpleader** $\S$ 29—In interpleader action, evidence supported finding that attorney was to be paid from fund held by plaintiff for protecting defendants' interests.

In action to determine respective interests of defendants in fund in possession of plaintiff obtained from estate of deceased, evidence held to support finding that attorney employed to protect interests of some of defendants with knowledge of other defendant was to be paid therefrom reasonable value of his services.

- 2. Interpleader** $\S$ 29—Evidence held to support finding that attorney was entitled to commission under compromise agreement on funds collected from deceased's estate.

Where heir executed to another power of attorney to act for her in matter of deceased's estate and assigned to the other one-third of her interest therein and the other assigned his power of attorney to third individual, and thereafter compromise agreement was executed in satisfaction of their interests in heir's share of estate, evidence held to support finding that plaintiff, in action to determine respective interests of parties in fund in his possession collected from estate, was entitled under compromise agreement to commission on funds collected.

- 3. Interpleader** $\S$ 35—Attorney collecting fund from estate for others held agent and bailee and not trustee, and hence not entitled to attorney's fees in interpleader action brought by him (Civ. Code, $\S\S$ 2250, 2273).

Where attorney collecting fund from deceased's estate for defendants brought action of interpleader to determine respective interests of defendants, attorney held to have acted as agent and bailee of defendants and not as trustee within meaning of Civ. Code, $\S$ 2250, and hence was not entitled to attorney's fees under section 2273.

- 4. Interpleader** $\S$ 35—Attorney bringing interpleader to determine claims to fund held by him held not entitled to allowance for attorney's fees (Code Civ. Proc. $\S$ 1021).

Where attorney brought suit in interpleader to determine respective interests of defendants in fund he had collected from deceased's estate, attorney held not entitled to fees, since in suits in interpleader attorney's fees cannot be allowed under Code Civ. Proc. $\S$ 1021.

- 5. Interest** $\S$ 11—Absent agreement, bad faith, or unreasonable delay, one receiving money for use of another is not chargeable with interest.

One who has received money for use of another, and is charged merely with duty of holding same and paying it over to proper person, is not, in absence of agreement, chargeable with interest unless guilty of bad faith or unreasonable delay.

- 6. Appeal and error** $\S$ 1035—Objection that interpleader could not be maintained because plaintiff claimed interest in fund held not basis for reversal, where nothing showed error resulted in miscarriage of justice.

Judgment in interpleader suit will not be reversed merely because plaintiff bringing action of interpleader claimed interest in fund, there being nothing to support conclusion that error resulted in miscarriage of justice.

Appeal from Superior Court, City and County of San Francisco; J. J. Trabucco, Judge.

Action by Fred C. Peterson against Ross R. Chorley, R. McColgan, and others. From an unsatisfactory judgment, the named defendants appeal. Modified, and as thus modified affirmed, and judgment rendered for the named defendants.

Brobeck, Phleger & Harrison and George B. Keane, all of San Francisco, for appellants.

Stanley R. Sterne, of Oakland, for respondent Fred C. Peterson.

PER CURIAM. An action to determine the respective interests of the defendants in a fund in the possession of the plaintiff.

The facts are as follows: Peter J. McGovern, who died on March 15, 1922, by his last will disposed of a portion of his estate; the residue passed by the law of succession to his heirs, among whom was his sister Bridget Cullen. The latter executed to E. A. Platt a power of attorney to act for her in the matter of the estate, and also assigned to him one-third of her interest therein. In June, 1922, Platt executed his power of attorney to defendant McColgan, giving him full power to act under the Cullen assignment and power of attorney; the purpose being to secure the repayment to McColgan of sums loaned to Platt. Defendant Ford, an attorney representing Mrs. Cullen, Platt, and one Blakemore, appeared in the proceeding and procured a partial distribution of the estate. Shortly thereafter Isidor Golden, an attorney, was substituted for Ford as the attorney for Mrs. Cullen, and the latter thereupon instituted an action against Platt and all those to whom he had given powers of attorney or assignments, including defendant McColgan, to cancel and annul her assignment to Platt and to quiet the title to her interest in the McGovern estate against the various claimants. The plaintiff, who was also an attorney, appeared in the action upon behalf of several of the defendants, including Ford and McColgan. The action was compromised, and all claimants under the assignment to Platt, including defendant Ford, agreed to accept in satisfaction of their claims the sum of \$500 and 5 per cent. of Mrs. Cullen's distributive share of the estate.

The plaintiff claimed, and the court found, that by agreement with the parties he was to receive as compensation for his services in the litigation 5 per cent. of all sums collected by him under the compromise agreement. In accordance with the latter agreement the executor of decedent's will paid to the plaintiff by check the sum of \$2,000, which check he in turn indorsed to McColgan, who thereupon paid him 5 per cent. thereof, or \$100. Subsequently, the executor paid plaintiff the further sum of \$2,161.46, which, after deducting the percentage claimed by him, namely, \$108.07, he deposited in his commercial bank account. Thereafter defendants asserted conflicting claims thereto, and the present action was brought to determine these claims.

The compromise agreement was evidenced by a letter signed by the defendants and directed to the executor, its material portions being as follows: " * * * It is the express understanding and agreement of the parties signatory hereto that the said sum of \$500 plus the said five (5%) per cent. is a payment in full to all of the persons who have filed notices of assignment or who have made claims adverse to the rights and interests of said Bridget Cullen in said estate, or on whose behalf such notices have been filed or claims made; and it is further understood that it is likewise in full payment of all moneys coming to the undersigned George K. Ford for services rendered by him on behalf of Bridget Cullen herein."

The court found that defendant Ford had at the request of Platt and Mrs. Cullen rendered services in securing a partial distribution of the estate, and that the services were reasonably worth \$1,050. It also found that plaintiff necessarily expended \$275 as attorneys' fees and \$56 as costs in the present case, but should be charged with interest in the sum of \$130.69 upon the balance remaining in his hands. The judgment directed that after deducting the difference between the amounts allowed as attorneys' fees and costs and the sum charged as interest the balance should be paid as follows: To defendant George K. Ford \$1,050, and to defendants R. McColgan and Ross R. Chorley the sum of \$803.08.

McColgan and Chorley have appealed from portions of the judgment. They contend that plaintiff was not entitled to attorneys' fees or a commission, and that the court erred in awarding defendant Ford any part of the fund.

[1, 2] It is undisputed that McColgan and Platt shared in the interest in the estate acquired by the latter from Mrs. Cullen, and that Ford—who had frequently acted in similar transactions for McColgan—was employed to protect the interests of Platt and Mrs. Cullen, all of which McColgan knew.

These circumstances taken with the compromise agreement, which impliedly recognized Ford's claim to a part of the fund, sufficiently supported the conclusion of the trial court that he was to be paid therefrom the reasonable value of his services; and the evidence also supports the finding that the plaintiff by agreement of the parties was entitled to the commission claimed by him. Plaintiff's testimony shows that he was either paid his commission when the collection was made or that the amount was deducted by him at the time, and that when the action was brought there remained in his hands a balance of \$2,053.39, upon which he was entitled to no further commissions.

The original complaint was filed by a firm of attorneys of which plaintiff was a member. Thereafter an amended complaint praying for additional compensation was filed by another attorney, for whose services an allowance from the fund was asked. The pleadings alleged that plaintiff was threatened with litigation by the defendants, that their claims were conflicting, and that the present suit was necessary in order to determine the same.

It was shown that plaintiff had no duties to perform other than to collect the amounts paid by the executor, and the trial court denied the extra compensation sought, but allowed an attorney's fee.

[3, 4] It is clear from the evidence that plaintiff was acting as defendants' agent and bailee. While his duties were in some respects analogous to those of a trustee, he was not such within the meaning of section 2250 of the Civil Code, and was not entitled to attorney's fees under section 2273 of the same Code. *Los Angeles Trust & Sav. Bank v. Ward*, 197 Cal. 103, 239 P. 847. Notwithstanding there was no denial of certain allegations in the complaint to the effect that plaintiff was a trustee, and that he was so described in a communication from defendant McColgan, the facts show that as to the amounts collected he was but a stakeholder, and the finding that he was a trustee is unsupported. The action in legal effect was but a suit in interpleader, in which cases attorney's fees cannot be allowed. *Code Civ. Proc. § 1021; Los Angeles Trust & Sav. Bank v. Ward*, 197 Cal. 103, 239 P. 847.

[5] It is also the rule that one who has received money for the use of another and is charged merely with the duty of holding the same and paying it over to the proper person, is not, in the absence of an agreement, chargeable with interest unless guilty of bad faith or unreasonable delay. 33 *Cor. Jur., Interest*, § 58, p. 202. In the present case no such contentions are made, nor is it claimed that plaintiff received any benefit from the fund; and not being a trustee with-

In the above section of the Code, the conclusion that he was legally chargeable with interest cannot be sustained.

[6] It is further contended by appellants that plaintiff having claimed an interest in the fund, the action of interpleader could not be maintained. The action, however, was tried on that theory; all questions between the parties were fully litigated, and the error, if any, was in a matter of procedure. Under such circumstances a judgment cannot be set aside unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error resulted in a miscarriage of justice; and in the present case there is nothing to support that conclusion. *Baker v. Miller*, 190 Cal. 263, 212 P. 11.

For the foregoing reasons the judgment is modified by striking therefrom the following paragraphs:

"It is hereby ordered, adjudged and decreed that on the 7th day of August 1924 plaintiff received two thousand one hundred sixty-one and 46/100 (\$2,161.46) dollars in trust for the uses and purposes set forth in the findings; that he was entitled to immediately deduct therefrom five per cent thereof, to wit, one hundred eight and 07/100 (\$108.07) dollars as compensation to himself for services theretofore rendered; that thereupon he became chargeable with the sum of two thousand fifty-three and 39/100 (\$2,053.39) dollars as trustee.

"It is further ordered, adjudged and decreed that plaintiff is entitled to deduct from said sum of two thousand fifty-three and 39/100 (\$2,053.39) dollars the sum of two hundred and seventy-five (\$275.00) dollars, attorney's fees paid to Stanley R. Sterne, and the sum of fifty-six (\$56.00) dollars, costs incurred in this suit.

"It is further ordered, adjudged and decreed that plaintiff held as trustee out of such fund for and on behalf of George K. Ford one thousand and fifty (\$1,050.00) dollars.

"It is further ordered, adjudged and decreed that plaintiff is chargeable with interest at seven per cent per annum on one thousand three and 39/100 (\$1,003.39) dollars from the 7th day of August 1924 to the date of judgment, which said interest is one hundred thirty and 69/100 (\$130.69) dollars.

"It is further ordered, adjudged and decreed that the defendants and cross-complainants R. McColgan and Ross R. Chorley take the balance of the trust fund conveyed, deducting from the said fund the amount herein adjudged to plaintiff as compensation for trustee and for costs of suit and for attorneys fees, and the amount herein adjudged to cross-complainant George K. Ford, to wit, the

balance of such sum, viz., eight hundred three and 08/100 (\$803.08) dollars."

And it is ordered that in lieu thereof the following be inserted therein: It is ordered, adjudged, and decreed that on the 7th day of August, 1924, plaintiff received \$2,161.46 for the use of defendants McColgan, Chorley, and Johnson; that he was entitled to deduct therefrom 5 per cent. thereof, to wit, \$108.07 as compensation for services theretofore rendered; and that he thereupon became chargeable with the sum of \$2,053.39.

It is further ordered, adjudged, and decreed that plaintiff is entitled to deduct from said sum of \$2,053.39 the sum of \$56, costs incurred in this suit.

It is further ordered, adjudged, and decreed that defendants George K. Ford, R. McColgan, and Ross R. Chorley have judgment against plaintiff for the balance of said fund in accordance with their respective interests therein, namely, George K. Ford in the sum of \$1,050, and R. McColgan and Ross R. Chorley in the sum of \$947.39, and that they have execution therefor unless the plaintiff shall within 10 days pay said amounts to the county clerk of the city and county of San Francisco, to be applied in satisfaction of said judgments, in which event he shall be discharged from liability to the defendants or any of them.

As so modified, the judgment is affirmed; and it is further ordered that the plaintiff and defendants McColgan and Chorley each bear his own costs on appeal.

103 Cal. App. 433

DUDLEY v. CITIZENS' STATE BANK OF SANTA MONICA. (Civ. 3972.)★

District Court of Appeal, Third District, California. Jan. 27, 1930.

Rehearing Denied Feb. 26, 1930. Hearing Denied by Supreme Court March 27, 1930.

1. Appeal and error ⇨1011(1)—Contradictory testimony in action for money had and received only raising conflict furnishes no ground for reversal.

On defendant's appeal in action for money had and received, contradictory testimony only raising conflict in evidence furnishes no ground for reversal.

2. Banks and banking ⇨54(1)—Directors of state bank are required to maintain sufficient money therein to meet obligations, and that duty devolves upon executive officer (Bank Act 1909).

Under Bank Act (St. 1909, p. 87), directors of state bank are charged with duty of maintaining sufficient sum of money in bank to meet its obligations, and this duty devolves upon executive officer thereof.

3. Banks and banking $\S$ 54(1)—While executive officer of state bank need not supply funds to keep surplus account intact, such duty is chargeable against bank (Bank Act 1909, $\S$ 21, as amended by St. 1913, p. 147, $\S$ 20).

While executive officer of state bank is not under duty to supply funds to keep surplus accounts intact, such duty is chargeable against bank under Bank Act (St. 1909, p. 87) $\S$ 21, as amended in 1913 (St. 1913, p. 147, $\S$ 20), requiring maintenance of surplus and providing method for raising and maintaining such surplus.

4. Banks and banking $\S$ 54(1)—If executive officer of state bank advanced money covering worthless checks temporarily until directors could take proper action, advancement would constitute loan entitling executive officer to recover same (Bank Act 1909, $\S$ 21, as amended by St. 1913, p. 147, $\S$ 20).

If executive officer of state bank advanced money temporarily to take care of worthless checks until they could be otherwise taken care of by directors, thereby making it only an expedient to maintain funds of bank unimpaired until Bank Act (St. 1909, p. 87) $\S$ 21, as amended by St. 1913, p. 147, $\S$ 20, could be complied with, advancement of money would constitute loan and not gift, entitling executive officer to recover money advanced.

5. Banks and banking $\S$ 54(1)—Executive officer voluntarily paying money to state bank to cover worthless checks under circumstances implying gift cannot recover money advanced.

If circumstances under which executive officer of state bank advanced money to take care of worthless checks show voluntary payment or payment under circumstances where law implies a gift, executive officer cannot recover money so advanced.

6. Banks and banking $\S$ 55(5)—Evidence held to sustain finding that money advanced to state bank by executive officer covering worthless checks was paid under circumstances implying promise to repay.

In action by executive officer of bank for money had and received, evidence held sufficient to sustain finding to effect that money advanced by executive officer covering worthless checks was paid under circumstances where law would imply promise to repay same, and not as a gift.

Appeal from Superior Court, Los Angeles County; William Hazlett, Judge.

Action by P. J. Dudley against the Citizens' State Bank of Santa Monica. Judgment for plaintiff, and defendant appeals. Affirmed.

Samuel J. Crawford, of Ocean Park, and Hill, Morgan & Bledsoe, of Los Angeles, for appellant.

Miller & Ellis and Fredericks & Hanna, all of Los Angeles, for respondent.

PLUMMER, J. The plaintiff had judgment in an action prosecuted against the defendant to recover the sum of \$10,400. From this judgment the defendant appeals.

The complaint in this action is in nine counts. The first count is for the sum of \$10,400, alleged to be for money had and received from the plaintiff for the benefit of the defendant, this sum being made up of the following items, to wit: The sum of \$3,000, alleged to have been paid by the plaintiff to the defendant, for its use and benefit, on or about the 1st day of November, 1923; the sum of \$1,400, alleged to have been paid to the defendant by the plaintiff, for its use and benefit, on or about the 6th day of February, 1924; the sum of \$5,000, alleged to have been paid by the plaintiff to the defendant, for its use and benefit, on or about the 11th day of February, 1924; and the further sum of \$1,000, alleged to have been paid by the plaintiff to the defendant, for the latter's use and benefit, on or about the 2d day of March, 1924. The next four counts are for the sums respectively mentioned, alleged to have been loaned to the defendant by the plaintiff at the defendant's special instance and request. The last four counts in the complaint relate to the separate items herein mentioned, and each is in the form of a count for money loaned and advanced the defendant, without consideration, to plaintiff, and for the use and benefit of the defendant. The answer consists of specific denials to each count. No affirmative defense is pleaded in the answer. The trial court made a general finding to the effect that all the allegations of the plaintiff's complaint are true and correct and likewise a general finding to the effect that the denials in the answer were and are untrue. The specifications of error simply raise the question as to the sufficiency of the evidence to sustain the finding of the court that the respective allegations of plaintiff's complaint are true. Neither the answer of the defendant nor the specifications of error raise any question as to the voluntary character of the payments made or of the money advanced by the plaintiff to and for the uses and benefit of the defendant. While the argument of the appellant is devoted chiefly to what the appellant calls the "voluntary character of the payments and advancements of money made by the plaintiff," the question of voluntary payment does not otherwise arise unless the testimony introduced by and on the part of the plaintiff establishes such fact in such a conclusive manner as compels this court to overturn the findings of the trial court to the effect that the money involved in this action was loaned by the plaintiff to the defendant, or that the money was advanced by the plaintiff to the defendant for its uses and benefit, without consideration. If all the other allegations of the complaint, found to be true by the court, are unsupported by the testimony, yet the finding of the court that the plaintiff advanced money to the defendant for its uses and benefit, without consideration, the law

implies a promise to repay the same, and such finding, if supported by the testimony, would be sufficient to support the judgment.

[1] As we have stated, the defendant tendered no issue of voluntary payment by its pleadings, and introduced no evidence of such voluntary character of the payments, and bases its appeal wholly upon the testimony of the plaintiff. Reference is made to some contradictory testimony, but this only raises a conflict, and furnishes no ground for reversal. Not having tendered any issue as to the alleged voluntary character of the payments or advancements of money by the plaintiff to the defendant, and not having raised any such question by specification of errors, it is a very doubtful question whether, under section 648 of the Code of Civil Procedure, the contention of the appellant can be considered. 21 Cal. Jur. 136; 2 Cal. Jur. 705-712; *Mills v. Brady*, 185 Cal. 317, and cases cited on page 321, 196 P. 776, 778. However, we will not base our decision upon any technical rules of pleading, but will confine ourselves to a consideration of whether the money was advanced, as alleged by the plaintiff, to the defendant for its uses and benefit, without consideration and under such circumstances that the law would imply a promise of repayment and an obligation to repay the same upon demand.

The transcript shows that the Citizens' State Bank of Santa Monica was organized some time during the year 1922, and opened its doors for the transaction of business in January, 1923. The par value of the capital stock of the bank was fixed at the sum of \$100,000, the stock being sold at \$110 per share—\$100 as the par value of the stock and \$10 on each share sold being credited to what was called the "surplus account," this account being created in this manner for the evident purpose of paying organizing and operating expenses until the business of the bank was sufficient to put it upon a paying basis. Shortly after the bank began business, it organized and established a branch at a place called "Ocean Park," a suburb of Santa Monica. The plaintiff in this action was, during all the time covered by this testimony, the vice president and executive officer of the Citizens' State Bank of Santa Monica. The plaintiff's son, Arthur Dudley, was first assistant manager, and for a while served as manager of the Ocean Park branch. During the latter part of the year 1923, the plaintiff, P. J. Dudley, having had introduced to him a man by the name of Hurd, cashed a check in favor of Hurd and drawn by Hurd on the Citizens' State Bank of Santa Monica for the sum of \$3,000. This transaction may be summarized as follows: On or about the 21st day of October, 1923, a man by the name of Hurd came into the bank of which the plaintiff was the manager, accompanied by one Homer Johnson, an acquaintance of the

plaintiff; Johnson introduced Hurd, stating that they were associated in some deal, and that Hurd desired to make a deposit and open an account; thereupon Hurd presented three different checks aggregating approximately \$40,000, all of which were signed by third parties in favor of Hurd; two of the checks were drawn upon banks in the neighboring town of Inglewood; the third purported to be a check certified by the cashier of the American National Bank of Pomona; the checks were received by Dudley and an account opened by the bank in the name of Hurd; thereupon Hurd immediately drew against the account in the sum of \$3,000, writing a check therefor, which the plaintiff directed the teller in the bank to pay; this sum was paid by the teller to Hurd in currency; no investigation was made of Hurd, nor as to the genuineness of the checks deposited by him; Hurd gave as an explanation for drawing out so much currency that he was going to buy some real estate; the plaintiff, upon cross-examination, was not able to tell just what reasons Hurd assigned for drawing the cash instead of using checks; in a short time it developed that the checks aggregating the aforesaid sum of \$40,000 were all forgeries; Hurd was arrested, convicted, and sent to prison.

On or about the 1st day of November, 1923, the plaintiff deposited in the defendant bank the sum of \$3,000, making the deposit in the form of a check signed by him, payable to the order of Citizens' State Bank, in said sum, with the words, "for to take up Hurd check." This money was paid into the defendant bank on or about November 21, 1923. No report was made of this transaction to the directors by the plaintiff, and it does not appear that any of the directors knew of the transaction with the exception of Mr. McClellan, who was the president of the bank, and Mr. Miller, who was one of the directors. The plaintiff testified that he had a conversation with McClellan in relation to this transaction, and that McClellan requested him not to report the transaction to the directors. The plaintiff, among other things, testified that his idea was that he was extending a credit to the bank because the money went into the bank; that he put up the money to take care of the situation until either the directors or the bank could arrange the matter; that he had the interest of the bank at heart, and put up the money in good faith. The plaintiff further testified that in his conversation with McClellan, the president of the bank, that it came to the question of taking care of the loan temporarily, the plaintiff's language being as follows: "Then it came to the question of taking care of the loan temporarily. I would be willing to furnish the funds temporarily, provided I would get it back again. He said that would be agreeable to him. I suggested that I was ready to make a report to the Board of Di-

rectors. He asked me not to do that; he said, 'Leave it to me.' The plaintiff further testified as follows: "I didn't consider myself in anyway obligated to pay any of this \$3,000.00. I had the interest of the bank at heart, and I put the money up in good faith. If I had known that it was not going to be paid back, that he was not going to take the matter up and see that I got it back, I would not have put up my check." This testimony was contradicted by Mr. McClellan, but it appears from the testimony of the witness Miller that the plaintiff and McClellan did have a conversation which in substance was practically the same as the conversation related by the plaintiff, and sufficient to justify the trial court in coming to the conclusion that the plaintiff had given a correct version of the conversation he had had with the president of the bank relative to the \$3,000 transaction. The minutes of the board of directors show that at a meeting held on the 20th day of November, 1923, the loss of \$3,000 by the bank was discussed by the board.

The remainder of the money claimed by the plaintiff as due him from the defendant is based upon a transaction had with a man by the name of W. F. Sharpless, otherwise known as L. J. Mills. It appears from the transcript that a man by the name of "Sharpless" did business with the Ocean Park branch of the defendant bank, under the name of Sharpless, and also under the name of L. J. Mills; that Sharpless was engaged in selling automobiles, and the branch bank handled a great deal of his paper. During most of the time the bank was handling Sharpless' paper, his account was overdrawn. Finally it appears that during the early part of the year 1924 Sharpless deposited several checks with the Ocean Park branch bank of the defendant and drew thereon various sums, so that, unless the checks just referred to were genuine, his account would stand overdrawn in the sum of \$7,400. As subsequent events proved, the checks which we have just referred to as deposited by Sharpless were all returned to the Ocean Park branch bank of the defendant as worthless, he having no funds in the bank upon which they were drawn. Upon being informed by his son of the worthless character of the checks drawn by Sharpless, and that they were being returned, the plaintiff deposited the various sums mentioned in his complaint, aggregating a total of \$7,400, in the Ocean Park branch bank of the defendant. His testimony was that he directed his son to hold the money until the whole matter was fixed up. A. V. Dudley, as manager of the branch bank, turned the money into the bank and carried it upon the books as so much cash. The deposit slips in the handwriting of the plaintiff show that the money just referred to was deposited at various times to the credit of, or on account of, Sharpless and Mills. It does not appear from the records of the de-

fendant bank that any report of these transactions was made by the plaintiff, or by A. V. Dudley, or that the directors of the bank understood the same until after the plaintiff had severed his connection with the defendant bank. The plaintiff, upon cross-examination, testified as follows: "I put in this money in the hope that Sharpless would later come along and make good the amount he had received from the draft which had been dishonored, and that if he did not do it, I would go to the Board of Directors and lay the situation before them to see if I could not get my money back, and, further, as to one of the transactions my idea was that if the bank did not repay me, the Directors would, and that if the Directors wouldn't, that the bank would; I had nothing definite as to which would. My idea was that I was extending a credit to the bank because the money went into the bank."

Upon this testimony, and more along the same line which does not change the effect of what we have set forth, it is contended by the appellant that a voluntary gift, and not a loan is established; that, while the money was advanced without any consideration on the part of the plaintiff, and went into the funds of the bank, the plaintiff was simply replacing in the bank funds which had been improperly paid out either by himself, from the defendant bank, or by his son from the Ocean Park branch bank. Without further consideration, or without regarding the official character of the plaintiff, and the fact that he was charged with the management of the bank and the control of its funds, and the law relating to the maintenance of a surplus by banking corporations, it might be that we would have to state, as a matter of law, that the transaction disclosed constituted voluntary gifts, and that none of the money could be recovered.

[2-4] Under the law, the directors of the bank were charged with maintaining a sufficient sum of money in the defendant bank to meet its obligations, and this duty, as the executive officer of the bank, devolved upon the plaintiff. While it was not his duty to supply funds to keep the surplus account intact, it was a duty chargeable against the bank. Section 21 of the California Bank Act (St. 1909, p. 87) as amended in 1913 (St. 1913, p. 147), and as it was in force at the time of the transactions considered herein, required the maintenance of a surplus, and provided a method for raising and maintaining a surplus. The procedure there set forth would ordinarily consume considerable time. The surplus of the defendant bank, as disclosed by the testimony, amounted to the sum of \$10,000. The losses incurred, as disclosed by the record, aggregated \$10,400. The testimony of the plaintiff is to the effect that the bank needed or required the money, although the bank

was not shown to be insolvent. Insolvency, however, is a different matter from not having ready cash, and, if the testimony of the plaintiff is true, that he put up his money temporarily until it could be otherwise taken care of by the directors of the bank, then and in that case it was only an expedient to maintain the funds of the bank unimpaired until section 21 of the Bank Act could be complied with. This would amount, in law, to a loan to the bank, and at least to an advancement of money to the bank, not as a gift, but without any binding obligation upon the plaintiff, and in such manner as would entitle him to recover the same. It is argued by the appellant that, if the plaintiff deposited the \$10,400 in the bank, as claimed by him, to maintain its reserves, then and in that case the repayment to the plaintiff of the amount which he had so deposited would leave the reserves of the bank in the depleted condition existing just prior to plaintiff making deposit of the money as alleged. This is true, but section 21 of the Bank Act and other sections of the Bank Act provide the procedure for taking care of just such situations. The fact that the plaintiff did not report the Sharpless transactions to the board of directors constituted a circumstance which the trial court was authorized to take into consideration in determining the credibility of the plaintiff as a witness in this case, and, if the court resolved this incident in favor of the plaintiff, and as not affecting his credibility, we are not in a position to overthrow the holding of the trial court simply because it is strongly urged that such fact does materially affect the credibility of the witness, even though we might agree with the contention of the appellant in this particular. The appellant cites a number of authorities relative to voluntary payments, which we need not consider, for the reason that the court has held otherwise upon testimony sufficient to sustain its findings, even though we might conclude differently upon the same testimony. The cases cited by appellant, based upon the text found in 7 C. J. 492, are not controlling here. The text in *Corpus Juris*, relative to this subject, reads as follows: "The capital stock of a bank is a trust fund for the benefit of depositors and creditors, and must be kept unimpaired, for which purpose an assessment may be levied on the stockholders in case a deficiency arises through losses or otherwise. Where the directors of a bank, in response to a demand of the state bank examiner, that they make good an impairment of the capital stock, sign and discount their personal note and deposit the proceeds to the credit of the bank, the transaction is a donation or gift to the bank"—citing *Interstate Trust, etc., Co. v. Irwin*, 138 La. 325, 70 So. 313; *Wright v. Gurley*, 133 La. 745, 63 So. 310. An examination of these cases shows that the directors had entered in-

to an agreement with the bank examiner to pay so much money into the bank to make up a deficit in its assets in lieu of levying an assessment, and that the various sums contributed were contributed unconditionally and as a gift to the bank.

[5, 6] A review of the authorities cited by the respective counsel would serve no useful purpose. It is sufficient to say that, if the circumstances show a voluntary payment, or a payment under circumstances where the law implies a gift, no recovery can be had. On the other hand, if the money is advanced, under such circumstances, by one having charge of the management of the affairs and business of the corporation, as to raise an implied contract to repay the same, judgment for repayment will be entered, and thus, if the court, upon sufficient testimony to sustain its findings, concludes that the money was paid under circumstances where the law would imply a promise to repay, further argument is foreclosed.

While we appreciate the force of the appellant's argument, it comes down to a question of fact, and that, having been found by the trial court against the contentions of the appellant, we have no recourse but to affirm the judgment, and it is so ordered.

We concur: FINCH, P. J.; R. L. THOMPSON, J.

103 Cal. App. 750

CITY OF TURLOCK v. BRISTOW et al. ★
(Civ. 3865.)

District Court of Appeal, Third District, California. Feb. 7, 1930.

Rehearing Denied March 8, 1930. Hearing Denied by Supreme Court April 7, 1930.

1. Nuisance ⇨84—Evidence held to show pollution of water in irrigation ditch, within city limits, constituting nuisance under statute (Civ. Code, § 3479).

In action by municipality to abate a nuisance caused by pollution of water in an open irrigation ditch traversing a populous section of the city in vicinity of two school buildings, evidence held sufficient to show existence of nuisance as defined in Civ. Code, § 3479.

2. Nuisance ⇨70—Although continuing nuisance was created by former owner of property, his successor is liable for neglect to abate it.

Every successive owner of property who neglects to abate a continuing nuisance upon or in use of his property, although created by former owner, is liable therefor in same manner as the one who first created it; regard being had to Civ. Code, § 3483.

3. Nuisance ⇨64—Owner of easement for use of water in irrigation ditch constituting public nuisance may be enjoined from using it.

One who owns an easement for the continuous use of water conveyed to his premises

through an irrigation ditch may be enjoined from using it, if he fails to maintain it in such condition as not to amount to a public nuisance.

4. Nuisance Ⓒ84—Evidence held to prove that unhealthful condition was caused throughout neighborhood by irrigation ditch, which was therefore public nuisance under statute (Civ. Code, § 3480).

In action to abate a nuisance arising from unsanitary and dangerous condition of open irrigation ditch traversing populous section of city, evidence held sufficient to show that entire neighborhood was injuriously affected by the ditch, which was therefore a public nuisance as defined in Civ. Code, § 3480.

5. Nuisance Ⓒ78—Municipality was authorized under statute to abate public nuisance caused by accumulations of vegetation and debris in irrigation ditch within city limits (Civ. Code, § 3494).

Where a public nuisance resulted from maintenance of unsanitary and dangerous irrigation ditch within city limits, the municipality was authorized to maintain an action to abate the public nuisance, in view of Civ. Code, § 3494.

6. Nuisance Ⓒ78—City in exercise of its police power may abate public nuisance injurious to health.

A manifest public nuisance affecting health may be abated by municipality under its police power.

7. Nuisance Ⓒ84—Persons who permitted continuing, visible, public nuisance to exist over considerable period would be deemed to have had knowledge and notice.

In action by municipality to abate a nuisance caused by pollution of irrigation ditch, contention that defendants were not served with notice to abate the nuisance was without merit, since they had maintained for many years a continuing, visible, public nuisance, and hence would be deemed to have had knowledge and notice thereof.

8. Nuisance Ⓒ84—Specific notice to abate nuisance was unnecessary, where notices to abate had been mailed to defendants before beginning of action.

In action by city to abate a nuisance caused by irrigation ditch, where evidence showed that complaints had been often made to municipal authorities, and that protests were given to some of defendants, and that notices to abate the nuisance were mailed to defendants before institution of action, no specific notice to abate the nuisance was necessary.

9. Nuisance Ⓒ84—In action to abate nuisance caused by pollution of irrigation ditch, allegation that defendants owned prescriptive rights to water therein raised immaterial issue.

In action by municipality to abate nuisance resulting from unhealthful irrigation ditch within city limits, a cross-complaint on ground that defendants owned prescriptive rights to use of water therein raised no material issue.

10. Nuisance Ⓒ66—No lapse of time can legalize public nuisance (Civ. Code, § 3490).

Neither prescriptive right, laches, nor the statute of limitations is a defense in action to abate a public nuisance, which cannot be legalized by mere lapse of time, in view of Civ. Code, § 3490.

11. Jury Ⓒ14(11)—Jury trial was properly denied in action to abate nuisance, involving only injunctive relief against maintenance of irrigation ditch in city.

In action by city to abate a nuisance arising from maintenance of irrigation ditch within city limits, a trial by jury was properly denied.

Appeal from Superior Court, Stanislaus County; J. C. Needham, Judge.

Action by the City of Turlock against Clarence Bristow, A. N. Crow, and others to abate a nuisance. From a decree awarding mandatory relief, A. N. Crow and others appeal. Affirmed.

William N. Graybiel, of Turlock, for appellants.

James C. Nichols, of Turlock, for respondent.

R. L. THOMPSON, J. This is an appeal from a decree awarding mandatory relief from a public nuisance caused by the pollution of the water of an irrigation ditch which extends through a portion of the city of Turlock.

For more than 20 years the defendants held an easement in the use of water for irrigation purposes which flowed in a ditch extending through the westerly portion of the city of Turlock. Originally this ditch, which was constructed with dirt embankments, was entirely uninclosed by culverts or conduits. The ditch was 10 or 15 feet in width and several feet in depth. It extended through a somewhat populous portion of the city for a distance of 16 blocks. At points where it intersected or traversed streets the city authorities at great cost constructed concrete culverts, installed 30-inch water pipes, and inverted siphons beneath the pavements. Nevertheless, this ditch for nearly one-half the distance traversed within the city limits remained open and unprotected. These uncovered portions became overgrown with vegetation and obstructed by an accumulation of debris so that the water was polluted and unsanitary.

The complaint alleged facts constituting a public nuisance and prayed for abatement thereof. The answer controverted these allegations, and a cross-complaint was filed setting up a claim on the part of the defendants to prescriptive rights to the use of the ditch for irrigation purposes and affirmatively charged the city of Turlock with wrongfully installing concrete culverts, conduits and

siphons so as to obstruct and diminish the flow of water to which they were entitled. From this interference with their alleged prescriptive rights the defendants prayed for equitable relief.

Upon trial of the cause the court found that the ditch was maintained by the defendants along the open portions thereof within the city limits of Turlock in such a manner as to permit the accumulation of foul and stagnant water, refuse matter, filth, and garbage which became a breeding place for typhoid and other disease germs and permeated the air with noxious, unwholesome, and offensive vapors and odors, rendering the ditch unsanitary, causing the neighborhood to become unhealthful, and destroying the comfort and enjoyment of the homes and property of the citizens of that vicinity. The court further found that the concrete culverts, pipe system, and siphons which were installed by the city were not constructed so as to obstruct or reduce the flow of water in the ditch, but, upon the contrary, that "said culverts are large enough to carry all water that has been carried through said ditch for the past ten years," and that the defendants were not damaged thereby. The court thereupon ordered that the defendants be "enjoined and restrained from conveying water through the said last above described portion of said ditch within the corporate limits of the City of Turlock unless and until all the open and uncovered portions thereof lying north of the said Tidewater-Southern Railroad tracks on Castor Street in said city are covered, tiled or piped in a substantial and permanent manner in concrete, iron or other durable and permanent substance so as to effectively prevent the escape or leakage therefrom of water or odors." These findings are amply supported by the evidence.

[1] There can be little doubt the irrigation ditch, complained of in this action, maintained in the manner in which the record discloses it to have been operated, constitutes a nuisance subject to abatement. Since 1906 the defendants availed themselves of an easement in the use of this ditch to periodically convey water to their respective lands for irrigation purposes. It may be conceded they thereby acquired prescriptive rights to the lawful use of the ditch and water flowing therein. The ditch traversed the westerly portion of the city of Turlock in the vicinity of two school buildings, along and across streets and through city blocks, a distance of some 6,000 feet. This portion of the city is now quite thickly populated. As the city developed, it improved this waterway in places where it was most required, by constructing culverts, installing concrete pipes, placing siphons beneath the crossings, and paving the streets. After thus inclosing the ditch at intervals, nearly one-half of it still

remained unprotected within the city limits. Along these uninclosed portions of the ditch vegetation and debris were permitted to accumulate so as to become a menace to health, comfort, and the reasonable enjoyment of home life among citizens who live in that vicinity and to those who have occasion to visit the neighborhood of that ditch. While the record does not disclose an extremely offensive condition of this waterway, there is ample evidence upon which to support the findings of the court to the effect that a nuisance was permitted to develop and exist by those in control thereof, according to the definition of a nuisance as that term is defined in section 3479 of the Civil Code.

[2, 3] It would be an arduous and useless task to select evidence which is scattered throughout a somewhat lengthy record to demonstrate the existence of this nuisance. The city engineer, a physician who was also the health officer of Turlock, and other witnesses furnish satisfactory proof of the presence of large quantities of bamboo, willows, rank grass, weeds, and vegetation which were permitted to grow and remain in dense masses within the ditch and along its borders, obstructing the flow of the ordinarily sluggish stream. The grass and vegetation were permitted to lie in masses along the borders of the stream or to decay upon its banks, creating danger of fire, menacing the health of citizens by fostering breeding places for mosquitoes, bacteria, colon and typhoid bacilli, and creating unsanitary and offensive odors. The grade of this ditch was not uniform. Holes were dug in the bed of the stream and miniature pools formed, where the water became stagnant and covered with a thick coating of green scum in which dead frogs and fish remained to decay. The presence of miasma and noxious effluvium resulted. The stream also became the dumping ground for tin cans, old boilers, discarded tires, and debris of all sorts, creating an unsightly, unhealthful, and unwholesome situation. Occasionally the banks washed out and the adjoining land was flooded. Moreover, the ditch became the playground for children who, during periods of high water, were in danger of being drowned. This condition unquestionably constitutes a nuisance. *McCarthy v. Gaston Ridge Mill Co.*, 144 Cal. 542, 78 P. 7; 20 R. C. L. 443, §§ 58-61; 20 Cal. Jur. 294, § 29. But appellants assert that the evidence fails to prove they created this situation. It was, however, a continuing nuisance which they suffered to exist. 20 Cal. Jur. 271, § 9. Every successive owner of property who neglects to abate a continuing nuisance upon, or in the use of such property, created by the former owner, is liable therefor in the same manner as the one who first created it. Section 3483, Civ. Code. It was the duty of the defendants to maintain the ditch in a reasonably sanitary

condition. One who owns an easement for the continuous use of water which is conveyed to his premises through an irrigation ditch may be enjoined from using it except upon condition that he shall maintain it free from an existing state which amounts to a public nuisance. This is precisely the effect of the court's mandate in the present case, which seems to accord with equitable principles.

[4-6] The evidence is also sufficient to show that the *entire neighborhood* through which the ditch ran within the city limits was injuriously affected by the unsanitary and dangerous condition of this irrigation ditch, and that it therefore constituted a *public nuisance* as that term is defined in section 3480 of the Civil Code. The city of Turlock was clearly authorized to maintain this action to abate the public nuisance. Section 3494, Civ. Code; *San Francisco v. Buckman*, 111 Cal. 25, 43 P. 396; 20 Cal. Jur. 307, § 38. Indeed, where the existing condition clearly constitutes a public nuisance which affects the health or sanitation of a city, it may be abated by the municipality under its police powers without liability on its part and independently of its equitable remedies. 20 R. C. L. 487, §§ 100, 101; 2 Wood on Nuisances (3d Ed.) 973, § 743; *McMahon v. Telluride*, 79 Colo. 281, 244 P. 1017, 46 A. L. R. 358, note.

[7, 8] The appellants contend that the record is devoid of evidence that the defendants were served with notice to abate the nuisance, and that such notice is a prerequisite to the instituting of this action for abatement. This was a continuing, visible, public nuisance which was permitted by the defendants to exist for many years. Under such circumstances they will be deemed to have had knowledge of the nuisance and notice thereof. 46 C. J. 743, § 325. The evidence, however, does show that complaints had been frequently made to the city authorities regarding the unsanitary condition of this stream; that protests were given to some of the defendants; and that notices to abate the nuisance were mailed to the defendants before the action was commenced. No specific notice to abate the nuisance in this case was necessary.

[9, 10] It is claimed the court erred in failing to adopt findings upon the claim alleged in the cross-complaint that the defendants owned prescriptive rights to the use of the water flowing through this irrigation ditch and that these prescriptive rights are a valid defense to the charge of maintaining a public nuisance. This, however, was an immaterial issue, which required no finding. Neither prescriptive rights, laches, nor the statute of limitations is a defense against the maintenance of a public nuisance. In the case of *Strong v. Sullivan*, 180 Cal. 331, 334, 181 P. 59, 60, 4 A. L. R. 343, it is said: "No

lapse of time can legalize a public nuisance and a prescriptive right cannot be maintained against a public nuisance." Nor may the maintenance of a public nuisance be defended on the ground of laches or the statute of limitations. Section 3490, Civ. Code; *Cloverdale v. Smith*, 128 Cal. 230, 60 P. 851; *Ex parte Taylor*, 87 Cal. 91, 25 P. 258; 46 C. J. 751, § 349; *Bowen v. Wendt*, 103 Cal. 236, 37 P. 149; *City of Santa Ana v. Santa Ana Valley Irr. Co.*, 163 Cal. 211, 124 P. 847; *Pennsylvania Ry. Co. v. Sagamore Coal Co.*, 281 Pa. 233, 126 A. 386, 39 A. L. R. 882. The foregoing rule respecting the defense based upon the grounds of prescriptive rights, laches, or the statute of limitations is equally applicable even though the defendants may have enjoyed these rights before the city of Turlock was incorporated. Prescriptive rights to the use of water in an open irrigation ditch extending through the boundaries of a city must be enjoyed with due regard and subject to the superior regulatory rights of the municipality to protect its citizens against the maintenance of a public nuisance.

[11] A trial by jury was properly denied. The issues of this cause were all equitable, involving injunctive relief only. The defendants were therefore not entitled to a jury trial. 15 Cal. Jur. 342; 1 Wood on Nuisances (3d Ed.) p. 45, § 22; *People v. McCaddon*, 48 Cal. App. 790, 192 P. 325, 326. In Wood's text on Nuisances, *supra*, the author says: "As to what constitutes a nuisance, as well as the question of convenience, are questions to be determined by the court, not by a jury; also (the question as to) whether the facts, if proved in a given case under all the circumstances, produce such result as amounts to a nuisance." In the case of *People v. McCaddon*, *supra*, which was a suit to abate a public nuisance, the court said: "This being an action for an injunction, neither the Constitution nor the statute requires the submission of the issues to a jury. It is not error to deny a jury in any case where such right was not granted at common law." In *McCarthy v. Gaston Ridge Mill Co.*, 144 Cal. 542, 545, 78 P. 7, 8, it is said: "The prevention or abatement of a nuisance is to be accomplished by means of an injunction either prohibitive or mandatory, and an action therefor is within the equitable jurisdiction of the court, and is to be governed by the principles prevailing in that jurisdiction. *Sullivan v. Royer*, 72 Cal. 248, 13 P. 655, 1 Am. St. Rep. 51; *Richardson v. City of Eureka*, 110 Cal. 441, 42 P. 965. The Constitution does not give to a party the right to have the issues in such action tried by a jury, nor is the action within those in which the Legislature has authorized a jury trial."

The judgment is affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

103 Cal. App. 647

A. H. BUSCH CO. v. STRAUSS et al.*
(Civ. 3971.)

District Court of Appeal, Third District, California. Jan. 31, 1930.

Rehearing Denied March 1, 1930. Hearing Denied by Supreme Court March 31, 1930.

1. Landlord and tenant ⇨237—On appeal by landlord from judgment awarding rent until premises were vacated, absence of notice to quit was sufficient ground for affirmance.

In an action for rent, it appeared that landlord had served his tenant with copy of a notice to pay rent or quit, which was claimed to have been served upon a sublessee in possession. *Held*, on landlord's appeal from judgment awarding him rent until surrender of premises, but denying him rent thereafter, failure to include in record the notice served on sublessee was sufficient reason for affirming judgment.

2. Landlord and tenant ⇨94(3)—Notice that landlord would institute action for unlawful detainer, unless rent were paid, clearly showed intention to terminate lease under statute (Code Civ. Proc. § 1174).

Where landlord, after default in payment of rent, served both the tenant and his sublessee with notice, which not only demanded payment of rent or surrender of premises, but also threatened proceeding for unlawful detainer, contention that notice was not intended to terminate lease could not be sustained, in view of Code Civ. Proc. § 1174, which provides that, in action for unlawful detainer, after default in payment of rent, a judgment in favor of landlord shall declare that lease is forfeited.

Appeal from Superior Court, Los Angeles County; Edward T. Bishop, Judge.

Action by the A. H. Busch Company against M. N. Strauss and another. From a judgment granting partial relief to plaintiff, he appeals; the defendant named being respondent therein. Affirmed.

Young & Young, of Los Angeles, for appellant.

Sam Wolf, of Los Angeles (Leo Shapiro, of Venice, of counsel), for respondent.

Harry M. Irwin, of Los Angeles, for defendant Connally.

FINCH, P. J. While in possession of one of the rooms of a building as the plaintiff's tenant, the defendant Strauss sublet the room, with the plaintiff's consent, to the defendant Connally. Thereafter, on January 13, 1925, the plaintiff served upon Strauss a notice reading as follows:

"Enclosed you will find copy of notice to pay rent or quit, served upon Mr. W. W. Connally, who was the last party to occupy 650 So. Vermont avenue. I am sending you this notice to call the matter to your attention inasmuch as you, by virtue of the consent to sublet which you and Mr. Connally signed, are jointly liable under the obligations of the

lease. If we do not receive either from you or from Mr. Connally or both of you, the \$400 which is now due in unpaid rental, we will be obliged to immediately proceed as per last paragraph of the notice."

[1] The record does not contain a copy of the notice served upon Connally. Since error is not to be presumed, the failure to include such notice in the record is a sufficient reason to warrant the affirmance of the judgment. The respondent, however, has printed in his brief what he states is a copy of a part of the omitted notice, dated January 9, 1925, which reads as follows:

"Now therefore, you will please take notice; that you are required to pay the said December, 1924, and January, 1925, installments of said rent, to-wit, the aggregate sum of four hundred (\$400.00) dollars to the undersigned, or deliver up possession of said premises on or before three (3) days after the date of the service of this notice upon you. You are further notified that in the event you fail to make said payment or deliver up possession of said premises within the said three (3) day period, the undersigned will institute legal proceedings for unlawful detainer against you for the recovery of said premises and treble rents."

In response to the notice served upon Strauss, he caused the room to be vacated and turned over the keys to the plaintiff. A few days thereafter this action was commenced to recover the rents mentioned in the notice. February 13, 1926, the plaintiff filed a supplemental complaint for the additional sum of \$2,600 as rents from February 1, 1925, to February 28, 1926. Judgment was entered in favor of the plaintiff for only the rents accrued at the time the premises were surrendered. The plaintiff has appealed. The lease contains the following clause:

"That in case of the violation by the lessee of any of the terms and conditions of this lease, the lessor may either terminate this lease without notice and take possession of the premises, or may enter and possess the premises as the agent of the lessee and for his account."

[2] Appellant contends that its notice served on Strauss was not given with the intention of terminating the lease, but that it intended to "enter and possess the premises as the agent of the lessee and for his account." In support of this contention the appellant relies on *Burke v. Norton*, 42 Cal. App. 705, 184 P. 45, and *Security Realty Co. v. Kost* (Cal. App.) 274 P. 608. It appears that the notice served upon the lessee in each of those cases merely demanded payment of the unpaid rent or the surrender of possession of the premises, and did not indicate an intention to terminate the lease. In this case the notice expressly provides that, upon the lessee's fail-

ure to pay the rent demanded or to deliver possession, the lessor "will institute legal proceedings for unlawful detainer against you for the recovery of said premises and treble rents." This language clearly evinces an intention to terminate the lease, for section 1174 of the Code of Civil Procedure provides that, in an action for unlawful detainer, "if, upon the trial, * * * the finding of the court be in favor of the plaintiff and against the defendant judgment shall be entered for the restitution of the premises; and if the proceedings be for an unlawful detainer * * * after default in the payment of rent, the judgment shall also declare the forfeiture of such lease." The judgment entered herein is supported by *Wickstrom v. McGrath*, 86 Cal. App. 651, 261 P. 326, and *Costello v. Martin Brothers*, 74 Cal. App. 782, 241 P. 588.

Appellant argues no other grounds for a reversal.

The judgment is affirmed.

We concur: R. L. THOMPSON, J.; PLUMMER, J.

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COHN et al. v. KLEIN et al. (Civ. 102.) ★

District Court of Appeal, Fourth District, California. Feb. 6, 1930.

Rehearing Denied March 3, 1930. Hearing Granted by Supreme Court April 7, 1930.

1. Pleading ⇨125—In action to quiet title, answer need not deny allegation of possession (Code Civ. Proc. § 738).

In action to quiet title brought under Code Civ. Proc. § 738, and not under Civ. Code, §§ 3412 and 3413, there is no necessity of denying allegation of possession contained in complaint, as matters of possession need not be alleged.

2. Quieting title ⇨43—Controlling issue in action to quiet title is as to ownership of property.

Particular and controlling issue in action to quiet title is as to ownership of property in controversy.

3. Quieting title ⇨43—Denial of allegation that plaintiff is owner is sufficient to put question of title in issue.

Denial in answer of an allegation in complaint that plaintiff is owner of particular land is sufficient to put in issue question of title.

4. Quieting title ⇨43—Complaint alleging that plaintiff's deceased was owner, and answer alleging that deceased had conveyed property, held to put question of ownership in issue.

Complaint, in action to quiet title, alleging that plaintiff's deceased was owner of certain property at his death, and answer alleging that deceased conveyed property to defendant during his lifetime, held to put question of ownership in issue.

5. Quieting title ⇨10(1)—Plaintiff, in action to quiet title, must prevail, if at all, on his own title, and not weakness of opponent's claims.

Plaintiff, in action to quiet title, must prevail, if at all, on strength of his own title, rather than on weakness in claims of his opponent.

6. Quieting title ⇨37(1)—Defendants' denial of allegations of ownership raised issue which should have been heard on merits, even if instrument relied on by defendants did not constitute deed.

In action to quiet title, defendants' denial of allegations in complaint raised an issue of ownership which should have been heard on merits, even if instrument under which defendants claimed did not constitute deed, since it was incumbent on plaintiff to prove his own title.

7. Pleading ⇨345(1)—Judgment on pleadings cannot be granted where answer raises an issue as to material allegations of complaint.

While judgment on pleadings may be appropriate remedy where no material issues are raised by complaint and answer, it cannot be granted where answer raises issue as to any of material allegations of complaint.

8. Pleading ⇨345(2)—Judgment cannot be rendered on pleadings, even though matter denied in one defense be admitted in another defense.

Defendant has right to plead inconsistent defenses, and, if one of them denies material allegations of complaint, judgment on pleadings cannot be rendered, even though matter thus denied may be admitted in another defense.

9. Pleading ⇨345(1)—Defendants' motion for judgment on pleadings held properly denied where answer set up affirmative allegations as to new matter (Code Civ. Proc. § 462).

Defendants' motion for judgment on pleadings held properly denied where answer set up affirmative allegations as to new matter which were, under Code Civ. Proc. § 462, deemed to be denied by plaintiffs.

10. Pleading ⇨345(1)—In action for cancellation of instrument under statute, plaintiffs would not be entitled to judgment on pleadings (Civ. Code §§ 3412, 3413).

If action be considered as one under Civ. Code §§ 3412 and 3413, to cancel instrument which defendants claimed to be deed rather than under Code Civ. Proc. § 738, to quiet title, plaintiffs would not be entitled to judgment on pleadings, since holding that instrument was invalid on its face necessary to such judgment would conclusively show no cause of action was alleged under such section.

11. Pleading ⇨345(1)—Judgment for defendants on pleadings would not be justified merely because validity of deed under which defendants claimed appeared on its face (Civ. Code §§ 3412, 3413).

In action under Civ. Code, §§ 3412 and 3413, to cancel instrument, judgment for defendants on pleadings would not be justified merely because validity of deed under which defendants claimed appeared on face of instrument.

Appeal from Superior Court, Kern County; Erwin W. Owen, Judge.

Action by Levi Cohn and another, special administrators of the estate of Charles Cohn, deceased, against E. A. Klein and another. From a judgment for plaintiffs on pleadings, and an order denying defendants' motion for judgment on pleadings, defendants appeal. Reversed, and order denying defendants' motion on pleadings affirmed.

Emmons, Aldrich & Mack, of Bakersfield, and W. W. Kaye and Bruns & Mooney, all of Los Angeles, for appellants.

F. E. Borton and James Petrini, both of Bakersfield, for respondents.

BARNARD, J. This is an appeal from a judgment in favor of the plaintiffs, on the pleadings. The complaint was filed by the plaintiffs, as special administrators of the estate of Charles Cohn, deceased. It alleges that the said Charles Cohn died on June 22, 1926, and that, at the time of his death, "the said Charles Cohn was the owner in fee and entitled to the possession and in possession of that certain property, situate in the City of Bakersfield, County of Kern, State of California, and commonly known as the Midland Hotel on 19th Street in said city, including the building and the lot or parcel of land upon which said building stands, and was also the owner in fee and entitled to the possession and in possession of that certain property in the City of Bakersfield, County of Kern, State of California, located on 19th Street and commonly known as the Vernon Hotel, including the building and the parcel of land upon which said building stands." It then alleges that on June 25, 1926, one of the defendants caused to be recorded in the county of Kern a certain written instrument, dated August 2, 1926, a copy of which is set out in full in the complaint. This instrument, although in the form of an agreement between the said Cohn and one of the defendants, purports to convey the properties in question to the other defendant herein, the same to take effect upon the death of Cohn. It is then alleged that the defendants have no interest in the real property involved, other than such as arises by and through the said instrument. It is further alleged that the defendants have served notice upon the tenants on the properties involved, claiming and asserting themselves to be the owners of said properties.

The amended answer contains the following: "Said defendants deny that at the time of the death of Charles Cohn as alleged in paragraph two of the complaint, he was the owner in fee or otherwise or at all of either the Midland Hotel as described in said complaint or the Vernon Hotel as described in said complaint or of the buildings or either of them, or the lots or parcels of land upon

which said hotels or either of them then stood and now stand or any of the said property."

There is also included a further special defense and counterclaim, in which the instrument mentioned in the plaintiffs' complaint is set out in full, and the same is alleged to be a deed, with allegations that the same was delivered to one of the defendants during the lifetime of the said Charles Cohn, and that the plaintiffs are wrongfully withholding from the defendants the possession of said properties. There is then set forth another separate affirmative defense, practically to the same effect, but with slightly different averments in regard to the delivery of the instrument in question.

The trial court granted the plaintiffs' motion for a judgment upon the pleadings, and the defendants have appealed. Apparently the trial court was of the opinion that the instrument in question showed upon its face that it was not a deed, and therefore concluded that the plaintiff was entitled to a judgment on the pleadings. Respondents in their brief present the argument thus: "Here the complaint alleges and the amended answer accepts and asserts that the sole claim of defendants is under the instrument in dispute. The instrument is fully before the court in both pleadings, and if, as respondents claim, it bears upon its face the incontrovertible evidence of its complete invalidity, respondents were entitled to judgment on the pleadings, unhampered by any general rule of pleading." As the court said in *Patchett v. Webber*, 198 Cal. at page 451, 245 P. 422, 426: "The difficulty with respondents' position on this phase of the case is that they have overlooked the well-known rule that in actions of this nature a party must prevail upon the strength of his own title and not upon the weakness of another's."

[1-5] This action was apparently not brought under sections 3412 and 3413 of the Civil Code, as it is based, and the motion under consideration was made and granted, upon the theory that the instrument, a copy of which is set up in the complaint, is void upon its face. We take it, the action is one under the provisions of section 738 of the Code of Civil Procedure, and, as such, is subject to the usual rules of quiet title actions. While it is true that the allegation in the complaint as to the possession of the property is not denied in the answer, it is also true that the matter of possession need not be alleged. *Hyatt v. Colkins*, 174 Cal. 580, 163 P. 1007; *Davis v. Crump*, 162 Cal. 513, 123 P. 294. This being true, there was no necessity for denying that allegation. The particular and controlling issue in an action to quiet title is as to the ownership of the property in controversy. *Flood v. Templeton*, 152 Cal. 148, 92 P. 78, 13 L. R. A. (N. S.) 579. It has been held that a denial in the answer of an allegation in the complaint that a plaintiff is

the owner of particular land is sufficient to put in issue the question of title. *Casci v. Ozalli*, 158 Cal. 282, 110 P. 932; *Peterson v. Plunkett*, 4 Cal. App. 302, 88 P. 283. The issue as to plaintiffs' ownership of the premises here involved was directly raised by those portions of the complaint and the amended answer, which are above quoted. The issue having been thus raised, the general rule of law that a plaintiff in a quiet title suit must prevail, if at all, on the strength of his own title, rather than on any weakness in the claims of his opponent, must prevail. *Rocky v. Vieux*, 179 Cal. 681, 178 P. 712; *Patchett v. Webber*, supra; *Biaggi v. Mainero*, 60 Cal. App. 608, 213 P. 541. In *Williams v. City of San Pedro, etc., Co.*, 153 Cal. at page 49, 94 P. 234, 236, the court said:

"It is elementary that a plaintiff in an action to quiet title cannot prevail unless he shows title in himself. If he has no title he cannot complain that some one else, also without title, asserts an interest in the land. *Pennie v. Hildreth*, 81 Cal. 127, 22 P. 398; *United Land Ass'n, etc., v. Pac. Imp. Co.*, 139 Cal. 370, 69 P. 1064, 72 P. 988; *City of San Diego v. Allison*, 46 Cal. 162; *City and County of San Francisco v. Ellis*, 54 Cal. 72; *Winter v. McMillan*, 87 Cal. 256, 22 Am. St. Rep. 243, 25 P. 407; *Heney v. Posoli*, 109 Cal. 58, 41 P. 819; *McGrath v. Wallace*, 116 Cal. 551, 48 P. 719; *McKenzie v. Budd*, 125 Cal. 602, 58 P. 199; *Schroder v. Aden G. M. Co.*, 144 Cal. 630, 78 P. 20. A defendant in such an action may always effectually resist a decree against himself, by showing simply that the plaintiff is without title."

[6] In the instant case, defendants had a right to attack the plaintiffs' title to the real property involved, irrespective of whether or not the instrument, which seems to be the principal ground of controversy, was, in fact, a valid deed, or not. Under defendants' denial of the allegations in plaintiffs' complaint that the said Charles Cohn was the owner in fee of the property many other defenses were available to the defendants other than their reliance upon the instrument in question. If it be assumed that the instrument in question did not constitute a deed, and that the defendants' claims under said instrument were worthless, it was still incumbent upon the plaintiff to prove his own title, and, this having been flatly denied in the answer, an issue was raised which should have been heard on its merits.

[7, 8] While a judgment on the pleadings may be an appropriate remedy where no material issues are raised by the complaint and the answer, it cannot be granted where the answer raises an issue as to any of the material allegations of the complaint. *Cass v. Rochester*, 174 Cal. 358, 163 P. 212, 213; *Neale v. Morrow*, 174 Cal. 49, 161 P. 1165. Nor is the rule any different where, as here, the

two separate defenses relate more particularly to the instrument set forth in both the complaint and the separate defenses in the answer. These separate defenses merely set up additional matters, other than the previous denial of the plaintiffs' title. In any event, as is stated in *Cass v. Rochester*, supra:

"* * * A defendant has the right to plead inconsistent defenses, and, if one of them denies material allegations of the complaint, judgment cannot be rendered on the pleadings, even though the matter thus denied may be admitted in another defense. *Nudd v. Thompson*, 34 Cal. 39; *Botto v. Vandament*, 67 Cal. 332, 7 P. 753."

[9] The defendants also filed a motion for judgment on the pleadings, which was denied by the court, and an appeal is also taken from that order. It is a sufficient answer to this portion of the appeal to call attention to the fact that the answer of the defendants sets up affirmative allegations as to new matter, including the allegation that the instrument in question is a deed, that it was delivered by the said Charles Cohn, in his lifetime, to the said Ethel Klein, and that it was delivered with the intent that it take effect immediately. All of these allegations, and others, under section 462 of the Code of Civil Procedure, are deemed to be denied by the plaintiffs. Assuming the instrument in question to have been a valid deed, upon its face, such defenses as fraud, undue influence, incompetency, and the like, were available to the plaintiffs, and it is possible that some such defense might have successfully prevailed against a deed that was otherwise valid.

[10, 11] If this action be considered as one under sections 3412 and 3413 of the Civil Code, rather than under section 738 of the Code of Civil Procedure, the result is the same. In that event, a holding that the instrument was invalid upon its face, necessary for a judgment for the plaintiffs on the pleadings, would conclusively show no cause of action was alleged, under these two sections. Nor would a judgment for the defendants, on the pleadings, be justified, merely because the validity of the deed appeared upon the face of the instrument, for the reasons above stated.

We cannot escape the conclusion that there were issues here that required a hearing on the merits, and that the judgment on the pleadings in favor of the plaintiffs, was improperly entered. It therefore becomes unnecessary to take up the other questions raised. The order granting plaintiffs' motion for a judgment on the pleadings is reversed, and the order denying defendants' motion for judgment on the pleadings is affirmed.

We concur: SLOANE, P. J.; MARKS, J.

103 Cal. App. 621

WORSLEY v. SEELIG et al. (Civ. 6342.)

District Court of Appeal, Second District, Division 1. California. Jan. 31, 1930.

Usury $\Rightarrow$ 78—Interest on usurious loan was forfeited under statute, but remainder of contract was valid.

Where beneficiary of deed of trust upon real property sought to enjoin trustee under another deed of trust upon same property from selling under the latter deed which was alleged to be usurious, judgment enjoining trustee from selling for amount in excess of principal and expenses of sale was proper, since under usury law the whole contract was not void, but only the portion thereof relating to interest.

Appeal from Superior Court, Los Angeles County; Albert Lee Stephens, Judge.

Action by E. R. Worsley against Harry B. Seeling and others. From a portion of a judgment for plaintiff, he appeals. Affirmed.

Emmet H. Wilson, of Los Angeles, for appellant.

Milton M. Cohen and Jerome H. Kann, both of Los Angeles, for respondents.

CRAIG, Justice pro tem. As stated in plaintiff's notice of appeal, this appeal is only "from that portion of the judgment heretofore rendered and entered in the above-entitled action enjoining the defendant Title Insurance and Trust Company from selling the property described in the complaint on file herein under the trust deed referred to in the said complaint, upon any notice or proceeding wherein the amount stated to be in default or the amount for which said property is to be sold is in excess of \$2,325.00."

The complaint alleges: That plaintiff is the beneficiary under a deed of trust upon certain real property; that defendant Title Insurance & Trust Company, as trustee under another deed of trust upon the same real property, has given notice of sale under the latter trust deed, and, unless enjoined, will make such sale; that said latter trust deed was given upon a loan purporting to be of \$3,500, but in fact of only \$1,800, and that the loan was usurious, and prays that the note and deed of trust be adjudged to be void, or, alternatively, that they be adjudged "void as to any stipulation therein contained to pay interest and further void as to any stipulation to pay any sum in excess of \$1,800.00

and that it be determined that plaintiff's trust deed is a prior security to said trust deed to the Title Insurance and Trust Company," and that defendants be enjoined from any sale thereunder. Before trial plaintiff became the owner of said real property as purchaser at a sale under his deed of trust, and thereupon filed a supplemental complaint asking that his title be quieted as against all defendants.

The court found that "the loan was in the sum of \$3500.00, which thereafter was reduced to \$2325.00 and no more, and that the rate of interest exceeded the rate of \$12.00 upon \$100.00 for one year and therefore the said agreement for the payment of interest contravenes the usury law of the state of California." By its judgment the court permanently enjoined said Title Insurance & Trust Company from selling the real property under said deed of trust for an indebtedness in excess of the unpaid principal of \$2,325 and expenses of sale. The appeal was on the judgment roll, hence the evidence is not before us.

The appeal was taken on February 7, 1927. Thereafter, on March 4, 1927, the Supreme Court of this state, in the case of *Haines v. Commercial Mortgage Company*, 200 Cal. 609, 622, 255 P. 805, 806, 53 A. L. R. 725, said: "Even a casual reading of the statute itself shows that the legislative intent was not to declare the whole contract void, but only the portion thereof relating to interest." That the principal is not forfeited by a usurious loan was again declared by the Supreme Court in *Curtis v. Thaxter*, 204 Cal. 439, 268 P. 630.

The forfeiture of interest and the allowance of sale for the principal were therefore proper adjudications.

Appellant contends that the findings of fact do not support the judgment, and that the judgment does not dispose of all of the issues in the case. In this connection appellant advances several propositions which we need not discuss, for the reason that the appeal is from only that portion of the judgment as fully set forth at the beginning of this decision. The findings are incomplete in many particulars, but, when considered with the admissions of the pleadings, are sufficient to support "that portion of the judgment" appealed from.

The judgment is affirmed.

We concur: CONREY, P. J.; HOUSER, J.

MADERA CANAL & IRRIGATION CO. v. K. ARAKELIAN, Inc., et al. (Civ. 3842.)★

District Court of Appeal, Third District, California. Jan. 30, 1930.

Rehearing Denied March 1, 1930. Hearing Denied by Supreme Court March 31, 1930.

1. Appeal and error ⇨931(1)—For purpose of supporting judgment, every intendment should be resolved in favor of findings.

For the purpose of supporting the judgment, every intendment should be resolved in favor of the findings.

2. Waters and water courses ⇨254—Bare finding that decree reduced quantity of water to which defendant sued for water rental was entitled means that water called for by contract was furnished.

Where court found that decree reduced quantity of water to which defendant sued for contract price of water furnished for irrigation purposes was entitled under contract, and court did not find that that amount was not in fact furnished to defendant in each season, finding held to mean that, while by virtue of injunction as basis for decree defendant was not entitled thereto, yet in fulfillment of covenants of agreement plaintiff actually did supply water which contract called for.

3. Waters and water courses ⇨254—Under contract providing that, if water in irrigation company's canals should be less than certain amount, landowners should be entitled to proportionate quantity, company fulfilled covenant by supplying amount decree found landowners entitled to.

Under contract for furnishing of irrigation water providing that, if at any time aggregate quantity of water in canal should fall short of 250 feet flowing per second, then landowners shall be entitled to only relative quantity which their stipulated amount bears to total amount contained in canal, irrigation company performed covenant respecting quantity of water to which defendant sued for price was entitled by delivering to defendant that amount of water which decree of former action found defendant was entitled to, since rights of water consumer are measured by terms of contract.

4. Waters and water courses ⇨254—Landowner's refusal to accept water justified failure of irrigation company to deliver it that season (Civ. Code, § 1511, subd. 1).

Where contract between irrigation company and landowner provided that water for irrigation purposes should be furnished each year, refusal of landowner to accept water for one of years in term was sufficient justification for failure of irrigation company to deliver water in that season under Civ. Code, § 1511, subd. 1.

5. Waters and water courses ⇨254—Under contract conditioning water rate on supplying specified quantity of water, failure to furnish water during year relieved consumer from paying rental for season.

Where contract between irrigation company and landowner specifically provided that company should not be responsible for deficiency of

water caused by drought, insufficient water in river, etc., and under which stipulated water rate was conditioned on supplying land with specified quantity of water each year, total failure of irrigation company to furnish water during entire year relieved landowner consumer from obligation to pay water rental for that season.

6. Vendor and purchaser ⇨228(7)—Under recorded contract creating lien for irrigation water, lien was binding on land in hands of subsequent grantee (Civ. Code, §§ 2872, 2881, 2890).

Where contract between irrigation company and landowners specifically created lien on land for payment of charges for water furnished for irrigation purposes, purchaser of land had constructive notice of lien, where contract was duly recorded so that lien was binding on land in hands of subsequent grantee with notice thereof, and could be enforced by foreclosure with same effect under Civ. Code, §§ 2872, 2881, 2890, as though title had not been transferred.

Appeal from Superior Court, Madera County; E. N. Rector, Judge.

Action by the Madera Canal & Irrigation Company against K. Arakelian Inc., and others, in which the named defendant filed a cross-complaint. From an adverse judgment, the named defendant appeals. Modified, and, as modified, affirmed.

See, also, 279 P. 201.

Lindsay & Gearhart, of Fresno, for appellant.

Walter C. Maloy, of Covina, for respondent.

R. L. THOMPSON, J. This is an appeal from a judgment for the contract price of water furnished for irrigation purposes, together with a decree foreclosing a lien for the security thereof. The appeal is based upon the judgment roll alone, and a reversal is sought upon the grounds that the findings are inconsistent, and that they do not support the judgment.

The plaintiff is a corporation engaged in supplying water for irrigation purposes. The defendant is also a corporation engaged in an agricultural enterprise. October 27, 1890, the German Savings & Loan Society, a corporation, was the owner of 960 acres of farm land in Madera county. On the last-mentioned date the savings and loan society entered into a written contract with the plaintiff, which was duly recorded, to supply said land for a term of 38 years during each season until 1938, with "all the water that may be required by the said party of the second part (Savings and Loan Society) not exceeding at any time six cubic feet per second," in consideration of \$2,000, which was paid, and \$1 per acre payable on the 1st day of September of each year during the term of the contract. It was also provided that this

water service was appurtenant to and transferable with the land. The contract also provided that: "The party of the first part *shall not be responsible* for a deficiency of water caused by drought, insufficient water in the river, * * *" etc., that the first party was authorized to sell and supply water for the use of 40,000 acres of farm lands, aggregating 250 cubic feet per second, and that, "If at any time the aggregate quantity of water in its canals shall fall short of 250 feet flowing per second, then each water right shall represent the 250th part of said aggregate quantity and the party of the second part shall be entitled to receive water in that proportion." Finally, the contract created a lien upon the land for the security of said water rate.

On January 2, 1923, the defendant acquired title to 320 acres of said 960-acre tract of land, together with the water rights appurtenant thereto, consisting of two cubic feet per second, subject to the terms and conditions of said contract. Upon trial the court adopted the entire contract as a part of its findings which was adjudged to be valid and binding. It was further found that the plaintiff had supplied said land with water pursuant to said contract for each season from 1911 to 1924, inclusive, except that by reason of an injunction duly issued in an action in the superior court of Madera county in 1916 the plaintiff's sole available water supply from the Fresno river was permanently reduced from 250 cubic feet per second to 200 cubic feet per second, and in the season of 1924, by virtue of a drought which prevailed, the plaintiff was without any water with which to fulfill the contract. It was then found there was due and owing from the defendant the principal sum of \$1,503.53 and interest, amounting to \$533.71, for which sum judgment was rendered, together with \$400 attorneys' fees, which were provided for by the contract. A lien was adjudged against the land to secure the payment of these sums, and a sale was ordered to satisfy the judgment.

The appellant contends that the findings are inconsistent with respect to the performance of the contract on the part of the plaintiff, and that the findings adopt facts which are insufficient to excuse the failure on the part of the plaintiff to furnish the appellant's land with the full amount of 2 cubic feet of water per second each year, as provided by the contract.

It is asserted that the following findings of the court are conflicting and irreconcilable. In the language of the complaint the court first found: "That plaintiff and cross-defendant has at all times duly done, kept and performed each and all and every one of its covenants in said water right contract contained." The court further found that on January 31, 1916, a judgment was duly en-

tered in an action in the superior court of Madera county in which this plaintiff was a party defendant, restraining this plaintiff from diverting from the Fresno river, which was its sole source of water supply, more than 200 cubic feet of water per second, and that the decree in that case reduced the quantity of water to which the defendant was entitled under the contract from 2 cubic feet to 1% cubic feet per second. The court, however, did not find that 2 cubic feet of water per second was not in fact furnished to the defendant each season. It was further found that in 1923 the plaintiff offered to deliver water to the defendant pursuant to the contract which it refused to accept. It was further found: "That in the year 1923 no demand was made by said cross-complainant for water under the said water right contract or at all for the said lands; that in the year 1924, by reason of drought and insufficiency of water in the river and in the canals of plaintiff and cross-defendant, said plaintiff and cross-defendant was prevented from delivering any water to said lands of defendant and cross-complainant, by reason of the said drought, and that no demand was made at any time in said year 1924 for water to be delivered under said contract by said defendant and cross-complainant upon plaintiff and cross-defendant."

[1-3] There is no inconsistency between the general finding that the plaintiff fully performed the covenants of the contract on its part and the finding with relation to the injunction which was issued in the former action restraining the plaintiff from diverting more than 200 cubic feet of water from the Fresno river or the further finding that, as a result of that injunction, the water rights of the defendant in this case were thereby reduced 20 per cent. from the maximum amount specified by the contract. For the purpose of supporting the judgment, every intendment should be resolved in favor of the findings. Applying this rule of construction, the findings may reasonably be held to mean that while, by virtue of the injunction, the defendant was not entitled to more than 1% cubic feet of water per second, yet in fulfillment of the covenants of the agreement (assuming that the contract required that amount) the plaintiff actually did supply 2 cubic feet of water per second. Moreover, the contract which was attached to the complaint as an exhibit, and found to be valid and binding, specifically provided that the quantity of water to which defendant was entitled was determined by the ratio which defendant's 320-acre tract of land bore to the entire 40,000 acres which the plaintiff was authorized to supply. Otherwise expressed, the defendant's portion was to be determined by the ratio which 2 cubic feet of water bears to the aggregate quantity of 250 cubic feet per second. The contract provides that, "if at any time the aggregate quantity of water in its

canals shall fall short of two hundred and fifty feet flowing per second," then the land-owners shall be entitled to only the relative quantity which their stipulated amount bears to the total amount contained in plaintiff's canals. Under this provision, we are of the opinion the plaintiff fully performed the covenant respecting the quantity of water to which the defendant is entitled by delivering to it 1½ cubic feet per second. The rights of a water consumer are measured by the terms of his contract. When a water company enters into a contract to furnish water to a consumer for irrigation purposes, the extent of the legal claims of the consumer is limited by the terms of his contract. He acquires only such rights as he bargains for. 3 Kinney on Irrigation and Water Rights (2d Ed.) 2727, § 1514.

[4] The further contention of the appellant that the findings which excuse the plaintiff for failure to supply water for the season of 1923 is without support in the record is equally devoid of merit. Regarding the furnishing of water for 1923, the court found: "In the year 1923, and on or about the 12th day of March * * * and (also) on or about the 12th day of April in said year, plaintiff * * * offered to deliver water to said land as provided in said contract, but that defendant and cross-complainant refused to receive the same." This refusal to accept water for the year 1923 was a sufficient justification for the failure to deliver it that season. Section 1511, subd. 1, Civ. Code.

Respecting the plaintiff's failure to supply the defendant's land with water during the season of 1924, the court found: "In the year 1924, by reason of drought and insufficiency of water in the river and in the canals of plaintiff * * * (the) plaintiff * * * was prevented from delivering any water to said lands. * * *"

[5] While the contract specifically provides that the plaintiff "shall not be responsible for a deficiency of water caused by drought, insufficient water in the river," etc., it does not seem reasonable to hold this means the consumer must, nevertheless, pay for water which he did not receive. The foregoing cause certainly does relieve the plaintiff from a claim of damages for nonperformance of the contract on account of drought. The failure to supply water on account of drought would furnish no ground for rescission of the contract. This clause clearly relieves the plaintiff from liability for damage to crops resulting from drought or other cause over which it has no control. 15 R. C. L. 481, § 34. There is, however, a clear distinction between relieving the plaintiff from the legal responsibility of a failure to supply water for irrigation purposes and the imposition of a liability on the part of the defendant to pay for what he did not receive. It is

true that the contract provided that, when the plaintiff delivered the supply of water in its main canal at the gate communicating with the lateral ditches which were constructed by the defendant on its land, the "annual water rate of one dollar per year for each acre of said land * * * shall become permanent." But this stipulated water rate was conditioned upon supplying the land with a specified quantity of water each year. By reason of the drought, there was a total failure of consideration for the annual water rate for that season. May it reasonably be said that under the terms of this contract the defendant was bound to pay an annual water rate of \$1 per acre for 38 years, even though for a series of years, on account of drought, he obtained no water whatever? To use an extreme illustration, may it be said that even though the entire source of supply were permanently destroyed by drought or other cause over which the plaintiff had no control, the consumer would still be required to pay the annual water rate throughout the entire term? We think not. Since the contract may be segregated into uniform annual periods, during which reciprocal obligations are created to supply a specified quantity of water on the one hand, and to pay a definite amount thereof upon the other hand, a total failure to furnish water during an entire year should relieve the consumer from the obligation to pay for what he did not receive. The ground of this release from liability is the failure of consideration.

We are therefore of the opinion that the judgment should be modified to the extent of disallowing the water tax for the year 1924, together with the interest thereon.

[6] There is no merit in the contention of appellant that his land was not liable for the unpaid water charges which accrued prior to the date upon which it acquired the title thereto. The contract specifically created a lien upon this land to secure the payment of these charges. The purchaser of the land had constructive notice of this lien, for the contract was duly recorded. A lien is a charge imposed upon the property to secure the fulfillment of an obligation. Section 2872, Civ. Code. Such a lien may be created by contract (section 2881, Civ. Code), but imposes no personal obligation to perform the act for which the lien is a security (section 2890, Civ. Code). The lien, however, is binding upon the land in the hands of a subsequent grantee, with notice thereof, and may be enforced by foreclosure with the same effect as though the title had not been transferred. Fresno Canal Co. v. Rowell, 80 Cal. 114, 22 P. 53, 13 Am. St. Rep. 112; 3 Kinney on Irrigation and Water Rights (2d Ed.) 2728, § 1515.

The judgment is modified by striking therefrom the water rate for the year 1924, in the

sum of \$320 and interest on said sum from the 1st day of September, 1924. As so modified, the judgment is affirmed, respondent to recover its costs on appeal.

We concur: FINCH, P. J.; PLUMMER, J.

103 Cal. App. 735

SMITH v. CALLEY et al. (Civ. 97.)

District Court of Appeal, Fourth District, California. Feb. 5, 1930.

1. Damages $\S$ 188(1)—Evidence which merely showed cost of automobile, that it was wrecked, and thereafter sold for junk, held insufficient to support finding of damages (Civ. Code, $\S$ 3333).

Evidence which merely showed cost of automobile, that plaintiff had had it five or six months, and that after accident it was "a complete wreck," and plaintiff sold it for junk, held insufficient to support finding as to amount of damage, under Civ. Code $\S$ 3333, making measure of damages for destruction of personal property the value of the property destroyed.

2. Damages $\S$ 113—Detriment caused by injury to personal property is difference in value before and after injury, unless repairs can be effected for smaller sum (Civ. Code $\S$ 3333).

Under Civ. Code $\S$ 3333, making measure of damages for destruction of personal property the value of the property destroyed, detriment caused by injury to property is difference in value immediately before and after the injury, provided that, if repairs can be effected for smaller sum, that sum becomes the limit of recovery.

Appeal from Superior Court, Kern County; Erwin W. Owen, Judge.

Action by Roy Smith against Elaxazer Calley and others. Judgment for plaintiff, and defendants appeal. Reversed.

Emmons, Aldrich & Mack, of Bakersfield, for appellants.

George M. Cook, of Taft, for respondent.

MARKS, J. Respondent instituted this action in the court below to recover a judgment for damages resulting from a collision between his automobile, driven by himself, and a motor truck, driven by Elaxazer Calley for the Maricopa Creamery and A. C. Ross, who were its owners. The trial court rendered judgment in favor of respondent, which, according to the findings, was composed of the following items: \$528.40, as damages to respondent's automobile; \$51.60, for loss of wages; and \$20, expended for medical attendance and nursing.

Appellants complain that there is no evidence to support the finding that the automobile was damaged to the extent of \$528.40.

The only evidence in the record on this point was given by respondent as follows:

"Q. What did you pay for the Dodge car? A. The car cost me \$1184.00 complete.

"Q. Did you buy it new? A. Yes.

"Q. How long had you had it at the time of the impact? A. Five or six months.

"Q. What did you do with it after the wreck? A. I sold it for junk.

"Q. You sold it for junk? A. Yes.

"Q. What did you get for it?

"Mr. Emmons: We object to that as incompetent, irrelevant and immaterial.

"Mr. Cook: To show the value of the car.

"Mr. Emmons: They have alleged the elements of damage, and they are limited to proving damages as alleged in their complaint.

"Mr. Cook (after argument): Withdraw the question.

"Q. What damage, if any, occurred to your car from the impact? A. It was a complete wreck.

"Mr. Emmons: Move to strike out the answer as being the conclusion of the witness.

Mr. Cook: Q. What do you mean by 'a complete wreck'? A. The motor was busted open; the frame of it 'shot'; the radiator 'shot' to pieces; the body of the car wasn't injured so much, only the dash—the motor was shoved back into the dash. I would like to have looked at it close at that time, but I couldn't stand up.

"Mr. Emmons: Move to strike out the last statement as not responsive.

"The Court: It may go out.

"Mr. Cook: Yes, that may go out.

"Q. After the injury, did you consult anybody to get an estimate as to what it would cost to repair the damage done? A. Yes, sir.

"Mr. Emmons: Object to that as hearsay.

"The Court: Put the other fellow on the stand and prove that by him.

"Mr. Cook: As a matter of fact, you allege in the complete—you allege it was a complete wreck; is that correct?

"Mr. Emmons: Objected to as incompetent, irrelevant and immaterial; what the pleadings allege is shown by the pleadings themselves, but that is not evidence; he alleges special damage in the sum of \$714.40.

"Mr. Cook: That is all the damage we are asking for.

"Mr. Emmons: What are you trying to prove now, then?

"The Court: He has described pretty well what happened to the car."

[1, 2] The injury to the automobile of respondent was amply proven, but the measure

of his financial loss following such injury is entirely lacking. The automobile had been driven by respondent several thousand miles, and its original cost to him was no measure of its value at the time of the accident. There is no evidence of the amount of money required to repair the injuries, if they could be repaired, nor the value of the car after the accident. That it was sold shows that it had some value. "Under section 3333 of the Civil Code, the measure of damages for the destruction of personal property is the value of the property destroyed. Its cost is not the standard, nor is money expended in replacing it. The detriment caused by the injury or partial destruction of personal property is the difference in value immediately before and after the injury, provided that if repairs can be effected for a smaller sum, that sum becomes the limit of recovery." 8 Cal. Jur., p. 814; Olds & Stoller, Inc., v. Seifert, 81 Cal. App. 423, 254 P. 289; Byrne v. Western Pipe & Steel Co., 81 Cal. App. 270, 253 P. 776; Menefee v. Raisch Imp. Co., 78 Cal. App. 785, 248 P. 1031. There is no evidence in the record to support the finding that respondent had been damaged in the sum of \$528.40 by the injury to his automobile. No measure of the damages was furnished to the trial court.

Judgment reversed.

We concur: SLOANE, P. J.; BARNARD, J.

103 Cal. App. 730

BARNES v. OSGOOD et al. (Civ. 5639.)

District Court of Appeal, Second District, Division 2, California. Feb. 5, 1930.

1. Brokers ⇨49(1)—Vendor's definite refusal to comply with agreement to sell excused broker from tendering performance (Civ. Code, §§ 1440, 1511, 1512, 1515).

Where vendor's refusal to comply with his agreement to sell was definite and certain, broker of performance is excused by refusal in chaser and vendor face to face, as formal ten-advance to accept performance, under Civ. Code, §§ 1440, 1511, 1512, 1515.

2. Brokers ⇨49(1)—Broker's performance as to one co-owner was performance as to her co-obligor, where both had given broker exclusive right to sell (Civ. Code, §§ 1475, 1488).

Where co-owners as joint obligors gave broker exclusive right to sell property, broker's performance as to one was performance as to her co-obligor under Civ. Code, §§ 1475, 1488.

3. Brokers ⇨49(1)—Broker obtaining binding agreement to purchase from prospective purchaser for price and on terms specified by owners held entitled to commission.

Where broker secured from prospective purchaser valid and binding agreement to purchase for price and on terms specified by ven-

dors in their listing agreement, broker held required to do nothing more to entitle him to commission.

4. Brokers ⇨63(1)—Broker who was to receive, as commission, price received above vendors' selling price, held entitled to commission, although vendors refused to complete sale.

Where broker's contract provided that broker was to receive as commission price received above vendors' selling price, broker held entitled to commission although vendors refused to complete sale, since, in absence of agreement to contrary, broker had performed his contract and was entitled to commission when he produced purchaser.

Appeal from Superior Court, Los Angeles County; William C. Doran, Judge.

Action by Raymond J. Barnes against Wendell J. Osgood and another. Judgment for plaintiff, and defendants appeal. Affirmed.

John C. Miles, of Los Angeles, for appellants.

Sheran, Alvord & Hearn and Thomas H. Hearn, all of Los Angeles, for respondent.

BURNELL, Justice pro tem. The appellants, who owned an equity in two lots in the city of Los Angeles, entered into a written listing agreement with the respondent whereby they granted to him "the exclusive and irrevocable right to sell the same" within the period of 45 days after February 14, 1925, "for \$7000, and to accept a deposit thereon, cash 1027, balance *as per contract*—three payments 1991 each, interest and taxes to date of assignment to be paid by seller." (Italics ours.) The agreement further provided: "I hereby agree to pay said agent as commission price received above 7000 of the selling price." Within the time limit of this agreement the respondent interested one Cornitius in the property and secured from him a deposit of \$100 and a written agreement to purchase the property "for the purchase price of eighty-two hundred dollars, payable as follows: \$2287 cash (of which \$100 is above acknowledged) and the balance *as per contracts of purchase issued between the Security Trust & Savings Bank and E. May Eaton and Wendell Osgood*; together with interest at the rate of 7% per annum, payable quarterly." (Italics ours.) The court found, and the appellants do not dispute the fact, that Cornitius was ready, willing, and able to purchase the land for the price and on the terms above outlined; nor do the latter contend that those terms differ from those specified in the listing agreement. Thereafter respondent, after several abortive efforts, finally succeeded in reaching appellant Osgood on the telephone and told him that he had a purchaser for the property and a deposit on the purchase price. Osgood stated that neither himself nor Miss Eaton want-

ed to sell the land, to which respondent replied: "I have it sold, you gave me an exclusive option on the property, and I have a purchaser and a check from him, he wants the property, ready to buy it and is able to buy it." Osgood's answer was, "Well, you are not going to get it." In a second conversation over the telephone, Osgood said to respondent, "You haven't made a tender on it yet," to which respondent answered that he would "come right down and make it." Osgood said he would be in his office "for the afternoon," but when respondent called there he was not in, and after waiting for him half an hour, calling at his home, and attempting to locate him by use of the telephone, all without success, respondent went to the home of Miss Eaton, who also stated that she and Osgood did not want to sell. A couple of days later respondent again called on Miss Eaton, accompanied by Cornitius, whom he introduced to her as the purchaser of the property, stating that they were there to close the deal. In reply to the question, "What was done about offering her the money?" respondent testified: "I took my pocketbook out and said, 'Miss Eaton, Mr. Cornitius is ready to buy the lot; I am here to pay you what you have got coming on the lot.'" Miss Eaton was, to quote respondent's testimony, "very antagonistic; she said, 'No, you are not going to steal that lot from me, you are not going to get it.'" She also said that Mr. Osgood "looked after all her business and that all transactions must be made through him." After vainly attempting to again communicate with the elusive Osgood, respondent brought this action for his commission and recovered the judgment from which this appeal is taken.

[1, 2] Appellants' first point is that "the plaintiff did not produce to the defendants, and particularly to the defendant Osgood, a purchaser ready, willing and able to purchase the property." It is not contended that Cornitius was not ready, able, and willing to purchase the property for the price and upon the terms specified by appellants in their listing agreement with respondent, but merely that respondent did not "produce" him. The foregoing review of the evidence is sufficient, without further comment, to demonstrate the utter lack of merit in this contention as applied to Miss Eaton. As to Osgood, it is apparent that he was deliberately avoiding respondent, and that for the latter to have brought the purchaser face to face with him would have been a vain act had respondent been able to perform it. His refusal to comply with his agreement to sell was definite and certain. The law does not require the performance of a vain act, and a formal tender of performance is excused by the refusal in advance of the party as to whom such performance should be made to accept the same. Civ. Code, secs. 1440, 1511, 1512, 1515; Pierce v. Lukens, 144 Cal. 397, 77 P. 996; Scribner

v. Schenkel, 128 Cal. 250, 60 P. 860; Peardon v. Markley, 50 Cal. App. 257, 195 P. 70. Furthermore, the obligation of Osgood and Miss Eaton was a joint obligation, and performance as to her was performance as to her co-obligor. Sections 1475 and 1488, Civ. Code; Hoover v. Wolfe, 167 Cal. 337, 139 P. 794.

[3] But apart from the question as to physical production of the purchaser, and even if he had not been brought face to face with either of the defendants, the evidence establishes the fact that respondent did all that could be required of him to entitle him to the commission for which he was awarded judgment. There are three methods either one of which a licensed broker employed to sell real property may follow in order to entitle him to his commission. All of them require that he shall, within the life of his contract or any extension thereof, find a buyer who is ready, able, and willing to purchase the principal's property for the price and on the terms demanded by the latter. Having done this, he may either (1) obtain a valid and binding contract from the purchaser agreeing to buy for such price and on such terms, (2) bring the buyer and seller together and thus enable them to enter into a contract of sale, or (3) produce such purchaser who verbally accepts the seller's terms and offers to *the latter* to enter into a written contract embodying said terms and binding on both parties. Twogood v. Monnette, 191 Cal. 103, 215 P. 542, 544; Meline Co. v. Kleinberger, 77 Cal. App. 193, 246 P. 136; Coulter v. Howard, 203 Cal. 17, 262 P. 751. The record before us shows, and the appellants do not otherwise contend, that respondent had secured from Cornitius a valid and binding agreement to purchase for the price and on the terms specified by appellants in their listing agreement. Having thus pursued the first of the three methods above set forth, he was required to do nothing more to entitle him to his commission.

[4] Appellants' other contention is that respondent "was entitled to a commission only out of the money received from the sale of the property, and inasmuch as no sale, was made and no money was received from said sale," he is entitled to no commission. The clause as to agent's commission in the agreement of employment does not bear out any such construction. In the absence of any agreement to the contrary, the broker has performed his contract and is entitled to his commission when he produces the purchaser by any of the three methods above outlined (Phelps v. Prusch, 83 Cal. 626, 23 P. 1111), "regardless of whether a written contract is actually entered into [between buyer and seller] or whether the sale is ever consummated by the delivery of the property and the payment of the purchase price." Twogood v. Monnette, *supra*; Gunn v. Bank of California, 99 Cal. 349, 33 P. 1105; Merwin v. Shaf-

ner, 31 Cal. App. 374, 160 P. 684. And this was held to be the case even where the agreement was to pay the commission on the sale "when the same is consummated." Purcell v. Firth, 175 Cal. 746, 167 P. 379, 380.

The judgment is affirmed.

We concur: CRAIG, Acting P. J.; IRA F. THOMPSON, J.

MCGAFFEY CANNING CO., Inc., v. BANK OF AMERICA et al. (Civ. 7232.) ★

District Court of Appeal, First District, Division 1, California. Feb. 1, 1930.

Rehearing Granted March 3, 1930.

1. Attachment ⇨296—Third-party claim not being pleading, technical niceties in verification should not overshadow claimant's rights to possession of attached property (Code Civ. Proc. § 689).

Third-party claim to attached property not being a pleading, technical niceties, such as absence of phraseology used in verifying pleadings under Code Civ. Proc. § 689, should not overshadow claimant's rights to legal possession of property.

2. Attachment ⇨296—Affidavit stating facts, and sworn to before authorized officer, held sufficient third-party claim without phraseology for verifying pleadings; "verify"; "claim verified by his oath" (Code Civ. Proc. § 689).

Third-party claim to attached property in form of affidavit, setting out facts and sworn to before authorized officer, is a "claim verified by his oath" within Code Civ. Proc. § 689, and puts attaching creditor to his election to protect sheriff with sufficient indemnity bond or submit to release of property, without addition of phraseology used in verifying pleadings; "verify" meaning "to affirm under oath," "to testify or affirm formally or upon oath."

[Ed. Note.—For other definitions, see Words and Phrases, First, Second, and Third Series, Verification; Verify.]

3. Attachment ⇨299—Sheriff and surety held not liable for conversion of property released to apparent pledgee after attachment creditor's refusal to furnish indemnity bond (Civ. Code, § 3440).

Third-party claim, averring loans by claimant to owner on security of attached property, which claimant held in pledge under warehouse receipts, issued and delivered to it before attachment, being sufficient to state apparent right to possession by claimant as pledgee, sheriff and surety on his bond were not liable to attachment creditor for conversion of property because of sheriff's withdrawal of keeper and release of property by warehouse company to claimant after creditor's refusal to furnish indemnity bond on grounds that there was no change of possession, required by Civ. Code, § 3440, to consummate pledge.

4. Trial ⇨165—Testimony conflicting with testimony supporting plaintiff's contention must be disregarded for purposes of nonsuit.

For purposes of nonsuit, testimony in conflict with testimony supporting plaintiff's contention must be disregarded.

5. Warehousemen ⇨15(3)—Delivery of warehouse receipt to one lending money on security of merchandise stored is equivalent to delivery of merchandise, but efficacy of pledgee's symbolio possession depends on pledgor's complete relinquishment of possession and control.

Delivery of warehouse receipt to one lending money on security of merchandise, actually delivered to warehouseman with actual and explicit change of possession, is legal equivalent of delivery of merchandise itself, but efficacy of such symbolio possession by pledgee depends on complete and actual, as distinguished from merely formal or colorable, relinquishment of possession and control by pledgor.

6. Warehousemen ⇨15(3)—Warehousing on pledgor's premises only far enough to get goods represented by documents is ineffective.

Warehousing on premises of owner proposing to pledge his merchandise is effective when done in obedience to legal requirements, but when done only far enough to get the goods represented by documents, without really storing them, such documents are but scraps of paper.

7. Warehousemen ⇨15(3)—Warehousing by pledgor without open, visible, unequivocal change of possession, manifested by substantial outward signs that his control of property has wholly ceased, is ineffective (Civ. Code, § 3440).

Warehousing, including "field warehousing," cannot be effectively conducted by pledgor without complying with Civ. Code § 3440, requiring open, visible, unequivocal change of possession, manifested by such substantial outward signs as to make it evident to world that his control has wholly ceased and that another has acquired and is openly exercising exclusive dominion over property; merely colorable or constructive change of possession being insufficient.

8. Pledges ⇨11—"Actual change of possession," required to validate pledge, means actually existing and truly and absolutely carried out (Civ. Code, § 3440).

"Actual change of possession," required by Civ. Code, § 3440, to validate pledge, means existing in fact and truly and absolutely carried out, as opposed to formal, potential, virtual, or theoretical change.

[Ed. Note.—For other definitions, see Words and Phrases, First, Second, and Third Series, Actual and Continued Change of Possession.]

9. Pledges ⇨11—Actual change of possession validating pledge must be shown by particular facts and circumstances and usually determined by court or jury from all evidence (Civ. Code, § 3440).

Whether actual change of possession, required by Civ. Code, § 3440, to validate pledge, is shown, depends on facts and circumstances of each particular case, and must usually be de-

terminated by court or jury after hearing evidence adduced on both sides.

10. Warehousemen *↪* 15(3)—Appointment of pledgor or his agent as warehouseman's custodian of goods must be considered on question of actual change of possession, though not conclusively ineffectual (Civ. Code, § 3440).

Appointment of owner of goods or one of his staff as warehouseman's custodian thereof must be carefully weighed, in connection with other facts in evidence, in determining whether there was actual change of possession, required by Civ. Code, § 3440, to validate pledge to holder of warehouse receipts, though not conclusively ineffectual.

11. Pledges *↪* 11—Pledgee of property in pledgor's field warehouse must so segregate and mark it as to indicate his possession to ordinarily prudent business men.

It is duty of pledgee so to segregate and mark property on pledgor's premises or in field warehouse as to indicate pledgee's possession thereof to business men of ordinary prudence dealing with pledgor in ordinary course of business on faith of such property.

12. Warehousemen *↪* 15(3)—Actual, open, visible, and unequivocal change of possession, validating pledge of attached goods to holder of warehouse receipts, held for jury (Civ. Code, § 3440).

Whether there was actual, open, visible, and unequivocal change of possession, required by Civ. Code, § 3440, to validate pledge of attached canned goods by canning company to bank by means of warehouse receipts, issued and delivered to bank before attachment, held for jury in attachment creditor's action against pledgee and warehouseman for conversion of goods.

Appeal from Superior Court, Ventura County; T. A. Norton, Judge.

Action by the McGaffey Canning Company, Incorporated, against the Bank of America and others. Judgment for defendants, and plaintiff appeals. Affirmed in part and reversed in part.

Meserve, Mumper, Hughes & Robertson and Baldwin Robertson, all of Los Angeles, for appellant.

James C. Hollingsworth, of Ventura, for respondents Robert E. Clark and National Surety Co.

Frank M. Bering, of Los Angeles, for respondents Bank of America and Lawrence Warehouse Co.

JOHNSON, Justice pro tem. This action, begun in Los Angeles county and afterwards transferred for trial to Ventura county, sounds in conversion. A jury was impaneled for the trial of the case; but the court having granted a motion for a nonsuit, the plaintiff appeals from the judgment thereupon entered in favor of defendants.

This action is a sequel to an action brought by the same plaintiff in Los Angeles county

against William F. Gasman, in which judgment for \$10,240 went in favor of plaintiff on May 2, 1924. In that action plaintiff had caused a writ of attachment to issue on August 20, 1923, to the sheriff of Ventura county. The writ was accompanied by instructions to attach certain canned goods in a canning establishment located at Camarillo, in Ventura county, and operated in the name of the Ventura County Canning Company, a co-partnership composed of Gasman and two others, William Heck and W. A. Clarke.

Acting under the writ, the sheriff levied upon 12,000 cases of canned apricots, valued at about \$30,000, also upon other personal property, and placed a keeper in charge. Thereupon a third-party claim was made by the Bank of America through its vice president. In the claim the bank averred that it had made certain loans to the Ventura County Canning Company on the security of the attached property, which it held in pledge by virtue of warehouse receipts issued by the Lawrence Warehouse Company in favor of the bank, and delivered into the bank's possession before the attachment. The Lawrence Warehouse Company is a corporation with its office and principal place of business in Los Angeles.

Upon receipt of this claim the sheriff duly notified the plaintiff. After some hesitation, the plaintiff refused to furnish an indemnity bond to the sheriff upon the ground that the claim was legally insufficient, and that there had not been the change of possession required by law for consummation of a pledge. Left without the protection of an indemnity bond, the sheriff withdrew his keeper; and the goods were ultimately released by the warehouse company to the bank and sold by the bank for its own account, the entire proceeds being applied toward satisfaction of its loans.

The judgment obtained later by plaintiff against Gasman remaining wholly unsatisfied, plaintiff began this action on December 8, 1924, against the bank, the warehouse company, the sheriff, and the surety on the sheriff's official bond to recover damages for conversion.

[1, 2] So far as the sheriff and his surety are concerned, the chief point presented by plaintiff relates to the sufficiency of the third-party claim. It was made on behalf of the bank by the vice president in the form of an affidavit to which the affiant took oath before a notary public. Plaintiff contends that an oath so taken by a claimant, without addition of the phraseology used in verifying a pleading, is not a "claim verified by his oath" within the meaning of section 689, Code of Civil Procedure. Such a claim, however, is not a pleading, and may frequently have to be drawn by persons unfamiliar with legal jargon. The affidavit criticized conforms to

the usual practice; and in such matters technical niceties should not overshadow the rights of a claimant to legal possession. One of the definitions of the word "verify" in the Standard Dictionary is "to affirm under oath"; and in the new English Dictionary one of the meanings given is "to testify or affirm formally or upon oath." In our opinion an affidavit setting out the facts and sworn to before an authorized officer meets fully the demands of the law; and puts the attaching creditor to his election either to protect the sheriff with a sufficient indemnity bond, or to submit to release of the property seized.

The plaintiff argues that the sheriff's liability is governed by the decision in *Arena v. Bank of Italy*, 194 Cal. 195, 228 P. 441. In that case, however, there was first filed a claim clearly insufficient on its face; and hence it furnished no basis for the demand for indemnity made by the sheriff. An amended claim was then filed, and upon the strength of the amended claim, the sheriff without any further demand released the attached property. Such release without notice to the attaching creditor or renewal of the demand for indemnification was held to be contrary to law. The case has no similarity to the case before us.

[3] In this instance the contents of the claim were sufficient to state an apparent right to possession by the bank as a pledgee; and the sheriff was not required to assume a judicial pose, and determine, at his peril, whether or not the circumstances connected with the issuance of the warehouse receipts and their delivery to the bank satisfied the provisions of section 3440 of the Civil Code. Where a litigant's courage oozes under the pressure of a demand for indemnification against a third-party claim sufficient on its face, the law will not make the sheriff the scapegoat. *Taylor v. Bernheim*, 58 Cal. App. 404, 408, 209 P. 55. The motion for nonsuit in behalf of the sheriff and his surety was properly granted.

The really vital question in the case, between the plaintiff on the one hand and the bank and the warehouse company on the other, is whether there had been a change of possession of the seized property sufficient to protect the bank as a pledgee.

The circumstances surrounding the dealings between the parties were as follows: The canning business of the Ventura County Canning Company was carried on in a workshop or factory at Camarillo rented from the California Fruit Confection Company, which conducted its business on the other side of a wooden partition. The rent payable by the canning company was 12½ cents per case; and its output for the canning season was about 50,000 cases. A man named Pace, employed by the canning company, served as its cookroom foreman and superintended the canning operations at a salary of \$60 per week.

Cal.Rep. 284-286 P.—19.

With the consent of its landlord, the canning company on June 28, 1923, sublet its entire shop on a month to month tenancy to the Lawrence Warehouse Company at a rent of \$1 per month for warehouse purposes. This lease was recorded July 28, 1923.

Notwithstanding this sublease, the canning company continued to conduct its business in the shop as before, using during the apricot season 150 to 200 employees. Pace continued to act as cookroom foreman, and at the same time he acted also as the sole representative of the Lawrence Warehouse Company on the premises. In fact, he drew his salary of \$60 a week from the Warehouse Company, and that company then rendered a bill for the amount to the canning company. Practically all Pace's time was given to superintendence of the canning processes. At night an employee of the canning company slept on a cot in a cubby-hole above a small office partitioned off from the shop; and during the night the premises with its contents were in his care.

When the cans had been filled and were ready for stacking, they were moved on trucks to another part of the shop, and stacked by skilled employees of the canning company in rows set about 4½ feet apart, and reaching to the ceiling. At the time of the attachment there were three or four such stacks in place. Frames made of slats were placed around the several stacks for the purpose of separating them and simplifying the count. The canning was done at the north end of the shop, and the storage at the south end. There was nothing to separate the canning department from the storage department except an intervening space about 15 feet in width.

As the cans were stacked they were inventoried by Pace, who kept the records. He then issued nonnegotiable warehouse receipts for the Lawrence Warehouse Company. The form used was an acknowledgment of receipt for storage "for account of, and to be delivered upon written order, without surrender of this receipt, to Bank of America, Los Angeles."

Referring to these receipts, Heck, one of the partners interested in the cannery, said in his testimony: "We jumped in the car as soon as we got them, and went to Los Angeles, and to the Bank of America, and got all the money we could."

As receipts were issued, stack cards of the Lawrence Warehouse Company were placed on the stacks about 6 feet from the floor, each specifying the aisle, stack, and mark, and giving the date, lot number, and quantity. These cards bore also the statement, "Warehoused to Bank of America."

When fruit was to be marketed, a release was issued from the Los Angeles office of the Lawrence Warehouse Company on order of the Bank of America; and upon delivery of

the release to Pace, withdrawal of the quantity designated followed. The cans were then labeled, packed in cases, and shipped by the canning company to fill orders obtained through brokers, who appear to have assumed responsibility to the bank for the proceeds of sale.

The canning company really paid Pace's salary; and though the warehouse company, according to the sublease, was charged the nominal rent of \$1 per month, there was an accompanying agreement obligating the canning company to pay the warehouse company for issuing receipts 3 cents per case for the first 50,000 cases and lesser amounts for additional quantities.

[4] No sign of the Ventura County Canning Company seems to have been displayed on the building. There was a sign of the California Fruit Confection Company on the outside, and a sign of the Lawrence Warehouse Company inside the shop near the south end. While Mr. Heck said the warehouse company had two of its signs on the outside, his co-partner, Mr. Clarke, said there was none on the outside to his knowledge. For purposes of nonsuit the testimony of Heck on this point must be disregarded.

The question now before us is whether, under the circumstances recited, there was error in granting the motions of the bank and the warehouse company for a nonsuit instead of letting the case go to the jury as to them.

[5] When there is actual delivery of merchandise to a warehouseman, with actual and explicit change of possession, and a warehouse receipt is issued and delivered to one lending money on the security of the merchandise in store, the delivery of the warehouse receipt is the legal equivalent of the delivery of the merchandise itself; but such symbolic possession by the pledgee is dependent for its efficacy upon complete and actual, as distinguished from merely formal or colorable, relinquishment of possession and control by the pledgor.

If, under the facts of this case, there was a transfer of possession from the canning company to the warehouse company, of such exclusive character that it must be declared as a matter of law that there was indisputable compliance with the requirements of section 3440, Civil Code, then the judgment of nonsuit was properly entered; but if a contrary conclusion was reasonably deducible from the evidence, the case should have been allowed to go to the jury as the triers of the facts.

It is contended by the defendants that the warehouse company used the premises as a so-called field warehouse; and cases from other jurisdictions are cited in support of such a system and as authority for the order of nonsuit.

Union Trust Co. v. Wilson, 198 U. S. 530, 25 S. Ct. 766, 49 L. Ed. 1154, certifies answers

to certain questions propounded by the Circuit Court of Appeals in a case arising in Illinois. A leather dealer named Flanders walled off a part of his basement and let it at a nominal rental to the Security Warehouse Company. The compartment had doors fastened with padlocks, bearing the name of the company; and the warehouse company had the only keys. It had also a key to the building so as to have access both day and night. There were two signs on the outside, stating in large letters that the premises were occupied by the company as a public warehouseman. The company received leather from Flanders, stored it in the locked compartment, and issued warehouse receipts which were indorsed by Flanders to the Union Trust Company as security for loans. Flanders became bankrupt, and the trustee for creditors filed a bill claiming the leather in storage. The court said that no question under the statutes of Illinois was suggested; and that since the warehouse company had the leather under lock and key in a place not visible to Flanders' patrons, to which the company had legal title and right of free access, and since there was no reason to doubt the good faith of the transaction, there was a sufficient delivery to validate the pledge. In so ruling the court is careful, however, to say (page 537 of 198 U. S., 25 S. Ct. 768): "We deal with the case before us only. No doubt there are other cases in which the exclusive power of the so-called bailee gradually tapers away until we reach those in which the courts have held as matter of law that there was no adequate bailment."

Manufacturers' & Traders' Bank v. Gilman (C. C. A.) 7 F. (2d) 94, is a similar case. There engines and engine parts were kept in a locked room for the bank as a pledgee. There was a written indenture of trust, whereby the general manager of the pledgor was named as trustee for the bank. He had the key to the room, which was rented to the bank; and the stored material was tagged so as to state that it was "property of N. B. Gladwin Trustee." In a proceeding instituted by the receiver in bankruptcy against the bank, it was held that there was a valid pledge.

Sexton v. Kessler & Co., 225 U. S. 90, 32 S. Ct. 657, 56 L. Ed. 995, is a case brought by a trustee in bankruptcy to set aside a certain alleged illegal preference in the transfer of securities. The New York house of Kessler & Co. was indebted to the English house of the same name, and for the protection of that creditor set apart certain earmarked securities, which were kept on a separate shelf in the firm's vault and listed in a document transmitted to the English house. In the panic of 1907 the New York house became embarrassed, and filed a petition in bankruptcy. Before doing so, however, it delivered the earmarked securities to an agent of the English house, then in New York. It was held

that the English house had an equitable lien superior to the rights of the trustee. This case can hardly be said to have a bearing on the case before us, especially since such securities are not in the same class with goods and chattels.

The remaining cases cited by defendants were either heard upon appeal after a decision in the trial court upon the facts, or were decisions rendered by the trial judge after taking the evidence himself, or upon a hearing after reference to a master to take testimony and report his conclusions. Thus, in *Dunn v. Train* (C. C. A.) 125 F. 221, 222, the court said: "It being a question of intention, and a question whether the change in the situation of the property was such as to be notice of a change of possession, it was, under the circumstances, largely a question of fact, to be determined under rules of law." And the findings of the trial judge in favor of the pledgee were sustained. A similar situation existed in *Love v. Export Storage Co.* (C. C. A.) 143 F. 1.

Bush v. Export Storage Co. (C. C.) 136 F. 918, and *Evans v. New York & P. S. S. Co.* (D. C.) 163 F. 405, were decisions by the trial judge after submission of the cause upon the evidence taken before him. Again, *Philadelphia Warehouse Co. v. Winchester* (C. C.) 156 F. 600, and *American Can Co. v. Erie Preserving Co.* (C. C.) 171 F. 548, were decisions confirming the master's report. *Israel v. Woodruff* (C. C. A.) 299 F. 454, falls into the same category, being an appeal from a decree confirming the report of the master. The appellate court there said (page 456 of 299 F.): "The experienced trial judge having approved the master's report, it will be permitted to stand, unless an obvious error has intervened in the application of the law, or some serious or important mistake appears to have been made in the consideration of the evidence." *National Union Bank v. Shearer*, 225 Pa. St. 470, 74 A. 351, 17 Ann. Cas. 664, and *State v. Robb-Lawrence Co.*, 17 N. D. 257, 115 N. W. 846, 16 L. R. A. (N. S.) 227, have but a remote application to the present case; but each came up for review of a judgment entered upon the verdict of a jury, and the judgment was affirmed.

While in *American Can Co. v. Erie Preserving Co.* (C. C.) reported in 171 F. at page 548, the trial judge approved the master's report to the effect that the goods pledged were conspicuously marked and set apart in a way to give the pledgee exclusive dominion, yet in a companion case, bearing the same title and reported in the same volume, at page 540, the same judge, dealing with other goods, found that there was only a semblance of an attempt to warehouse those goods in the premises of the pledgor. Accordingly, in that case he held that there was no such change of possession as to validate the receipts in the hands of the pledgee. The judgments in both

these cases were affirmed on appeal in *American Can Co. v. Erie Preserving Co.* (C. C. A.) 183 F. 96, 98; the court, as to the case reported in 171 F. 540, saying: "Warehouse receipts would give constructive possession of goods actually warehoused; but it is plain that the warehousing company did not maintain a warehouse in any proper sense, because it had no exclusive and unequivocal possession."

In *Macdonald v. Aetna Indemnity Co.*, 90 Conn. 415, 97 A. 332, cited also by defendants, one Rodebaugh, a grain dealer at Buffalo, entered into a written contract with the American Warehousing Company, whereby he leased to the warehouse company as a "field storage warehouse" the property on which his grain business was conducted. The plot of ground was marked at the corners by stakes bearing the initials of the warehouse company; and one of Rodebaugh's employees acted as custodian for the warehouse company. Warehouse receipts were issued to the Bank of Buffalo as collateral security for loans to Rodebaugh. The bank was further protected by bonds given by the Aetna Indemnity Company to indemnify against any loss "through the negligence or dishonesty" of the warehouse company or its custodian. After the lease to the warehouse company, and before the issuance of receipts to the bank, Rodebaugh transferred his business to the Niagara Company of which he became president, and upon Rodebaugh's death a few months later, the Niagara Company filed a petition in bankruptcy, and a receiver was appointed, who took the grain into his possession. Immediately after Rodebaugh's death, however, the warehouse company had asserted its right to possession of the grain, and placarded the interior of the mill, the elevator, the bins, and bags with conspicuous signs declaring its interest in the property, and maintained possession until ousted by the receiver. The receiver having taken and sold the grain, the bank caused suit to be brought by the insurance commissioner on the indemnity bond furnished by the warehouse company, charging negligence by that company. In the trial court the judgment sustained the claim of the Bank of Buffalo under the bond. This judgment was reversed on appeal, but the court said that up to the time of Rodebaugh's death there had been no such change of possession as to validate a pledge; that the marking of corner stakes was not adequate notice, and any possession of the custodian, who remained in the employ of the pledgor, was really the possession of his employer. The case turned on what was done by the warehouse company the day following Rodebaugh's death and two weeks before the appointment of the receiver. The court ruled that possession was then actually taken before any specific lien had been acquired by any creditor, and that there had been no illegal preference under the bankruptcy law.

In its decision the court took into consideration the statute of New York. At the time of the transactions, which occurred between January, 1906, and August, 1907, the statute had a qualification not embodied in section 3440 of our Civil Code. The statute then in force in New York declared transfers without actual change of possession fraudulent, "unless it appear on the part of the person claiming under the sale or assignment that it was made in good faith and without intent to defraud such creditors or purchasers." 4 Birdseye's Cons. Laws of N. Y., § 36. Under our law good faith, without good works, supplies no saving grace.

In *Union Trust Co. v. Wilson*, 198 U. S. 530, 537, 25 S. Ct. 766, 768, 49 L. Ed. 1154, the general principle applicable in cases of questioned change of possession was couched by Judge Holmes in this form: "When there is conscious control, the intent to exclude and the exclusion of others, with access to the place of custody as of right, there are all the elements of possession in the fullest sense." At the same time he added a word of caution about cases where the exclusive power of control "tapers away."

Such a case is exhibited in *Re Rodgers* (C. C. A.) 125 F. 169. There, Rodgers, a dealer in seeds in Chicago, prior to his bankruptcy, had made certain written contracts with the National Storage Company, whereby Rodgers leased to the company part of his premises, and the storage company agreed to store his seeds therein and issue its receipts therefor. The receipts were used by Rodgers as collateral security for loans. The storage company had some signs inside the building, but not conspicuously placed; and its inspector visited the premises several times a week. The keys, however, were kept by Rodgers alone, access being obtainable only through him; and he continued to conduct his business on the premises as of old. Upon each pile of bags for which receipts were issued, there was placed a small tag; but Rodgers was left in a situation to deal with the seeds much as he pleased. In a controversy which arose between the trustee in bankruptcy and the holders of receipts, the court ruled upon appeal that there had never been a change of possession sufficient to validate the receipts, and consequently there existed no enforceable pledge.

In *Security Warehousing Co. v. Hand*, 206 U. S. 415, 421, 27 S. Ct. 720, 722, 51 L. Ed. 1117, 11 Ann. Cas. 789, affirming the decree of the Circuit Court of Appeals upon the facts recited in 143 F. 32, the court said in reference to certain warehouse receipts issued to the Racine Knitting Company and transferred to pledgees: "The general law of pledge requires possession, and it cannot exist without it. *Casey v. Cavaroc*, 96 U. S. 467, 24 L. Ed. 779. There was scarcely a semblance of an attempt at such change of posses-

sion from the hands of the knitting company to the hands of the warehousing company. Actual possession of the property in question was exercised by and existed with the knitting company substantially the same after the issuing of the receipts as before. It is a trifling with words to call the various transactions between the knitting company and the warehousing company a transfer of possession from the former to the latter. There was really no delivery, and no change of possession, continuous or otherwise. The alleged change was a mere pretense, a sham."

In that case the Racine Knitting Company had leased to the warehouse company certain portions of the knitting company's premises, both at Racine and at Stevens Point, Wis. Employees of the knitting company, nominated by the warehouse company, acted as custodians for the latter. The stored goods were kept within slatted inclosures or fence-like palings, and the inclosures were provided with sliding doors with padlocks to which the appointed custodian had keys. These, however, were kept by the custodian in such way as to be accessible when desired by officers of the knitting company. There were some interior signs of the warehouse company, and some use was made of identification cards also. Nevertheless, it was held that the facts did not show the open, exclusive, unequivocal possession required by law.

[6] Warehousing on the premises of the owner proposing to pledge his merchandise is effective when done in obedience to legal requirements; but when done only far enough to get the goods represented by documents without really getting them stored, the documents are but scraps of paper. The term "field warehousing" is not a talisman to give dominion by enchantment. Taking exclusiveness of possession and control as the criterion, we find now and then a case where it may be said as a matter of law that, through the field warehouse, open, exclusive, and unequivocal possession passed constructively to a pledgee; and then again in other cases we find that as a matter of law the possession of the warehouseman "tapers away" to nothingness. Between these two extremes lies the aggregation of cases in which the facts are such that different men may with reason reach opposing conclusions. Cases of that character, when tried by a jury, must be allowed to go under proper instructions to the jury for their determination of the facts in controversy.

[7] Whether warehousing is called "field warehousing" or by any other name, it cannot be effectively conducted in this state without compliance with the law as declared in section 3440 of the Civil Code. Merely colorable or constructive change of possession accomplishes nothing in favor of a pledgee. There must be open, visible, unequivocal change of possession, manifested by such sub-

stantial outward signs as to make it evident to the world that the control of the owner has wholly ceased, and that another has acquired, and is openly exercising, the exclusive dominion over the property. *Stevens v. Irwin*, 15 Cal. 503, 506, 76 Am. Dec. 500; *Cahoon v. Marshall*, 25 Cal. 197, 201; *Godchaux v. Mulford*, 26 Cal. 316, 324, 85 Am. Dec. 178; *Sequeira v. Collins*, 153 Cal. 426, 431, 95 P. 876; *Hassell v. Bunge*, 167 Cal. 365, 366, 139 P. 800.

[8, 9] Actual change of possession means existing in act, and truly and absolutely carried out, as opposed to formal, potential, virtual, or theoretical change. *Bunting v. Saltz*, 84 Cal. 168, 170, 24 P. 167; *Guthrie v. Carney*, 19 Cal. App. 144, 150, 124 P. 1045. The proof required to show actual change of possession is not measured by any fixed set of rules. Dependence must be placed upon the facts and circumstances of each particular case; and usually the determination must rest upon the finding of the court or the jury after hearing the evidence adduced on both sides. *Claudius v. Aguirre*, 89 Cal. 501, 503, 26 P. 1077; *Dubois v. Spinks*, 114 Cal. 289, 293, 46 P. 95; *Feeley v. Boyd*, 143 Cal. 282, 285, 76 P. 1029, 65 L. R. A. 943; *Jarvis v. Webber*, 196 Cal. 86, 99, 236 P. 138; *Bosbyshell v. Cline*, 51 Cal. App. 109, 113, 196 P. 274; *Gray v. Little* (Cal. App.) 275 P. 870.

[10] The appointment of the owner, or one of his staff, as a warehouseman's custodian of goods stored, while not conclusively ineffectual, is nevertheless a circumstance to give pause, and must be carefully weighed in connection with the other facts in evidence. *Goldstein v. Nunan*, 66 Cal. 542, 544, 6 P. 451; *Hickey v. Coschina*, 133 Cal. 81, 84, 65 P. 313; *Bucher v. Allen*, 11 Cal. App. 650, 651, 105 P. 942; *Vall v. Nichibei Bussan Co.*, 65 Cal. App. 60, 63, 223 P. 577; *Gray v. Little* (Cal. App.) 275 P. 870.

[11] In this case a foreign element is introduced by the interjection of the warehouse company between the pledgor and the pledgee. If the loans had been made without resort to warehouse receipts, and the fruit had been stacked and kept on the premises as shown in the evidence, with Pace as custodian for the bank, there would then have been the simple question whether the pledgee had been placed in actual exclusive possession and control. Instead of actual possession, the bank claims to have obtained symbolic possession by virtue of the warehouse receipts; but those receipts can have no virtue, unless the warehouse company had the same actual and exclusive possession and dominion which would have been essential to the protection of the bank, if it had acted independently in reliance on the goods instead of on the receipts.

In *re Spanish-American Cork Products Co.* (C. C. A.) 2 F.(2d) 203, 204, the company, de-

siring to borrow money from a bank, leased a portion of its premises to one of its employees; and there, in care of the employee as agent for the bank, was stored under lock and key the cork intended to be pledged, the doors having a placard, reading, "Property of A. E. Nichol, Agent." The custodian had general instructions from the bank to receive payments in its behalf and released cork; and as payments were made he supervised removal of the quantity released. Upon the trial of an issue between the trustee in bankruptcy of the cork company and the bank, the District Court decided that the bank had not the possession necessary to a pledge, and the decree was affirmed on appeal. The court expressed its views in the following language: "All authorities agree that possession is necessary to the validity of a pledge. The necessary indication of possession varies, of course, according to the nature and bulk and situation of the property. The rule is the pledgee must either have actual exclusive possession of the property, or if it remains on the pledgor's premises he must so separate and mark it as to give notice of his possession to the public, who might deal with the pledgor on the faith of it. In this case the cork was in the building occupied by the bankrupt, engaged in the cork business. Those who dealt with it had a right to assume in the absence of notice that the stock of cork carried in the building for use in the business was the property of the company which was using it. There was nothing on the outside to put anybody on inquiry. The public dealing with the cork company or interested in it could not be required to search for notice of some other ownership of the stock of cork by making an obtrusive and prying inspection of the inside of the cork company's premises to find and inquire the meaning of the signs of agency of one of the bankrupt's employees. There is no binding nor well-considered case that goes to that length. It is the duty of the pledgee to make such segregation and marks as will indicate his possession to business men of ordinary prudence dealing with the pledgor in the ordinary course of business."

What is there said concerning a transaction directly with a pledgee applies with equal force to a transaction through the medium of a "field warehouseman."

[12] In the discussion in which we have indulged we are not to be understood as intimating any opinion upon the question whether the circumstances in evidence do or do not show a change of possession satisfying the law. As is said in *Byrnes v. Moore*, 93 Cal. 393, 394, 29 P. 70: "Every case of the kind here involved has its own peculiar features, and must be determined on the particular facts which surround the given transaction or transfer." We hold merely that the circumstances are not such that it can be said

absolutely as a matter of law that there was an actual, open, visible, and unequivocal change of possession. The plaintiff was therefore entitled to the submission of the facts to the jury for their verdict under appropriate instructions as to the rules of law by which they should be guided.

The judgment in favor of the sheriff, Robert E. Clark, and his surety, National Surety Company, is affirmed; and that in favor of the defendants Bank of America and Lawrence Warehouse Company is reversed.

We concur: TYLER, P. J.; CASHIN, J.

103 Cal. App. 599

ROBERTS et al. v. PRISK et al. (Civ. 3976.)★

District Court of Appeal, Third District, California. Jan. 30, 1930.

Rehearing Denied March 1, 1930. Hearing Denied by Supreme Court March 31, 1930.

1. Trial $\S$ 163—Fact that defendants' counsel when making motion for nonsuit used word "proof," instead of "evidence," held not to affect validity of motion (Code Civ. Proc. $\S$ 581, subd. 5).

In action against directors of corporation to recover moneys alleged to have been misappropriated, fact that defendants' counsel used word "proof," instead of word "evidence," when making motion for nonsuit, on ground plaintiffs' charges of fraud had not been established, held not to affect validity of motion, in view of Code Civ. Proc. $\S$ 581, subd. 5, providing for dismissal upon defendant's motion when upon trial plaintiff fails to prove case sufficient for jury; provision of statute also being applicable to actions tried before court.

2. Corporations $\S$ 386—If directors had authority to authorize purchase of stock in another corporation, they had authority to ratify previous purchase.

If board of directors of corporation had authority to authorize purchase of stock in another corporation, they were authorized to ratify purchase before passing resolution authorizing purchase.

3. Corporations $\S$ 389—Burden of proof is upon party claiming purchase of stock in another corporation is unauthorized.

Burden of proof is upon party who claims that purchase and ownership of corporate stock was not within scope of corporate powers, since corporation is not presumed incapable of purchasing and holding shares of stock of another corporation.

4. Appeal and error $\S$ 909(5)—Where plaintiff appealing from judgment in action to recover funds used to purchase stock in another corporation did not introduce articles of incorporation, appellate court cannot presume purchase was unauthorized.

On appeal by plaintiff suing directors of corporation to recover money alleged to have been misappropriated to purchase in another corporation, where plaintiff had not introduced

articles of incorporation of corporations involved, appellate court cannot presume that corporation purchasing stock did not have authority to make purchase.

5. Corporations $\S$ 377(2)—Absent fraud, lack of good faith, or breach of trust, fact of interlocking directorates held not to invalidate purchase of stock in another corporation.

Fact that corporation purchasing stock in another had same directors and stockholders as corporation whose stock it was purchasing held not to invalidate purchase of stock, absent showing of fraud or lack of good faith or breach of trust, in addition to fact of interlocking directorates.

Appeal from Superior Court, Los Angeles County; Wilbur F. Downs, Judge.

Action by Belle McCord Roberts and another against W. F. Prisk and others. Judgment for defendants, and plaintiffs appeal. Affirmed.

W. A. Anderson, of Los Angeles, for appellants.

Knight & Goddard, of Long Beach, for respondents.

PLUMMER, J. This action was begun by the plaintiffs against the defendants to recover of and from the four individual defendants mentioned the sum of \$75,000, and directing that such sum be repaid to the defendant Press Telegram Publishing Company, a corporation, that an accounting be had, a receiver appointed, and an injunction issued; it being alleged in the complaint that the four individual defendants mentioned had misappropriated the funds of the Press Telegram Publishing Company, a corporation, the gist of the action being to restore to the treasury of the defendant Press Telegram Publishing Company all the moneys alleged to have been misappropriated by the individual defendants named, the Press Telegram Publishing Company being made a defendant because it refused to join as a plaintiff in this action.

The complaint alleges the corporate existence of the Daily Telegram Company of Long Beach, the Press Telegram Publishing Company, and the Press Telegram Building Company; the latter being the present name of the corporation originally known as the Long Beach Press Building Company. The board of directors of the Press Telegram Publishing Company are the defendants named in this action, together with S. S. Conklin, Oscar Conklin, and the plaintiff Belle McCord Roberts. The directors of the Press Telegram Publishing Company, a corporation, are identical in personnel with the directorate of the Press Telegram Building Company. The complaint also alleges that the individual defendants named in this action constitute a majority of the board of directors of both companies. It is then further alleged in the complaint that the Press Telegram Building Com-

pany undertook to erect a large building in the city of Los Angeles, and became heavily indebted; that the individual defendants in this action being in control of said corporation, as aforesaid, and also the defendant Press Telegram Publishing Company, at divers times appropriated, used, and diverted the funds and money of the Press Telegram Publishing Company to said Press Telegram Building Company, in the sum of \$75,000. It is further alleged that on or about the 20th day of December, 1926, at a meeting of the board of directors of said Press Telegram Publishing Company, the individual defendants above named, then constituting a majority of the board of directors, caused to be adopted a resolution, in which resolution it was provided and declared that the said Press Telegram Publishing Company should purchase 650 shares of the capital stock of the Press Telegram Building Company. It further appears in the complaint that the board of directors of the defendant Press Telegram Publishing Company have purchased, all told, 658 shares of the capital stock of the Press Telegram Building Company.

Stripped of its legal verbiage, the record shows that the directors of the Press Telegram Publishing Company and Press Telegram Building Company are identical; that the Press Telegram Building Company has been erecting a building to be occupied by the Press Telegram Publishing Company. Some time prior to the beginning of the erection of the building referred to, the Daily Telegram Company of Long Beach and the Press Publishing Company of Long Beach, respectively publishing newspapers, were consolidated, and thereafter only one paper was published, and known as the "Press Telegram," by the Press Telegram Publishing Company. In the consolidation of the companies it appears that the Daily Telegram Company of Long Beach was given 32 per cent. of the capital stock of the Press Telegram Building Company and 32 per cent. of the Press Telegram Publishing Company. The Long Beach Press Publishing Company, under the consolidation, was given 68 per cent. of the capital stock of the Press Telegram Publishing Company, and was given 68 per cent. of the capital stock of the Press Building Company. The capital stock is still owned in the same proportions by the same companies. In the construction of the Press Telegram Building the Press Telegram Publishing Company advanced money from time to time to the building company in the aggregate of \$80,800, and had received from the building company, at the date of the trial, 808 shares of its capital stock. The records introduced upon the trial show the following resolutions adopted by the Press Publishing Company on December 20, 1926: "Be it Resolved that the Press Telegram Publishing Company accept from the Press Telegram Building Company, in payment of \$15,000.00 advanced dur-

ing the year 1926, 150 shares of the capital stock of the Press Telegram Building Company, at par. Be it further Resolved that during the year 1927 that this Corporation purchase at par, as much of the capital stock of the Press Telegram Building Company, not to exceed 500 shares, as the president may deem it advisable, and that such purchase be made from time to time from the profits of the Press Telegram Publishing Company on hand. Be it further Resolved that the actions of this Corporation in purchasing such capital stock of said Press Telegram Building Company during the year 1926, be, and the same is hereby approved and ratified as the acts and deeds of this Corporation." The action before us was begun in January, 1928. Summarized, the complaint alleges that the individual defendants used and diverted funds and money belonging to, and in the treasury of, the Press Telegram Publishing Company; that said acts were fraudulent and a breach of trust of said individuals; that said acts were done by said individual defendants for their own profit, benefit and gain; that the Press Telegram Building Company is insolvent and its shares of stock worthless. The record further shows that \$75,000 was borrowed by the Press Telegram Publishing Company from the Pacific Southwest Trust & Savings Bank of Los Angeles, by resolution introduced by the plaintiffs in this action and voted for by all of the directors of the Press Telegram Publishing Company. While there is no action of the directors of the Press Telegram Publishing Company called to our attention relative to the purpose for which this money was to be used, it does appear that the directors all understood that it was to be used for the purpose of advancing money to the Press Telegram Publishing Company, and that the capital stock of the publishing company to which we have referred should be accepted for the money so advanced. It may be further stated, to clarify whatever confusion might result from the use of the moneys herein, that the stockholders of the Press Telegram Publishing Company were the seven directors thereof, and that the stockholders of the building company were the seven directors thereof. Thus, while the two corporations were distinct entities, the directors and stockholders were the same in both corporations. So far as we have been able to trace the money set forth in the transcript originally borrowed by the Press Telegram Publishing Company, or that may have come from the profits of the Press Telegram Publishing Company and advanced to the building company, all went toward the payment of the expenses incurred in erecting the building occupied by the Press Telegram Publishing Company, and, as presented by the record, the Press Telegram Building Company owns the building, and the Press Telegram Publishing Company and the directors thereof own all of the capital stock of the building company. The

money referred to, although charged in the complaint to have been appropriated to the uses and purposes of the individual defendants, thus appears to have gone into and paid for properties owned by all the parties concerned. The record shows that the stock of the building company has become quite valuable and is paying sufficient to justify a dividend in the sum of 7 per cent. on the investment, which controverts the allegation of insolvency. Upon the conclusion of plaintiffs' testimony the defendants interposed a motion for nonsuit, which was granted and judgment entered thereon, from which judgment the plaintiffs appeal.

[1, 2] No testimony whatever was introduced showing any fraudulent acts on the part of the individual defendants named in this action. The only question presented upon the record, in view of the want of testimony showing fraud or that the defendants individually profited to the disadvantage of the plaintiffs, is the want of legal authority to purchase stock in the Press Telegram Building Company by the Press Telegram Publishing Company. While some technical objection has been made to the motion for nonsuit, we think it sufficiently shows that there was presented to the court, for its consideration, the want of testimony to show any breach of trust on the part of the defendants, or any fraudulent misappropriation of money by them, or any fraudulent diversion of money from one corporation to the other for the gain and profit of the individual defendants named in this action. The argument that counsel for the respondents used the word "proof" instead of the word "evidence" when making his motion for nonsuit, on the ground that none of the charges had been established, seems to us too technical to necessitate further consideration than the citation of subdivision 5 of section 581 of the Code of Civil Procedure providing for a dismissal. It is there said: "An action may be dismissed * * * By the court, upon motion of the defendant, when upon the trial the plaintiff fails to prove a sufficient case for the jury." The action under consideration was tried before the court, but the subdivision of the section applies in such instances. Some question is also made that the purchase of the stock referred to was partly made before the board of directors had passed a resolution authorizing the purchase of the same, but, if the board of directors had authority to authorize the purchase, they had power to ratify the previous purchase of the 150 shares. See *Fletcher on Corporations*, vol. 3, at p. 2151; 6 Cal. Jur., pp. 119 and 120.

[3] The appellants call our attention to the case of *Knowles v. Sandercock*, 107 Cal. 629, 40 P. 1047, 1050, where it is said: "A private corporation has no implied authority to invest in shares of another private corporation"—citing a number of authorities. And like-

wise calls our attention to section 9 of article 12 of the state Constitution limiting the power of corporations to engage in business other than as expressly authorized by its charter. In that case the articles of incorporation of the two corporations involved were introduced in evidence and show the purposes for which the respective organizations were formed, and it is upon these articles of incorporation that the court held that the subscription of one corporation to the capital stock of the other corporation was ultra vires and void. As applied to the facts in that case the authorities cited by appellants appear to have fully settled the law that one corporation has no implied power to purchase the stock of another corporation, but the cases cited, however, and the principle of law there involved, are not applicable to the instant case. The record fails to show that the articles of incorporation of any of the corporations involved in this case were introduced in evidence; therefore, the following decisions of our Supreme Court are decisive: In the case of *Evans v. Bailey*, 66 Cal. 112, 4 P. 1089, having under consideration the question of ultra vires of one corporation purchasing shares of the capital stock of another corporation, it is said: "A corporation is not presumed incapable of purchasing and holding shares of the stock of another. The burden of proof is upon the party who claims that the purchase and ownership of the stock was not within the scope of the powers of the corporation."

In the case of *Stockton Savings Bank v. Staples*, 98 Cal. 189, 32 P. 936, 938, where the same principle was involved, but the property held was a tract of land, and articles of incorporation were not introduced in evidence, the court said: "Under these circumstances * * * it must be presumed * * * that the corporation had power to purchase and hold the land." And further: "It does not appear under what statute, or for what purpose, the plaintiff was incorporated, nor what business it was engaged in, nor for what purpose the property was purchased or used." And quoting from the case of *People v. La Rue*, 67 Cal. 526, 8 P. 84, it is further stated: "If there was anything in its charter, or the business in which it was engaged, or in the law under which it was organized, in any manner abridging its right to hold land, it does not appear of record; hence we deem the objection untenable."

[4] And in *Kennedy v. Savings Bank*, 101 Cal. 495, 35 P. 1039, 40 Am. St. Rep. 69, the cases to which we have just referred were reaffirmed, and, it there appearing that the articles of incorporation were not introduced in evidence, it was held that the law would not presume that the corporation did not have the power to purchase or subscribe for shares of the capital stock of another corporation. Not having introduced the arti-

cles of incorporation of the various corporations involved in this action, we cannot presume that the Press Telegram Publishing Company did not have authority to make the purchase of the capital stock of the Press Telegram Building Company.

[5] Again, the fact that the record shows interlocking directorates is urged as a reason why the transaction should be held void. However, as no fraud was shown, and no other reason advanced upon which the trial court could have entered judgment in favor of the appellants, this objection is also untenable. There must be either fraud or a lack of good faith, or some breach of trust shown in addition to the fact of interlocking directorates. In 14 C. J. 873, § 1332, the law relating to dealings between interlocking directorates is thus stated: "The fact that part or all of the stockholders of two corporations are the same does not have the effect of rendering the corporations legally identical. It does not make either corporation responsible for the contracts of the other or for the acts of its members as members of the other. Neither does it prevent the corporations from dealing with each other, although where the same majority is in control of both corporations, the dealings of the corporations with each other will be subjected to a careful scrutiny and the rights of minority stockholders will be protected by the courts. However, it is held that the fact that the same persons constitute majority stockholders in each of two corporations, does not enlarge the jurisdiction of equity to interfere with the management of one of these corporations in relation with the other, at the suit of a minority stockholder." Many authorities are cited in the footnotes in support of the text just quoted. See, also, *Sausalito Bay Land Co. v. Sausalito Improvement Co.*, 166 Cal. 302, 136 P. 57.

No reason having been shown why the judgment of the trial court should be reversed, it is hereby ordered that the same be, and it is hereby, affirmed.

We concur: FINCH, P. J.; R. L. THOMPSON, J.

103 Cal. App. 691

In re SEEDELKEN'S ESTATE. *

WITT et al. v. SCHMITZ et al.
(Civ. 7251.)

District Court of Appeal, First District, Division 2, California. Feb. 4, 1930.

Rehearing Denied March 6, 1930. Hearing Denied by Supreme Court March 31, 1930.

1. Habeas corpus §112—On collateral attack, court must assume order in habeas corpus proceedings restoring competency was based on evidence which court deemed sufficient to prove sanity.

As against collateral attack, court must assume that order in habeas corpus proceedings

restoring person to competency was made on evidence which court deemed sufficient to prove sanity, where order recited it was made after the hearing.

2. Wills §55(1)—Testimony as to sanity of deceased warranted finding that deceased at time of his destruction of will was sane.

Testimony of witnesses that testator was sane at time of his destruction of will was sufficient to sustain finding in will contest that he was sane at the time.

3. Appeal and error §1010(1)—Finding which has competent evidence to support it will not be disturbed on appeal.

Finding will not be disturbed on appeal if there is competent evidence to support it, unless testimony on which finding is based is wholly improbable or contrary to physical facts, so that reviewing court can say as a matter of law that the finding is not supported by competent evidence.

4. Wills §386—Finding in will contest that deceased's destruction of will was not induced by undue influence of contestant, though against preponderance of evidence, was supported by contestant's testimony.

In will contest, finding that deceased was not induced by undue influence of contestant to destroy will was supported by contestant's testimony, though great preponderance of evidence was otherwise.

Appeal from Superior Court, City and County of San Francisco; Frank H. Dunne, Judge.

Petition by Sophie Witt and others for letters of administration with the will annexed in the estate of John Seegelken, also known as Johann Seegelken, deceased, in which contest was interposed by Louise Schmitz and others. Judgment for contestants, and petitioners appeal. Affirmed.

John L. McNab and Byron Coleman, both of San Francisco, Walter E. Rode, of Oakland, and Albert Jacoby, of San Francisco, for appellants.

Dinkelspiel & Dinkelspiel, F. A. Devlin, and David K. Lener, all of San Francisco, for respondents.

NOURSE, J. A petition was filed for letters of administration with the will annexed in the above-named estate. Contest was joined upon the ground that the will had been destroyed by the testator with the intention of revoking it. The cause was tried before the court sitting without a jury, and resulted in findings and judgment for contestants. Petitioners appeal upon typewritten transcripts.

The petition alleged that the physical destruction of the will was made at a time when the testator was of unsound mind, and that it was accomplished through the undue influence and fraud of Louise Schmitz, a niece of the testator, whose participation in the estate

would be greatly increased by the revocation of the will.

The will was duly executed in 1914, when the testator was admittedly sane. In 1918 he was committed to the insane asylum at Agnew after proceedings duly had in the superior court of Monterey county. Just prior thereto he had been duly adjudged to be incompetent in proceedings in the same court, and a guardian of his person and estate had been appointed. A few months after his commitment habeas corpus proceedings were instituted in Santa Clara county, upon the hearing of which he was restored to competency and returned to his guardian in Monterey county. Immediately thereafter, upon stipulation of all interested parties, the guardianship proceedings in Monterey county were terminated, and Seegelken was restored to competency.

The deceased was an unmarried man. He left a number of nieces and nephews, many of whom were given special bequests in the will of 1914. One of these nieces, Louise Schmitz, feeling aggrieved because two of the nieces had been particularly favored in the will, endeavored to stir up the other nephews and nieces to take some action. Unable to interest the others, she went to Salinas immediately after the incompetency proceedings were dismissed, and persuaded her uncle to return with her to her home in San Francisco, where he lived until his death in March, 1927. She testified that in November, 1918, the decedent destroyed the will by burning it in her kitchen stove, and that he told her at the time that he did not want the will—that he was through with it. Soon thereafter she applied for and obtained letters of guardianship over his person and estate, and this relation continued until his death.

[1-3] On this appeal the petitioners attack the order upon the ground that the evidence is insufficient to support the findings that the decedent was mentally competent at the time the will was destroyed, and that he destroyed it with intent to revoke it. In this connection they argue that the previous adjudication of insanity is evidence of continued mental incompetency, because the only evidence heard in the habeas corpus proceeding demonstrated a condition of insanity at that time. This, however, is merely a collateral attack upon the judgment in the habeas corpus proceeding, and, as that order recites that it was made after a hearing, we must assume that the court deemed the evidence sufficient to prove sanity.

In reference to the condition of the decedent at the time the will was destroyed, witnesses were produced who testified that he was then sane. This testimony was sufficient, if believed by the trial court, to sustain the finding that at the time the will was destroyed

the decedent was sane, and knew the consequences of his act. When the sufficiency of the evidence is the basis of the appeal, our power ends when we find competent evidence which supports the finding, unless the testimony upon which the finding is based is wholly improbable or contrary to physical facts, so that we can say as matter of law that the finding is not supported by competent evidence.

[4] As to the issue of fraud and undue influence, we should add that the great preponderance of the evidence points unmistakably to a fixed course of conduct on the part of Louise Schmitz by which she secured possession of the decedent and his effects for the purpose of influencing him to destroy the will, but preponderance of the evidence alone does not justify a reversal. These charges were all denied by her, the trial court believed her, and her testimony alone is sufficient to support the findings adverse to appellants on these issues.

No errors in the conduct of the proceedings are assigned, and we find none in the record. Order affirmed.

I concur: STURTEVANT, J.

103 Cal. App. 420
(Cr. 20.)

PEOPLE v. WILSON.

District Court of Appeal, Fourth District, California. Jan. 25, 1930.

1. Criminal law ⇨1202(3)—Evidence held sufficient to support verdict of former convictions, defendant being identified as person named in records of prior judgment and imprisonment (Pen. Code, § 644).

Where defendant was charged with prior convictions and commitments for felonies, the authenticated record of conviction, sentence, and imprisonment of persons under various names, and identification of defendant as being person confined in different prisons at periods covered by respective sentences under names given in the judgments, was sufficient evidence to support judgment of former convictions and sentence to life imprisonment under Pen. Code, § 644.

2. Criminal law ⇨1159(2)—Verdict will be set aside only where it is clear that evidence is insufficient to support trial court's conclusion upon any theory.

On appeal, a verdict cannot be set aside on ground that it is unsupported by evidence unless it clearly appears that upon no hypothesis whatever is there sufficient substantial evidence to support conclusion of trial court.

3. Criminal law ⇨339—Foundation being laid by proof that person sentenced to one prison was transferred, evidence was admissible to show defendant's identity.

Where it was shown that a person had been committed to San Quentin and later transferred

to Folsom, evidence of identification of defendant as person thus transferred was properly received in support of identification of defendant as person committed to San Quentin.

Appeal from Superior Court, San Bernardino County; Charles L. Allison, Judge.

George Wilson was convicted of prior convictions, and from the judgment and an order denying his motion for a new trial, he appeals. Affirmed.

See also 280 P. 137.

Albert E. Weller and Fred Duffy, both of San Bernardino, for appellant.

U. S. Webb, Atty. Gen., John L. Flynn, Deputy Atty. Gen., and George H. Johnson, Dist. Atty., of San Bernardino, for the People.

SLOANE, P. J. The defendant, George Wilson, pleaded guilty to an information filed by the district attorney of San Bernardino county charging him with the crime of burglary. Upon such plea of guilty the court proceeded to pass judgment and sentenced defendant to serve a term of imprisonment in the California state prison at San Quentin, of date January 14, 1929.

Immediately following such sentence a supplemental information was filed, charging four separate prior convictions and commitments for felonies previously committed by the defendant. Under this supplemental information it was charged that the defendant, George Wilson, under the name of Frank Clark, was in the superior court of the state of California, in and for the county of Tulare, on or about the 6th day of June, 1914, convicted of the crime of burglary in the first degree, a felony, and was sentenced to serve a term of one year in the California state prison at San Quentin therefor.

That the defendant, George Wilson, under the name of William Henry Duncan, was in the superior court of the state of California, in and for the county of Yuba, on or about the 9th day of April, 1919, convicted of the crime of burglary in the second degree, a felony, and was sentenced to serve a term of five years in the California state prison at San Quentin therefor.

That the defendant, George Wilson, under the name of Harry Jackson, was in the superior court of the state of California, in and for the county of Yuba, on or about the 14th day of April, 1919, convicted of the crime of burglary in the second degree, a felony, and was sentenced to serve a term of five years in the California state prison commonly known as Folsom prison therefor.

That the defendant, George Wilson, under the name of Will Duncan, was, in the Second Judicial district court of the state of Nevada, in and for the county of Washoe, on or about the 17th day of July, 1926, convicted of the crime of attempted burglary in the second de-

gree, a felony, and was sentenced to serve a term of imprisonment in the state prison at Carson City, Nev., therefor.

The third count in this information was dismissed for the reason that the commitment to the state prison at Folsom was for the same offense charged in the second count, and the commitment to the Folsom prison was merely a transfer of the defendant from San Quentin to Folsom, to which place of confinement defendant had been previously committed.

On the trial under the supplemental information defendant was convicted before a jury on the three remaining counts of former conviction. By reason of the former convictions defendant was sentenced to life imprisonment, pursuant to section 644 of the Penal Code.

The only question presented on this appeal is the alleged insufficiency of the evidence to identify the defendant, George Wilson, as the same person convicted and imprisoned under the former convictions and under the names, respectively, of Frank Clark, William Henry Duncan, and Will Duncan.

The evidence as shown by the record consists of authenticated copies of the judgment and commitment of the person named in each of the charges of former conviction and the receipt of the person so convicted at the respective prisons. Supplementing this evidence as to the first former conviction was the testimony of a witness, J. H. Carpenter, captain of the guard of the San Quentin penitentiary, who testified that he knew and saw, as a prisoner in the state prison at San Quentin, in June, 1914, an inmate there held under the name of Frank Clark, and identified in open court the defendant, George Wilson, as being that person.

The same witness also testified that in April, 1919, he knew and saw at the San Quentin penitentiary a person confined as a prisoner in said institution under the name of William Henry Duncan, alias Harry Jackson, who was afterwards transferred to the Folsom penitentiary, and identified in open court the defendant, George Wilson, as being that person.

A witness, John F. Connell, a guard at Folsom prison of some 30 years' employment, in further identification of the defendant, George Wilson, as the prisoner confined at San Quentin as William Henry Duncan, alias Harry Jackson, and afterwards transferred to Folsom, testified that he saw and knew in 1919 an inmate of the prison under the name of Harry Jackson and identified in open court the defendant, George Wilson, as being that person.

The authenticated copy of the record of the conviction and commitment to San Quentin of the person last mentioned, identified as the defendant, Wilson, shows that he was named

in the judgment as William Henry Duncan, alias Harry Jackson.

On the identification of defendant under the Nevada conviction and commitment, it appears that the judgment and commitment in that case was in the name of Will Duncan. The witness Harland L. Howard, assistant district attorney of Washoe county, Nev., testified that he saw and knew the said Will or William Duncan in the courtroom of the Second judicial court in and for the county of Washoe, state of Nevada, and that he was the person described in the authenticated copy of judgment of conviction from that court, introduced in evidence in the present case, and that said Duncan and the defendant, George Wilson, are one and the same person.

[1] The authenticated record of a former conviction, sentence, and imprisonment of persons under the name of Frank Clark, William Henry Duncan, alias Harry Jackson, and Will Duncan, respectively, and the positive identification of the defendant as being the person confined under commitment in the three prisons named, at the periods covered by the respective sentences under the names given in the judgments, is sufficient evidence to support the verdict and judgment of the former convictions set out in the supplemental information in this case.

It is true that the identification of the defendant, Wilson, as being the same person convicted and imprisoned under the former convictions, is an essential part of the case for the prosecution, but it cannot be disputed that the introduction of the record of the conviction and imprisonment of the defendants named as Frank Clark, William Henry Duncan, alias Harry Jackson, and Will Duncan, and the identification by a competent witness of the defendant here as being the same person serving sentence under these respective judgments of conviction, is a sufficient identification.

On a former appeal of this case from an order granting a new trial, reported in (Cal. App.) 280 P. 137, the proof of conviction and identification of defendant under precisely the same evidence as was given in this case was upheld by the appellate court with reference to the convictions and commitment to San Quentin prison from Tulare and Yuba counties, and a new trial was granted on the ground of insufficient proof of the record of conviction in Nevada, which defect has been supplied in the present case.

As is stated in *People v. Tom Woo*, 181 Cal. 315, 184 P. 389:

[2] It is the function of the jury in the first instance, and of the trial court after judgment, to determine what facts are established by the evidence, and before the verdict of the jury, which has been approved by the trial court, can be set aside on appeal upon the

ground that the evidence is insufficient to support the verdict, it must be made clearly to appear that upon no hypothesis whatever is there sufficient substantial evidence to support the conclusion reached by the trial court.

[3] The alleged prior conviction of defendant and sentence to imprisonment in Folsom penitentiary was dismissed and eliminated from this case as one of the judgments of prior conviction, but under the showing that the party named in the prior conviction from Yuba county was transferred to Folsom, the evidence of identification of the defendant as the party so transferred was properly introduced in support of the conviction, and identification in the proceeding under which such transfer was made.

The judgment of conviction and order overruling and denying defendant's motion for new trial are affirmed.

We concur: BARNARD, J.; MARKS, J.

103 Cal. App. 656

**FLETCHER v. COMMERCIAL DISCOUNT
CO. et al. (Civ. 3974.)★**

District Court of Appeal, Third District, California. Feb. 1, 1930.

Rehearing Denied March 3, 1930.

1. Fraudulent conveyances ⇨299(9)—Automobile held so far within dealer's control when ordered as to invalidate sale without change of possession as against subsequent innocent purchaser (Civ. Code, § 3440).

Evidence held to warrant inference that automobile was so far within control of dealer when ordered by original purchaser that former could have made delivery on payment of balance of price, so that sale without immediate delivery, followed by actual and continued change of possession, was fraudulent and hence void against subsequent innocent purchaser from dealer, under Civ. Code, § 3440.

2. Fraudulent conveyances ⇨139—Transfer of automobile to purchaser by dealer, without delivery and change of possession, held void as against subsequent innocent purchaser from dealer (Civ. Code, § 3440).

Transfer of automobile to purchaser by dealer, from which it was ordered while in possession of distributor, without delivery and change of possession, held void as against subsequent purchaser in good faith from such dealer, under Civ. Code, § 3440.

3. Pleading ⇨434—Defective allegation of defense, not demurred to and clearly established by stipulation and evidence admitted without objection, held not available error.

Defective allegation of defense held not available on appeal, where no demurrer was filed, case was tried on theory that facts constituting defense were in issue, and defense was clearly established by stipulation and evidence admitted without objection.

Appeal from Superior Court, Los Angeles County; Stanley Murray, Judge.

Action by D. Fletcher against the Commercial Discount Company, a corporation, and another. From a judgment for named defendant, plaintiff appeals. Affirmed.

W. W. Kaye and Ralph E. Wallace, both of Los Angeles, for appellant.

Hardy, Elliott & Aberle and Rex Hardy, all of Los Angeles, for respondent.

FINCH, P. J. The plaintiff brought this action to recover possession of an automobile or its value. Judgment was entered in favor of the defendant Commercial Discount Company for the possession of the automobile and in favor of the plaintiff against the defendant Hollywood Marmon Company for the value thereof. The plaintiff has appealed from the judgment.

It was stipulated at the trial that on April 5, 1927, the Hollywood Marmon Company was "a motor vehicle dealer, * * * dealing particularly in Marmon automobiles"; that on that day the plaintiff "ordered from said Hollywood Marmon Company a certain five-passenger * * * automobile * * * for the sum of \$4,405" and delivered to that company a 1925 Marmon sedan "as part payment in the sum of \$2,250"; that on April 13, 1927, the plaintiff paid the balance of the purchase price and was given a memorandum of sale of the automobile, stating the motor number and other particulars to identify the machine; that the plaintiff never took possession of the automobile, "nor was there ever any actual or continuous change of possession of said automobile between the Hollywood Marmon Company and the plaintiff"; that the plaintiff "did not record any bill of sale or other indicia of ownership" or cause the automobile to be registered in the Motor Vehicle Department of the state; that "on April 21, 1927, and while said new automobile was then and there in the possession of the Hollywood Marmon Company, it sold and conveyed said new automobile and the title thereto to the defendant Commercial Discount Company, which thereupon entered into a conditional contract of sale * * * with said Hollywood Marmon Company; * * * that then and there and as a part of the same transaction, the defendant Commercial Discount Company paid to the Hollywood Marmon Company the sum of \$2,890; that thereupon said Hollywood Marmon Company" caused the automobile to be registered in the Motor Vehicle Department "in the name of the Hollywood Marmon Company, with the legal ownership of said automobile registered in the name of the defendant Commercial Discount Company," which "received from said Motor Vehicle Department the customary and usual pink certificate of registration"; that the Commercial Discount Company

did not "come into the actual possession of said automobile until May 6, 1927," up to which time the automobile remained in "the physical possession of said Hollywood Marmon Company"; that on said 6th day of May the "Commercial Discount Company took possession of said automobile and removed same from the place of business of the Hollywood Marmon Company"; that before it so removed the automobile "the plaintiff personally demanded of * * * the defendant Commercial Discount Company and of said Hollywood Marmon Company the possession of said new automobile, then and there stating that he was the owner of same."

In addition to the facts stipulated by the parties, the court found "that the Commercial Discount Company * * * had no notice expressed or implied of the transaction had between the plaintiff and the defendant Hollywood Marmon Company until May 5, 1927," and that "the automobile in question was prior to April 21, 1927, placed upon the sales floor of the defendant Hollywood Marmon Company and was offered for sale by said company to the general public."

From the foregoing facts the court drew conclusions of law as follows:

"That the defendant Commercial Discount Company * * * was innocent in the entire transaction"; that the plaintiff placed the Hollywood Marmon Company "in ostensible authority to sell and dispose of said automobile; * * * that as against the defendant Commercial Discount Company * * * title to the automobile involved in this litigation never passed to the plaintiff; that the defendant Commercial Discount Company is entitled to retain the possession of said automobile as against the plaintiff."

[1] The findings are supported by the evidence. Every transfer of personal property of the kind here involved "is conclusively presumed if made by a person having at the time the possession or control of the property; and not accompanied by an immediate delivery, and followed by an actual and continued change of possession of the things transferred, to be fraudulent, and therefore void, * * * against purchasers or encumbrancers in good faith subsequent to the transfer." Civ. Code, § 3440. Appellant contends that the automobile was not in possession of the Hollywood Marmon Company at the time the plaintiff ordered the machine, and that therefore section 3440 is not applicable. It appears from the evidence that on April 5, 1927, the automobile was in the possession of the Pelton Motor Company, distributor of Marmon automobiles, and that on that day the sales agent of the Hollywood Marmon Company and the plaintiff inspected it, and that thereupon the plaintiff selected that particular automobile, but with the understanding that, if another shipment of automobiles

was received by the Pelton Motor Company by April 15, the plaintiff might select one of them in lieu of the one he had inspected, but the order which he signed on that day does not describe any particular automobile. It was addressed to Hollywood Marmon Company, dealer, "subject to your acceptance." No acceptance by the dealer is indorsed thereon. The memorandum of sale of April 13 contains, after the description of the automobile, the words, "or to be selected." R. E. Brown, the salesman through whom the plaintiff ordered the automobile, testified that, at the time the order was signed by the plaintiff on April 5, "he told me he better wait and see what came in, that he was in no hurry about a car, and so the deal was left open," and that "after the receipt (memorandum of sale of April 5) had been made I gave it to Mr. Fletcher and he stated that he did not want that automobile, so I asked him how I could give him a receipt for a car that I did not know anything about, I could not show any name or serial number, and then he said to insert 'or to be selected,' which was done by the stenographer." In explanation of a statement he had made to the district attorney, the defendant testified: "I stated that the reason I did not take possession of the automobile on or before the 13th, prior to payment, was because Mr. Brown had promised that a new shipment would arrive not later than the 15th of April, and * * * we decided that the car in question was actually purchased and paid for on the 13th and accepted by me on the 15th." The automobile came into the possession of the Hollywood Marmon Company on April 15th. The reasonable inference from the evidence is that the automobile was so far within the control of the Hollywood Marmon Company on April 5 that it could have made delivery thereof upon payment by the plaintiff of the balance of the purchase price, and it appears from the plaintiff's own testimony that he did not finally select the particular automobile in question until April 15th, when it was in the actual possession of the Hollywood Marmon Company. It must be held, therefore, that section 3440 is applicable.

[2] The transfer of the automobile from the Hollywood Marmon Company to the plaintiff was void for want of delivery and change of possession as against the Commercial Discount Company, which was a subsequent purchaser in good faith.

[3] The first separate defense alleges that such transfer was void. If it be conceded that such defense was defectively alleged, no demurrer thereto was filed and the case was tried upon the theory that the facts constituting such defense were in issue. The defense was clearly established by the stipulation referred to and evidence admitted with-

out objection. The findings in relation thereto are determinative of the cause, and therefore it was unnecessary to find on other issues. 24 Cal. Jur. 947.

The judgment is affirmed.

We concur: PLUMMER, J.; R. L. THOMPSON, J.

103 Cal. App. 650

MILLER v. PRICE et al. (Civ. 3964.)

District Court of Appeal, Third District, California. Jan. 31, 1930.

1. Pleading Ⓒ349—In action for wrongful execution, granting defendants' motion for judgment on pleadings because plaintiff did not file affidavit denying genuineness of sheriff's instructions and return, made part of answer, held improper (Code Civ. Proc. § 448).

In action for damages for wrongful execution, where answer set forth certain writings relative to instructions given sheriff, and return of sheriff, granting judgment on pleadings for defendants, under Code Civ. Proc. § 448, providing that when defense to action is founded upon written instrument made part of answer, genuineness and due execution are admitted unless plaintiff file affidavit denying same, held improper, since writings in case were not binding on plaintiff, who was not party thereto.

2. Execution Ⓒ183—Levying of execution on property of one under claim that it belonged to another would entitle the former to begin action to determine adverse claims immediately (Code Civ. Proc. § 738).

Levying of execution on property of one under the claim that it belongs to third person would entitle the former to begin action immediately under Code Civ. Proc. § 738, to determine such adverse claim.

3. Appeal and error Ⓒ916(1)—On defendants' motion for judgment on pleadings, appellate court could only consider complaint.

On defendants' motion for judgment on pleadings, only complaint can be considered, and

on same basis as though it were before appellate court on general demurrer.

4. Pleading ⚡34(4)—Presumptions are that pleader stated case as favorably as possible, and further presumptions are against pleader.

In considering complaint, all presumptions are that pleader has stated his case as favorably as possible, and if any further presumptions are to be indulged in they are against pleader.

5. Pleading ⚡8(9)—Allegation that sheriff wrongfully levied execution held to plead only a conclusion of law.

Allegation in action for damages for wrongful execution that sheriff wrongfully levied execution held demurrable as pleading only a conclusion of law.

6. Pleading ⚡17—Matters of substance must be alleged in direct terms.

Matters of substance must be alleged in pleadings in direct terms, and not by way of recital.

7. Execution ⚡470—Complaint in action for wrongful execution held insufficient to state cause of action.

In action for wrongful execution, complaint which did not allege exclusive ownership, and which did not charge defendants with giving wrongful instructions to sheriff under which sheriff levied execution, held not to state cause of action.

Appeal from Superior Court, Los Angeles County; Edward T. Bishop, Judge.

Action by Loren L. Miller against W. C. Price and others. Judgment for defendants on pleadings, and plaintiff appeals. Affirmed.

Superseding opinion of District Court of Appeal in 283 P. 348.

L. C. Woods, of Los Angeles, for appellant.
William Ellis Lady, of Los Angeles, for respondents.

PLUMMER, J. [1] This is an appeal by the plaintiff from a judgment in favor of the defendants upon the pleadings. The complaint in the action alleges that on, and prior to, the 11th day of February, 1926, the plaintiff was the owner of certain real property situate in the county of Los Angeles, particularly described in the complaint; that said property was, at the date mentioned, and at the date of the beginning of this action, of the value of \$11,500, incumbered to the amount of \$2,638, secured by a deed of trust payable on the 17th day of March, 1926; that on the 11th day of February, 1926, the said defendants caused to be issued out of the superior court of the county of Los Angeles, an execution in an action entitled "W. C. Price v. John P. Hight et al.," and that acting under and by virtue of said writ of execution, and under the instructions of said defendants as to what property to levy upon, the sheriff of the county of Los Angeles did, on the 13th day of Feb-

ruary, 1926, wrongfully, and without right so to do, levy upon the property hereinbefore referred to; that at the time of the levy upon said property, the plaintiff was negotiating for a loan of sufficient amount to satisfy the aforesaid incumbrance, and was at such time offering as security for the money to be loaned, a deed of trust on the foregoing property, and that the plaintiff had no other means by which to obtain a sufficient sum to satisfy said incumbrance; that by reason of said wrongful levy as aforesaid, the plaintiff was unable to secure the money with which to satisfy the said obligation, and that on the 30th day of July, 1926, the trustees in said trust deed named, sold said real property to satisfy the obligation referred to; that by reason of the foregoing wrongful acts on the part of the defendants, the plaintiff has suffered damage in the sum of \$8,862. To this complaint the defendants interposed both a general and special demurrer. The demurrer being overruled, the defendants answered, denying the ownership of the plaintiff, and set forth in their answer certain writings relative to the instructions given the sheriff, and the return of the sheriff that he had levied upon the interest of one L. B. Miller in the real property described in the plaintiff's complaint. Thereafter the defendants, relying upon the provisions of section 448 of the Code of Civil Procedure, which reads: "When the defense to an action is founded upon a written instrument, and a copy thereof is contained in the answer, or is annexed thereto, the genuineness and due execution of such instrument are deemed admitted, unless the plaintiff file with the clerk, within ten (10) days after receiving a copy of the answer, an affidavit denying the same, and serve a copy thereof on the defendant," interposed a motion for judgment on the pleadings. Judgment went for the defendants upon this motion. Irrespective of what we may say hereafter, it is clearly apparent that the basis assigned for the defendants' motion is unsound. The writings referred to are writings with which the defendants only were connected, and with which the plaintiff had nothing to do. Such writings, not being binding upon the opposite party, furnish no grounds whatever for a judgment against such party. If such papers are admissible at all in evidence, they are only in the case for what they are worth, and not as instruments binding upon the plaintiff in this action. Such papers are binding only upon the parties who have signed the same. This clearly appears from the following cases: *Heath v. Lent*, 1 Cal. 411; *Marx v. Raley & Co.*, 6 Cal. App. 479, 92 P. 519; *Citizens' Bank & Trust Co. v. Pocatello*, 41 Idaho, 403, 240 P. 186; *Krug v. Warden*, 57 Cal. App. 563, 207 P. 696; *Interstate Realty & Improvement Co. v. Clark*, 77 Cal. 558, 247 P. 244.

[2] Practically admitting that these decisions are conclusive against respondents for the reasons first presented in support of their motion for judgment, it is contended that the order granting the motion and the judgment entered thereon should nevertheless, for other reasons, be affirmed. In this behalf it is argued that an execution issued in an action in which the plaintiff was not a party, and the levying thereof upon the lands claimed by him, fail to cast a cloud upon the title of the plaintiff, as it would appear from the record that the plaintiff, not being named as a party, the proceeding is void upon its face, and therefore an action in equity to remove the cloud would not lie. This contention of the respondents appears to be well taken, as appears in the case of *Russ & Sons Co. v. Crichton*, 117 Cal. 695, 49 P. 1043, and the cases there cited. This, however, does not relieve the respondents from liability if they are otherwise sufficiently charged in the plaintiff's complaint. While the weight of authority is in support of the contention that equity will not interfere to remove a cloud upon title to real estate where the invalidity of the instrument said to cast such cloud appears upon the face thereof, this apparent defect in affording a landowner a remedy has been obviated by section 738 of the Code of Civil Procedure relative to adverse claims. In *Castro v. Barry*, 79 Cal. 443, 21 P. 946, 947, the Supreme Court had before it the question of when an action would lie to determine an adverse claim, rather than by a proceeding in equity to remove a cloud. It is there said, quoting section 738: "An action may be brought by any person against another who claims an estate or interest in real property adverse to him, for the purpose of determining such adverse claim." * * * The distinction between the two kinds of action is clear. They are different not merely in form, * * * but in purpose. In the former case the proceeding is aimed at a particular instrument, or piece of evidence, which is dangerous to the plaintiff's rights, and which may be ordered to be destroyed in whosoever hands it may happen to be; while in the latter the proceeding is for the purpose of stopping the mouth of a person who has asserted or is asserting a claim to the plaintiff's property [whether such claim be founded upon evidence or utterly baseless]. It is not aimed at a particular piece of evidence, but at the pretensions of an individual. * * * The statute enlarges the class of cases in which equitable relief could formerly be sought in the quieting of title." The opinion further goes on to approve cases holding that it is not necessary that the adverse claim should be of any particular character. A like question was before the Supreme Court in the case of *Dranga v. Rowe*, 127 Cal. 506, 59 P. 944, 945, where it was said, quoting from the lan-

guage of the same court in *Kittle v. Bellegarde*, 86 Cal. 564, 25 P. 58: "It is contended that the complaint does not warrant any relief, because it shows that the adverse claims of defendants rest upon proceedings which are void upon their face. But this objection is not available in an action to determine an adverse claim, under section 738 of the Code of Civil Procedure. Such an action may be maintained against a person who claims under a void tax deed." From which it follows that the levying of an execution upon the property of one person, under the claim that it belongs to a third person, would entitle the plaintiff to begin an action immediately to determine such adverse claim, and we think it is scarcely open to question that no one would either care to loan money upon the security of real estate or to purchase the same where adverse claims thereto are undetermined.

[3-6] This brings us to the crucial question determinative of this appeal: Does the complaint state any cause of action? Upon a motion for judgment on the pleadings only the complaint can be considered, and upon the same basis as though it were before the court upon a general demurrer. This is the well-settled law of this state. *Elmore v. Tingley*, 78 Cal. App. 460, 248 P. 706, and the authorities cited in the opinion in that case. Upon the premise thus laid down, let us examine the complaint. Paragraph one of the complaint alleges the ownership of the plaintiff to the real property set forth therein, but it does not allege possession or exclusive ownership. The Civil Code describes ownership of property as being either absolute or qualified. Admitting that this may be only an ambiguity which should be reached by special demurrer, yet the fact remains that the judgment does not show exclusive ownership or possession of any kind, and for all that the complaint shows the person against whom the execution ran may have been in possession of the premises and the owner of a qualified interest therein which would be subject to sale on execution. A vital defect, however, appears in paragraph three of the complaint, where it is attempted to charge wrongful levy of the writ of execution. It is there set forth that in an action entitled "*W. C. Price v. John P. Hight et al.*," the sheriff of the county of Los Angeles, acting under instructions of the defendants, wrongfully, etc., levied upon the property described in the complaint. There is not one word in the paragraph referred to, or in any other portion of the complaint, charging the defendants in this action with giving any wrongful instructions. The wrongdoing is charged as the act of the sheriff, who is not a party to this action. Furthermore, the charge that the sheriff wrongfully levied the execution is not a statement of any fact tendering an issue,

but is only a conclusion of law. 21 Cal. Jur., p. 31, § 16. Paragraph four of the complaint sets forth that at the time of the levy of the execution the plaintiff was negotiating for a loan to be secured by a trust deed covering the property involved. There is nothing in the complaint showing the character of such negotiations, or that the same would have been successful. Paragraph five of the complaint alleges that by reason of said alleged wrongful levy of execution, the plaintiff was unable to secure the money with which to satisfy the obligation, and that on the 30th day of July, 1926, the trustee in the deed of trust referred to sold the property mentioned in the complaint. This paragraph does not contain a single statement of fact, but is a pure conclusion of the pleader. It must be here borne in mind that the complaint shows that the levy of the execution was made on the 13th day of February, 1926, and the sale of the property did not take place until the 30th day of July, 1926, lacking thirteen days of being just six months thereafter. There is nothing in the complaint showing that any adverse claims to the property could not have been determined during the time between the levy of the execution and the sale of the property. Not a single fact is set forth in the complaint as to anything done or performed by the plaintiff relative to securing money to take up the obligation secured by the trust deed, and the whole cause of action simply rests upon the conclusion of the pleader that he was unable to do so by reason of the alleged wrongful levy of execution. There is nothing in the complaint from which it can be concluded that the plaintiff was not a party to the action in which the execution was issued. The defendants in that action are named as "John P. Hight et al.," and there is no statement of any facts showing that the person referred to by the words "et al." possessed no interest in the property levied upon. In considering the complaint, all the presumptions are that the pleader has stated his case as favorably as possible, and, if any further presumptions are to be indulged in, they are against the pleader. See *Silvers v. Grossman*, 183 Cal. 696, 192 P. 534. It is further held in the case just cited that matters of substance must be alleged in direct terms, and not by way of recital.

[7] Upon this analysis of the complaint, which was not made upon the original hearing hereof, we are led to the conclusion that the complaint does not state a cause of action, and that the defendants were entitled to prevail upon their motion, and that the judgment entered thereon should be affirmed; and it is so ordered.

We concur: FINCH, P. J.; R. L. THOMPSON, J.

**COSSINS v. HERSHEL CALIFORNIA
FRUIT PRODUCTS CO. (Civ. 3948.)★**

District Court of Appeal, Third District, California. Jan. 29, 1930.

As Modified on Denial of Rehearing Feb. 28, 1930.

1. Appeal and error ⇨989—In determining whether evidence supports finding, appellate court determines merely whether there is substantial supporting evidence.

The function of an appellate court in determining whether evidence is insufficient to support finding is to determine merely whether there is substantial evidence to support the finding.

2. Sales ⇨153, 177—Refusal of buyer to accept tomatoes tendered and notice to seller it would receive no more was repudiation of contract, relieving seller from making further tender.

Buyer's refusal to accept tomatoes it had agreed to purchase from plaintiff seller which buyer's inspector had inspected, and information conveyed to seller through another that buyer would receive no more tomatoes from him, held to be such a repudiation of contract as to relieve seller of necessity of making any further tender of tomatoes.

3. Sales ⇨181(12)—Failure to show that tomatoes rejected by buyer's inspector under contract to purchase them were of marketable quality held fatal defect in proof.

Failure to show, in action for damages for alleged refusal to accept and pay for tomatoes which buyer had agreed to purchase from plaintiff seller and his assignors, that tomatoes of two of assignors which inspector of buyer rejected were of marketable quality, held to be fatal defect in proof.

4. Damages ⇨62(4)—After buyer's rejection of one load of tomatoes from crop it agreed to purchase, sellers had duty to make reasonable efforts to minimize their damages (Civ. Code, § 3353).

After inspector of buyer sued for alleged failure to accept and pay for tomatoes it had agreed to purchase from plaintiff seller and his assignors had rejected carload of tomatoes, it was duty of sellers to make reasonable efforts to minimize their damages as required by Civ. Code, § 3353.

5. Sales ⇨181(11)—Evidence held insufficient to support finding that one of sellers tendered delivery of certain tomatoes to buyer refusing to accept them, for which loss damages were claimed.

Evidence, in action for alleged failure of buyer to accept and pay for tomatoes it had agreed to purchase from plaintiff seller and assignors, held insufficient to support finding that one of seller's assignors tendered delivery of certain tomatoes to buyer but that buyer refused to accept them, for loss of which damages were claimed.

6. Sales  83—That buyer furnished seller of tomatoes with boxes for some of shipments did not render buyer liable for failure to furnish boxes demanded for other shipments contrary to contract.

Where contract for purchase of tomato crop provided that, if for convenience of seller buyer furnished boxes to seller for delivery of fruit and vegetables, rental charge per box for each time used should be paid by seller and that buyer would not be held accountable or responsible for failure to furnish boxes at any particular time, that buyer did in fact furnish one of sellers with boxes for some of his shipments did not render it liable on that account in damages, contrary to express provisions of contract for failure to furnish boxes demanded for other shipments.

Appeal from Superior Court, San Joaquin County; D. M. Young, Judge.

Action by B. T. Cossins against the Hershel California Fruit Products Company. From an adverse judgment, the defendant appeals. Reversed in part, and affirmed in part.

Levinsky & Jones and Charles H. Epperson, Jr., all of Stockton, for appellant.

G. M. Steele, of Lodi, and Scott Rex, of Stockton, for respondent.

FINCH, P. J. This is an action for damages for the defendant's alleged refusal to accept and pay for tomatoes raised by the plaintiff and his assignors during the year 1926, and which the defendant had agreed to purchase, and for balances due for tomatoes delivered and accepted by the defendant. The complaint contains five counts, based on five separate contracts. The plaintiff is the seller named in the first contract, A. F. Donald and F. Ascrizzi in the second, C. C. Burnett and P. Giordano in the third, E. Leventini in the fourth, and Thomas Lazini in the fifth. Judgment for damages was entered in favor of the plaintiff on the first four counts and for the defendant on the fifth. The judgment is in favor of the plaintiff also for the amount which the answer admits was due for tomatoes accepted by defendant. The defendant has appealed from the judgment in favor of the plaintiff.

Each contract provides that the buyer "has bought" the crop of "Early Anna" tomatoes to be grown by the seller upon a specified acreage during the year 1926 at \$14.10 per ton, delivered f. o. b. cars "as hereafter directed by buyer." The defendant supplied the sellers with seed, a part thereof being of a different variety from that specified in the contract. This departure from the terms of the contract appears to have been made by mutual consent and is not material here. It seems to have been understood between the parties that the tomatoes were to be delivered at Peltier station.

[1] Appellant contends that the evidence is insufficient to support the findings in favor of the plaintiff. Some parts of the appellant's argument go to the weight of the evidence rather than its insufficiency. Since the function of an appellate court in this respect is to determine merely whether there is substantial evidence to support the findings, it is deemed sufficient to state the evidence most favorable to the plaintiff.

Early in July, when from two to four tons of tomatoes per acre were ripe and ready for market, the defendant refused to take them. This refusal constituted a plain breach of the agreements with the growers. However, at the defendant's suggestion, the growers sold their tomatoes, as they ripened, to other buyers, until the defendant opened its cannery, and they have made no claim for damages arising out of this first breach.

The defendant's cannery was opened in the early part of August, and during the remainder of that month the defendant accepted the tomatoes shipped to it by the growers, making deductions, however, for those claimed to be of inferior quality. The cannery is located at San Jose. At the inception of the transactions in question, the defendant employed J. S. Triolo, who was engaged in the fruit and produce business in the city of Stockton, "to contract these tomatoes, supervise the loading, pay for the labor of loading, for the sum of 75 cents a ton on all contracts," and also to inspect the tomatoes before shipment and "keep a proper daily report of each car that is shipped." He or his assistant, Victor Ghiorzo, inspected all shipments of tomatoes involved in this action made during August but, apparently, not to the satisfaction of the defendant. About September 3, the defendant employed John Vasconcellos to inspect the tomatoes of the Peltier growers. His first act was to reject tomatoes offered for shipment by the growers mentioned in the first three counts. The plaintiff testified that those so offered by him "were in good condition. They were sorted tomatoes, picked very carefully * * * and sorted. * * * We threw all the bad tomatoes in the ditches, absolutely trying to get by the inspector, and they were excellent tomatoes, in fine shape, solid; the boxes were well filled; they were not mashed. * * * I got plenty of instructions through Mr. Triolo from Mr. Hershel (president and general manager of defendant) to keep me from moving my 510 tons. * * * He gave me the instructions Hershel sent word that he didn't want anything more to do with Cossins at all, he would receive no more tomatoes from his ranch. * * * He told me that about the second day after the inspection took place." Triolo testified that shortly after September 3 Hershel "told me he wanted nothing more to do with Cossins." Hershel's statement ap-

pears to have been induced by violent language and conduct of plaintiff towards Vasconcellos at the time of the inspection mentioned. Triolo testified, without objection, as follows: "I said to him, 'you are a tomato inspector?' 'Well,' he says, 'No, I can't say I am. * * * I am in the tire business in San Jose.' I said, 'You have no experience in growing tomatoes or anything?' He said, 'No, I have not, but I know just what I want to accept.' * * * On one particular occasion I * * * brought the subject up, what kind of tomatoes he (Cossins) had to deliver. Mr. Vasconcellos at that time informed me that they had to be perfect, no deductions were allowed. * * * He told me he would stand for no dockage at Peltier."

Mrs. Burnett testified Vasconcellos said he could not accept the Burnett tomatoes inspected at the time mentioned "because they are not 100% pure. I told him, 'You can not raise anything like that.' He said, 'Well I know that, but that is my instructions, not to take them unless they are 100% pure. * * * Perhaps not that word, but 'perfect.' * * * He said the tomatoes were good, but he could not take them because they were not 100% perfect." Mr. Burnett testified that at another time Vasconcellos inspected two loads of tomatoes belonging to the witness and "said, 'I reject these.' I said, 'What is the matter, those tomatoes are all right.' * * * He said, 'Those tomatoes are all right, those tomatoes are good, but my instructions are that they must be at Peltier 100% perfect. At Stockton I am allowed to make deductions and let them go on, but at Peltier they must be 100% perfect. * * * I am sorry, I am not anything but a hired man, I must follow my instructions.'" Another witness testified that the tomatoes so rejected were "all right tomatoes, all in good condition, * * * good, merchantable tomatoes." Ghiorzo testified that Vasconcellos found a few of Burnett's tomatoes "kind of cracked, and some with green ends at the stem, and he said that he could not accept those tomatoes under his directions. * * * That is, he could not accept them unless they were 100% perfect." Triolo testified: "An Early Anna tomato has a characteristic or individuality, no matter how ripe it gets, there is always at the butt end of the tomato a sort of greenish spot. * * * That tomato will rot and still the green spot will be on it." It was stipulated at the trial that the Early Anna tomato will not "ripen up so that the green spot where the stem has been will disappear and turn red."

The plaintiff and his assignor Burnett made no further effort to deliver their tomatoes to the defendant, but sold as many of them as they could find markets for to other buyers at the best price obtainable, which was lower than the defendant had agreed to pay therefor; the market price

having fallen below such agreed price. The court gave judgment for damages in the amount of the agreed price of the unsold tomatoes, less the estimated cost of picking and delivering them.

[2] The appellant contends that the growers did not make a sufficient tender of the tomatoes to put the buyer in default. While the evidence would support a finding either way on that issue, it cannot be held as a matter of law that the evidence is insufficient to support a finding to the effect that the defendant repudiated its contract with the plaintiff and that with Burnett and Giordano. It not only refused to accept plaintiff's tomatoes which Vasconcellos first inspected, but informed the plaintiff through Triolo that it would receive no more tomatoes from him. This was such a repudiation of the contract as to relieve the plaintiff of the necessity of making any further tender. *Tomboy Gold & Copper Co. v. Marks*, 185 Cal. 336, 197 P. 94. The defendant unreasonably refused to accept the tomatoes of Burnett and Giordano. One of the grounds upon which they were rejected was the presence of green spots at the stem end, a condition which it was impossible to avoid, a fact the defendant must have known when it agreed to purchase Early Anna tomatoes. In justice to the defendant, it may be added that much of the damaging testimony given against it was denied by its witnesses, but the determination of the conflict was within the exclusive province of the trial court.

The evidence is conflicting also as to the tonnage of tomatoes lost by the plaintiff and his assignors because of the defendant's repudiation of the contracts. Such evidence is too extensive to be set forth herein, but an examination thereof shows that it is sufficient to support the findings in relation thereto.

[3, 4] The evidence fails to show that tomatoes of Donald and Ascrizzi which Vasconcellos rejected were of marketable quality. This is a fatal defect of proof. It appears from Donald's testimony that after Vasconcellos rejected one load of tomatoes they "stopped irrigating" and made no effort to market the remainder of the crop. He testified: "There was no use of picking if you were under contract with a cannery and the cannery would not take them, and I was not going to take chances to sell to somebody else and then get in trouble over that." It was the duty of these sellers to make reasonable efforts to minimize their damages. *Civ. Code*, § 3353; *Vitagraph, Inc., v. Liberty Theatres Co.*, 197 Cal. 694, 242 P. 709; *Hill v. McKay*, 94 Cal. 5, 29 P. 406; 8 Cal. Jur. 782, 787.

[5] It appears from Leventini's testimony that he continued to deliver tomatoes to the defendant until about the first of November. His claim for damages, according to his testimony, was based on defendant's failure to

furnish him a sufficient number of boxes for the shipment of his tomatoes. The complaint does not allege any such default on the part of the defendant and the court made no finding in relation thereto. The complaint alleges that Leventini "tendered delivery of said tomatoes to defendant," but that the defendant refused to accept those for the loss of which damages are claimed. The court found to the same effect. There is no evidence to support this finding. The written agreement does not obligate the defendant to furnish boxes. The contract provides: "If, for the convenience of seller, buyer shall furnish boxes to seller for delivery of fruit and vegetables, a rental charge of one cent per box for each time used * * * shall be paid by seller. * * * Buyer will not be held accountable or responsible for failure to furnish boxes at any particular time."

[6] The defendant did, in fact, furnish Leventini with boxes for some of his shipments, but it cannot be held on that account that it is liable in damages, contrary to the express provisions of the contract, for its failure to furnish boxes demanded for other shipments.

The other grounds urged by appellant for the reversal of the judgment on the first and third counts have been considered, and it is deemed sufficient to say that they appear to be without sufficient merit to warrant a discussion thereof.

The judgment in favor of the plaintiff for damages in the sum of \$1,085.80 on the second count of the complaint and \$715.43 on the fourth count is reversed, and in all other respects the judgment is affirmed.

The trial court is directed to retry the causes of action for damages alleged in the second and fourth counts of the complaint.

We concur: R. L. THOMPSON, J.; PLUMMER, J.

103 Cal. App. 703

SINAN v. ATCHISON, T. & S. F. RY. CO.
et al. (Civ. 203.) *

District Court of Appeal, Fourth District,
California. Feb. 4, 1930.

Rehearing Denied Feb. 24, 1930. Hearing Denied by Supreme Court March 31, 1930.

1. Carriers ⇨291—Passenger carrier is not insurer of safety of traffic.

Although extreme care and diligence is required of railway company carrying passengers in keeping its track in safe condition, it is not an insurer of safety of traffic.

2. Carriers ⇨320(22)—Where passenger train ran into open switch, negligence in employees' failure to notify train master that switch had been spiked held for jury.

In action for injuries sustained by passenger when train ran into open switch and was wreck-

ed, question whether there was actionable negligence in failure of employees of carrier to notify train master that switch had been spiked held for jury.

3. Carriers ⇨316(5)—Burden was on carrier to prove wreck was caused by malicious tampering with switch and that carrier was not negligent in failing to discover condition in time to avert accident.

In action for injuries sustained by passenger when train ran into open switch, burden was on defendant carrier, not only to satisfy jury that wreck was caused by malicious tampering with switch, but that carrier was not guilty of negligence in failing to discover condition of track in time to avert accident.

4. Appeal and error ⇨1001(1)—Appellate court cannot disregard jury's findings, where sustained by evidence.

Where evidence is sufficient to raise an issue for jury, it is not province of appellate court to disregard its findings.

5. Carriers ⇨320(22)—In action by passenger for injuries sustained when train ran into open switch, question whether wreck was caused by malicious tampering with switch held for jury.

In action for injuries sustained by passenger when train ran into open switch, question whether wreck was caused by malicious tampering with switch held for jury.

6. Carriers ⇨320(22)—Where train wreck was caused by open switch, carrier's negligence in not discovering condition in time to avert accident held for jury.

In action for injuries sustained by passenger when train ran into open switch, question whether carrier was negligent in not discovering condition of switch in time to avert accident held for jury.

7. Trial ⇨253(7)—When instruction directs verdict if jury finds certain facts, it must embrace all things necessary to support verdict.

When instruction directs verdict, if jury finds certain facts to be true, it must embrace all things necessary to support verdict and to show legal rights or liability of party in whose favor verdict is directed to be returned.

8. Carriers ⇨321(12)—Where train ran into open switch and was wrecked, instruction finding of derailment of train by act of third party entitled carrier to verdict, without mentioning subsequent negligence in failing to discover displaced switch, held erroneous.

In action for injuries sustained by passenger when train ran into open switch, instruction in effect that finding of derailment of train by act of third party not employed by carrier entitled carrier to verdict in its favor, which instruction entirely relieved carrier from any showing as to opportunity or diligence in discovering condition of switch in time to have averted accident, held erroneous.

Appeal from Superior Court, Kern County; J. W. Mahon, Judge.

Action by Antoine Sinan against the Atchison, Topeka & Santa Fé Railway Company and others for damages for personal injuries. From a judgment for defendants, plaintiff appeals. Reversed.

Fred C. Peterson, of Oakland, and Emmons & Aldrich, of Bakersfield, for appellant.

E. W. Camp and Robert Brennan, both of Los Angeles, for respondents.

SLOANE, P. J. This is a case in which the decision on appeal rests chiefly on the sufficiency of the evidence to support the verdict of the jury, and in which, it is conceded by both plaintiff and defendant, there is no conflict in the evidence.

The verdict was for the defendant, and the correctness of such verdict must rest upon the justification from the undisputed facts for the inferences and conclusions which must have been arrived at to support the verdict.

As the testimony of the numerous witnesses, shown in the bill of exceptions, is in substantial accord, nothing is to be gained by reviewing such testimony in detail.

The consensus of the separate narrations as to the facts pertaining to the accident is as follows:

On the 2d day of December, 1922, train 22 of the defendant railway company departed from Ferry Point, on San Francisco Bay, bound for Barstow, Cal. Plaintiff was a passenger on this train at the time and place of the accident. While the train was moving southerly about four miles north of the city of Bakersfield, it was derailed, and the plaintiff thereby received the injuries complained of.

The roadbed at the scene of the derailment was practically level, without curves, and was rock-ballasted and in good condition. The train passed the station of Shafter at 5:21 p. m., a distance of 16 miles from the scene of the wreck, and arrived at the place of the accident at 5:37 p. m., after dark, covering the intervening distance in 16 minutes. The rate of speed on the approach to the point of derailment was variously estimated by witnesses at from 45 to 60 miles per hour. The accident occurred at a junction of the main line with a little-used spur track known as the Shattuck-Nemo spur, which was connected with the main line by the usual switching appliances.

This spur track had not been used for a considerable period of time, and the switch not only was kept locked, but a spike had been driven at the point of connection of the spur rail with the main line, so as to furnish an additional safeguard against opening the switch. On reaching this point, the engine and train ran in and upon the spur track and was derailed, the engineer killed, the fireman injured so that he died soon after, and the

injuries complained of inflicted on the plaintiff.

Immediately after the accident, an inspection disclosed that the switch was open so as to deflect the moving train from the main line upon the spur track, thus causing the derailment. The switching device was, however, found locked, and the signal lights attached were found burning, with the green light facing the approaching train, and other signal devices in place, indicating that the main track was open for passing trains.

The position and operation of these signals is explained in the testimony as follows: Testimony of L. E. Heaster, a brakeman on the wrecked train, who examined the switch and signals immediately after the accident: "When I examined the switch I found it was locked, and that the switch and signals were in a position for a clear main line track. When I first observed the connecting rod of the shuttle box which operates the electrical signal device, I found it disconnected, lying on the ground with the bolt missing therefrom, and the cotter pin was gone. The same situation existed with respect to the pitman rod—it was resting on the ties, with the bolts and other appliances used to connect it to the pitman rod missing."

Other witnesses testified to the same effect as to the condition of the switch and signaling devices immediately after the wreck.

The record on appeal does not make the relation of these parts to each other very clear to the layman, but it appears that photographs and diagrams not included in the transcript were displayed to the jury, purporting to give the jurors a clear understanding of the situation.

To quote another of several witnesses who testified to practically the same conditions immediately following the accident, the witness Clark, a porter on the train, in the employ of the Pullman Company, testified: "I saw the light on the switch-stand was showing east and west and saw it was clear. I looked underneath and saw this switch was thrown, which would cause the train to go on the switch instead of the main line, and the bolts were disconnected from the rod, between the rods from the switch-stand to the rails, and at that time I called the conductor's attention to it. He and I and some other passengers went there again to look for bolts, but we did not find any. I do not know the technical names of the rods or appliances, but the rod that reaches from the switch-stand over to the rails, and the rod that reaches from the electric box to the rails was disconnected. They had been disconnected by the removal of the bolts and the rods were lying on the ground."

The evidence also discloses that the spike which had been driven to hold the switch closed had been bent over to such an extent

as to permit the switch rail to pass over it. It also appears that another south-bound train had passed this point safely a few hours previously, indicating that the switch was not open at that time.

We do not see how the jury could reach any other conclusion than that the wreck was caused by the train running into an open switch.

Some contention is made that the switch might have been thrown by the operation of a car wheel with a sharp flange, concerning which there was some evidence. But appellant concedes that there was sufficient conflict in the evidence to justify the jury in rejecting that theory.

The question next presents itself: Who was responsible for the open switch? Appellant contends, and respondent concedes, that the doctrine of *res ipsa loquitur* applies to this accident, and that the presumption of negligence rests on the defendant, and, to rebut such presumption, the burden was on the defendant to satisfy the jury that the open switch was not the result of lack of due care and diligence on the part of the employees and servants of the railway company. Respondents claim to have met this requirement by showing of facts justifying a finding that the displacement of the switch was an act of malicious vandalism on the part of persons unknown.

The controversy on this appeal rests chiefly upon the sufficiency of the evidence to support this implied finding of the jury.

There are two other theories on which the jury might have acted, either of which would have established the liability of the defendant: First, that defendant's employees, within the scope of their employment, had left the switch open, after removing and negligently failing to replace the disconnected parts of the switching apparatus; or second, that the defendant company had sufficient opportunity and notice to have enabled it, in the exercise of due care and diligence, to have discovered the dangerous situation in time to have averted the wreck.

There is no direct evidence to support the first of these theories, and the extent of the disarrangement of the appliances, the number of detached parts, and the fact that so short a time had elapsed since trains had passed safely over this part of the road, rendered such situation extremely improbable. It is inconceivable that this switch could have been left in the condition shown by the evidence by the mere negligence or carelessness of an employee. The combination of displacements points more logically to a deliberate act of sabotage.

[1] On the second theory, while extreme care and diligence is required of the railway company in keeping its track in a safe con-

dition, it is not an insurer of the safety of traffic. The evidence discloses that inspection of the track and switches was made daily by the company in the manner and at intervals accepted as adequate and customary in such matters. Such inspection, of course, cannot require the oversight of every foot of the roadway during every hour of the day. It does not appear very clearly just when this particular switch was inspected prior to the accident, but there is evidence that some time during the day one Medina, a trackwalker for the railway company, had made a report to one of his superiors to the effect that the spike heretofore referred to had been driven at the switch as an additional safeguard against accidental displacement of the rail. It appears that the using of such a spike was customary at spur tracks which were infrequently used.

Appellant argues that, with knowledge that this spike had been driven, it was incumbent on the defendant company to have immediately sent some one to inspect the switch, or to have notified traffic on the road of the position of the spiked rail. The defendant Frank Stewart, a foreman in the Bakersfield yards of the defendant company, testified as follows: That about noon of the date of the accident a trackwalker by the name of Jesus Medina came into the yards at Bakersfield on his trackwalking velocipede, and told the witness Stewart that he (Medina) had spiked the switch at the spur across the river. The witness testified that the only spur within the jurisdiction of Medina across the river was the spur at which the accident occurred. Stewart then endeavored to find Welsh, the timekeeper, but failed to do so, and did not report to any official of the company that he had received the statement of Medina. He made no effort to telegraph the trainmaster at Fresno that the switch had been spiked.

A rule of the railroad company, No. 600, provides as follows: "In case it becomes necessary to spike a switch, the trainmaster must be advised by telegraph or telephone as soon as possible, and also advised when switch is ready for use."

Archibald Wood, trainmaster of the defendant railway company at Fresno, the official to whom the report should have been made, testified that no reports were made to him as trainmaster, nor to his office, that the Shattuck-Nemo spur had been spiked by any person. He also testified that, in the event a switch had been spiked and a report made to him thereof, a special bulletin of caution would have been issued to the operating crew of every train which would pass over the spiked switch from the time the report was received by the trainmaster until a further report was received that the switch had been repaired, and it would then

be the duty of the train operators to run at a slow rate of speed and use caution over the spiked switch.

[2] The circumstances just narrated evidence some degree of negligence on the part of the employees of defendant in conforming to the rules of the company, but we cannot say as a matter of law that any failure in this regard proximately contributed to the accident. It was a matter to be considered by the jury as to whether there was actionable negligence in this respect. There is nothing in the record to indicate that in this particular instance the presence of the spike in question added anything to the danger of the situation. The practice of spiking the switch rail at unused switches would seem to be a very reasonable precaution against possible accidental displacement of the switch rail, but the evidence discloses that the ordinary switching appliances which existed at this point are deemed entirely adequate at the numerous switching stations along the railroad. Had notice of the presence of this spike been given to the train crew in advance of the accident, it is possible that the train would have approached the spur track in question with a degree of caution which might have prevented the accident, notwithstanding the signal lights showing an open track on the main line. But we think it was for the jury to determine whether there was negligence on the part of the railroad employees in failing to advise the proper authorities under rule No. 600 quoted, or whether or not the presence of this spike, in view of the other evidence relating to the displacement of the switch, in any way contributed to the wreck.

If the switch itself had not been tampered with, it would under usual circumstances have been a sufficient safeguard against accident, irrespective of the presence or absence of the additional precaution of the spike.

We do not find any support in the evidence for appellant's claim that Medina's report of having spiked the switch rail resulted from his finding the switch out of order, or that he did find it out of order or so reported.

Of course, if he did so find, his failure to report to that effect in the due course of his employment would establish negligence on the part of the railway company. The mere spiking of the switch rail would raise no inference that the switch itself was out of order, as the testimony shows that it was a customary precaution at unused side tracks.

It is our conclusion that the verdict of the jury exonerating the defendant company from liability rests on the sufficiency of the evidence to justify a finding that the wreck was caused by an act of vandalism by some

one **not** acting in the course of employment as a servant to defendant and of sufficient evidence to disprove a presumption of negligence in discovery.

Counsel for appellant have gone into the law relating to the degree of proof necessary to sustain a finding of sabotage with much industry and research. It is their contention that the evidence on this point was insufficient to overcome the presumption of negligence resting upon the defendant under the doctrine of *res ipsa loquitur*.

[3] The burden was on the defendant company not only to satisfy the jury that the wreck was caused by malicious tampering with the switch, but that the company was not guilty of negligence in failing to discover the condition of the track in time to avert the accident. Counsel for appellant cite the case of *Chicago, M. & St. P. Co. v. Irving* (C. C. A.) 234 F. 562, 569, as indicating the degree of proof required to sustain a defense of vandalism. The opinion in that case recites:

"The defense relied upon evidence largely circumstantial, tending to show that some person unknown to it had deliberately pulled some spikes, removed angle bars, and displaced a rail. This may have been a correct way of accounting for the derailment, but the reasonableness of such a conclusion was evidently not clear to the jury and to the District Judge and, as we read the testimony, is by no means a satisfactory explanation to us."

[4] The difficulty in applying this case to the situation here presented is that the jury there found for the plaintiff, evidently rejecting the defense of vandalism, and the appellate court merely holds that such a finding by the jury was justified by the evidence. In this case, if the jury had found on this issue for the plaintiff, we would not be in a position to dispute the correctness of their verdict. Where the evidence is sufficient to raise an issue for the jury, it is not the province of the appellate court to disregard its findings.

The case of *Norton v. Galveston, H. & S. A. Ry. Co.* (Tex. Civ. App.) 108 S. W. 1044, 1046, is also relied upon by appellant.

In that case the only issue presented by the petition was the unsafe condition of the track by reason of a failure to properly spike and tamp the ties, and to fill in between them and surface the same where old ties had been removed and new ones substituted; this being the only ground of negligence presented by the pleadings in evidence. Under its general denial, the defendant sought to show that it employed skillful trackmen to care for the track, and that they performed that duty in a careful and prudent manner the day before the accident occurred. The defendant also

set up the defense that the wreck in question was caused solely by reason of the act of some person or persons not connected with the defendant company. The verdict and judgment was for the defendant. The issue of vandalism was submitted to the jury under an instruction that, "if you believe from the evidence that defendant's train, upon which plaintiff was a passenger, was derailed solely by reason of the act of some person or persons not connected with the defendant company, you must return a verdict for the defendant." The appellate court held that there was not sufficient evidence of vandalism to justify the submission of this issue to the jury. The only evidence on this point was that the employees of the company had left a push car and tools at the place where the wreck occurred. The push car was found on the morning of the wreck about 600 or 700 feet east of where it had been left. It required from two to four men to put the push car on the track. It was down a dump near the track. It was not shown that any of the tools had been molested or used. The opinion says:

"We do not think the facts raise the issue. That the push car had been lifted on the track by four or six men, carried 600 or 700 feet, and then dumped off down an embankment, merely had a tendency to show that persons had been at or near the place of the wreck before it occurred and had moved the push car, and did not tend to show any tampering with the track."

The opinion further states:

"The evidence raised merely a suspicion or surmise that wreckers might have caused the derailment, and that was not sufficient to warrant a submission of the question to the jury."

There was to all intents and purposes no evidence whatever on that point. The conclusion was that the submission of the question of vandalism to the jury was unwarranted.

The opinion further holds, as is the law of the instant case, that the burden of proving that the derailment took place on account of the track having been tampered with by malicious persons rested on appellant, and carried with it the burden of showing that due care had been used in inspecting the track so as to discover the defects—citing authorities. The opinion continues:

"In submitting the issue to the jury the duty of inspection and care in discovering the dangerous condition of the track should be coupled with it, for proof of the track having been interfered with, without proof of the exercise of reasonable diligence in discovering the defect, was an imperfect defense."

[5] In the instant case, as we have indicated, the evidence of vandalism was sufficient to go to the jury.

Another citation relied upon by appellant is that of *Houston & T. C. R. Co. v. Gaither* (Tex. Civ. App.) 43 S. W. 266, 268, in which the allegations of vandalism as the cause of the accident was pleaded in defense. The court says:

"The testimony of the defendant on this issue tended to show that the switch was in good condition, but that the bolt had been abstracted by some person not under the control, and without the knowledge, of the railway company. The evidence was amply sufficient to justify the jury in reaching the conclusion that the switch was out of repair, as contended for by plaintiff, and that the switch was open as a result of this defective condition."

But the court further held in that case that "the evidence was sufficient to justify the conclusion that the switch had been defective for some time, and that the railway company was guilty of negligence in not discovering and remedying this defect. Though the jury might have believed and accepted the theory of the defendant that the rod was abstracted by some person alien to its employment, and without its knowledge or consent, still the evidence indicated that the employees of defendant were not sufficiently watchful as to the condition of this switch, and the jury were warranted by the evidence in concluding that the railway company was guilty of negligence in not discovering that the switch was out of place."

Here again is a verdict accepting the theory of a malicious displacement of a switch by the vandalism of the third party, but at the same time holding against the defendant on the issue of sufficient opportunity and negligence in remedying the defect. The court in this connection says:

"Though the jury might have believed and accepted the theory of the defendant that the rod was abstracted by some person alien to its employment, and without its knowledge or consent, still the evidence indicated that the employees of defendant were not sufficiently watchful as to the condition of this switch, and the jury were warranted by the evidence in concluding that the railway company was guilty of negligence in not discovering that the switch was out of place."

In this connection it is the contention of appellant that the consideration of the question of negligence on the part of the defendant subsequent to the malicious interference with the switch was improperly presented to the jury under an instruction XVI, excepted to by the plaintiff, which predicated the nonliability of the defendant solely on the issue of vandalism. This instruction reads as follows:

"If you find by a preponderance of the evidence that the accident to the train referred to in the complaint and described in the evidence, and the derailment thereof, were

caused by the act of third parties who were not employed by defendants or either of them, then you will at once return a verdict in favor of the defendants, because the defendants would not be liable for the malicious acts of third parties."

Appellant's argument is that this instruction entirely relieves the defendant from any showing as to opportunity or diligence in discovering the condition of the switch in time to have averted the accident. It is argued that this instruction placed the liability of the defendant company solely upon the defective condition of the switch, caused by parties for whom the defendant was not responsible, without taking into account the question of reasonable opportunity to have remedied the defect in time to have prevented the accident.

Unless this omission is remedied by other instructions given at the trial, the omission was a serious one. Notwithstanding there may have been evidence before the jury to show that the defendant was without negligence in failing to discover and report the displaced switch, this instruction clearly eliminates the consideration of such evidence by declaring unequivocally that a finding of the derailment of the train by the act of third parties not employed by defendants entitled defendants to a verdict in their favor, irrespective of subsequent negligence in failing to discover and repair the displaced switch. We fail to find elsewhere in the instructions anything calling attention of the jury to the fact that proof of vandalism causing the accident should be accompanied by evidence showing that the accident could not have been averted by the exercise of due care and diligence on the part of defendant.

[6] The jury may well have found from the evidence that the defendant railway company was not responsible for the displacement of the switch, and have been led by the instruction to disregard, or at least fail to take into account, whether or not there was subsequent negligence in failing to discover the condition of the track in time to replace it or warn the train crew. As hereinbefore held, there was sufficient evidence on this point to make it a question for the jury.

It is true that the jury was elsewhere instructed in general terms that, if they found that the derailment occurred by reason of a defect in the appliances, or a failure to keep the appliances used by the defendant in repair, "and if you find that the defendants were negligent in failing to discover, or in failing to remedy such defect, the mere fact of the employment of an inspector will not release the defendants from the consequences of that negligence." If this instruction had concluded with the admonition "that the mere fact that the disrepair of the switch was caused by a malicious act of vandals would not relieve the defendants from the conse-

quences of that negligence, without a showing of diligence in discovering and repairing the defect," it might have supplied the omission complained of in instruction XVI. In spite of the instruction last above quoted, the jury might well have understood that negligence in failing to discover and remedy the defect did not apply where the direct cause of the accident was occasioned by trespassers.

The doctrine seems to be accepted in this state that an instruction directing a verdict under given conditions must include all the conditions necessary to support such verdict, and that an omission of a material matter of consideration cannot be cured by reference thereto in some other instruction. A recent statement of this rule by the Supreme Court is contained in the opinion in *Douglas v. Southern Pacific Co.*, 203 Cal. 390, 393, 264 P. 237, 238. The court says:

"The authorities are legion to the effect that a so-called 'formula' instruction must contain all the elements essential to a recovery, and the absence of any one of such elements may not be compensated for nor cured by a reference thereto in other instructions correctly and fully stating the law.

"This principle is well stated in *Beyerle v. Clift*, 59 Cal. App. 7, 9, 209 P. 1015, 1016, wherein it is held that: 'If an instruction by its terms purports to state the conditions necessary to a verdict, it must state all those conditions and must not overlook pleaded defenses on which substantial evidence has been introduced. "It is clear that an instruction directing a verdict for the plaintiff in the event that the jury finds certain facts to be true must embrace all the things necessary to show the legal liability of the defendant and to warrant the direction or conclusion contained therein that plaintiff is entitled to a verdict, and such is the rule in this state."'

In *Pierce v. United G. & E. Co.*, 161 Cal. 176, 184, 118 P. 700, 704, it is said:

"It is clear that an instruction directing a verdict for the plaintiff in the event that the jury finds certain facts to be true must embrace all the things necessary to show the legal liability of the defendant and to warrant the direction or conclusion contained therein that plaintiff is entitled to a verdict, and such is the rule in this state. * * * It is true that other instructions were given at the request of defendant that stated the law in these respects as favorably to defendant as was warranted, if not more favorably. But the giving of these other instructions simply produced a clear conflict in the instructions given the jury by the court, and it is impossible for us to say which instruction the jury followed in arriving at a verdict in favor of plaintiff. * * *

[7] The rule is that, where an instruction directs a verdict if the jury finds certain facts to be true, it must embrace all the things

necessary to show the legal rights or liability of the party in whose favor the verdict is directed to be returned.

Other California authorities bearing on this point are: *Starr v. Los Angeles Ry. Corp.*, 187 Cal. 270, 201 P. 599; *Keena v. United R. R. of S. F.*, 57 Cal. App. 124, 207 P. 35; *Dunne v. Hines*, 50 Cal. App. 345, 350, 195 P. 276; *Beyerle v. Clift*, 59 Cal. App. 7, 209 P. 1015; *Humphres v. Western Pac. R. R. Co.*, 173 Cal. 428, 160 P. 415; *Killelea v. Calif. Horseshoe Co.*, 140 Cal. 602, 74 P. 157; *Darrell v. Mut., etc., Ins. Co.*, 44 Cal. App. 523, 186 P. 620; *Rathbun v. White*, 157 Cal. 248-253, 107 P. 309.

[8] Counsel for respondent cites a number of authorities to the general rule that instructions must be considered as a whole, and that, if the instructions thus considered fairly state the law, the insufficiency of some single instruction will not be considered reversible error. We do not think that this general rule corrects the present situation. The instruction complained of definitely states a certain condition under which the defendant is entitled to a verdict, and unconditionally directs, if that state of facts is found by the jury, that their verdict shall be for the defendant. Under this instruction the jury may well have understood that, if the misplaced switch caused the accident, and that its displacement was occasioned by trespassers over whom the defendant had no control, these facts alone required the verdict as directed.

Appellant assigns other grounds of error in the instructions, and in the admission of evidence, but we doubt if these points are well taken. In any event, in view of our conclusion that there was prejudicial error in giving instruction XVI, it is unnecessary to discuss the matter further.

The judgment appealed from is reversed.

We concur: MARKS, J.; BARNARD, J.

104 Cal. App. 128

JOHANNSEN v. KLIPSTEIN et al.

(Civ. 242.)

District Court of Appeal, Fourth District, California. Feb. 18, 1930.

1. Pleading $\S$ 68—Allegation on information and belief that note sued on was duly sold and indorsed to plaintiff held sufficient, where purchase was made from payee's transferee and complaint was verified by attorney.

Where note sued on had been first assigned by payee to another and by the other assigned and transferred to plaintiff, and where complaint was verified by plaintiff's attorney, allegation therein that plaintiff was informed and

believed, and alleged upon information and belief, that the note was duly sold, assigned, transferred, and indorsed to plaintiff, who was the owner and holder thereof, held sufficient.

2. Trial $\S$ 395(1)—Judgment for plaintiff on note held sustained by findings that allegations of complaint were true and those of answer untrue and that note was not materially altered by indorsement without consent of makers.

In action on note in which defense was that note had been materially altered without consent of makers or their knowledge, finding of trial court that it was not true that the note was materially altered by indorsement thereon without the knowledge and consent of the makers, together with findings that all the allegations of the complaint were true and that all of the allegations of the answers were untrue, held sufficient to sustain judgment for plaintiff.

3. Alteration of instruments $\S$ 12—If indorsements on note were made with consent of makers, it was immaterial whether indorsements constituted material alteration (Civ. Code $\S$ 3205).

Where indorsements on note were made with knowledge and consent of makers, it was immaterial, as regards liability of makers, whether such indorsements constituted a material alteration within the meaning of Civ. Code $\S$ 3205.

4. Bills and notes $\S$ 125—Where note provided for interest from maturity, interest was payable from maturity date given on face of note, notwithstanding subsequent indorsements allowing extensions.

Where note on its face was payable on or before July 1, 1922, with interest at rate of 7 per cent. from maturity until paid, interest was payable from maturity date so stated on face of note, notwithstanding subsequent indorsements on back of note providing for extensions.

5. Bills and notes $\S$ 116—Parties' intention is gathered from face of note.

Intention of parties to note is to be gathered from the face of the instrument.

6. Appeal and error $\S$ 1033(9)—Defendants on appeal could not complain that judgment against them was for insufficient amount.

Defendants on appeal in action on note could not complain that court by some erroneous computation had entered judgment against them for amount less than it should have been.

Appeal from Superior Court, Kern County; Howard A. Peairs, Judge.

Action by C. E. Johannsen against T. E. Klipstein and others. Judgment for plaintiff, and defendants appeal. Affirmed.

See, also, 90 Cal. App. 106, 265 P. 568.

Homer Johnstone, of Los Angeles, and E. F. Brittan, of Bakersfield, for appellants.

W. E. Simpson and Gallaher, Simpson & Hays, all of Fresno, and F. E. Borton and James Petrini, both of Bakersfield, for respondent.

BARNARD, J. This is an action upon a promissory note, which, with its indorsements, reads as follows:
"\$9,500.00

"Bakersfield, California, April 29, 1922.

"On or before July 1, 1922, after date, for value received, I, we, or either of us, promise to pay John V. Bock or order, at First National Bank of Bakersfield, in Bakersfield, California, the sum of Nine Thousand Five Hundred 00/100 Dollars, with interest at the rate of 7 per cent. per annum from maturity until paid, interest payable, * * * and if not so paid to be compounded annually and bear the same rate of interest as the principal. * * *

"T. E. Klipstein,

"C. E. Lucas,

"C. F. Johnson,

"Chas. Haberkern.

"Extended for 60 days.

"Pay to the order of Warren H. Stetson.

"Extended to April 10th, 1923, John B. Bock

"Date	Principal Paid	Balance due
		on Principal
"June 22	3000	6,500

"John V. Bock

"Warren H. Stetson."

The defendants have appealed from a judgment in favor of the plaintiff, and through the failure of appellants to perfect a bill of exceptions, this appeal rests entirely upon an inspection of the judgment roll.

[1] The first point urged by appellants is that the complaint does not state facts sufficient to constitute a cause of action. This contention is based upon one paragraph of the complaint, reading as follows:

"That plaintiff is informed and believes and upon such information and belief alleges the fact to be that thereafter and prior to the commencement of this action, for valuable consideration, said note was duly sold, assigned, transferred and indorsed to the plaintiff herein, who is now the owner and holder thereof."

It is urged that this violates the rule laid down in *Hall v. James*, 79 Cal. App. 433, 249 P. 876, that one may not allege on information and belief facts which are peculiarly within his own knowledge, but unknown to the other party. This rule does not apply to such an allegation as the one in question. The note had been first assigned by the payee named therein to one Stetson, and the court found that it had been duly assigned and transferred to the plaintiff herein. While some of the facts in relation to these two transfers may have been within the knowledge of the plaintiff, it is by no means apparent that all of them were, and the regularity, validity, and genuineness of each step therein may have been believed by the plain-

tiff without being within his positive knowledge. In addition, the fact appears that the complaint was verified by plaintiff's attorney, and the complaint may have been thus worded because the attorney had no personal knowledge as to those particular facts.

[2, 3] It is next insisted that the conclusions and judgment are not supported by the findings. In this connection it is argued that the two indorsements on the note, extending the time of payment of the same, were material alterations which released the makers of the note from liability, since the findings did not show that such alterations were made with the consent of the makers. The court made the following finding:

"That it is not true that without the knowledge and consent, or knowledge and consent, of all, or any, of the parties who were the makers of said note, that said note was materially, or at all, altered by two indorsements thereon, one of which indorsements extended the time of payment of said note for a period of sixty days and the other indorsement one which extended the time of payment of said note to the 10th day of April, 1923. * * *"

It is urged that the court thus admits that the note was altered by the two indorsements, but finds that it is not true that these alterations were without the knowledge or consent of the makers, and then fails to find that the appellants ever gave their consent to said indorsements. This contention is without merit. Even if we assume that such indorsements constitute a material alteration, this becomes entirely immaterial if they were made with the knowledge and consent of the makers. The court found all of the allegations in the complaint to be true. It also found all of the allegations of the answer to be untrue. This was sufficient to sustain the judgment. *Fritz v. Mills*, 170 Cal. 449, 150 P. 375; *County of Sutter v. McGriff*, 130 Cal. 124, 62 P. 412; *Carr v. International Indemnity Co.*, 58 Cal. App. 617, 209 P. 83. The answer alleged that without the knowledge or consent of all or any of the parties, said note was materially altered by the two indorsements in question, and that both of said indorsements were made without the knowledge, consent, or approval of any of the makers of the note. In addition to the general findings that all of the allegations in the complaint are true, and all those in the answer are untrue, the court found on this particular matter as above quoted. The court thus made specific findings negating the facts affirmatively alleged in the answer. As the court said in *Turner v. Turner*, 187 Cal. at page 636, 203 P. 109, 111:

"* * * In answer to the first of these contentions it may be stated generally that a finding which is in identical language a negation of the allegation in the complaint is suf-

ficient. *Dam v. Zink*, 112 Cal. 91, 44 P. 331; *McCarthy v. Brown*, 113 Cal. 15, 45 P. 14; *Hayne*, New Trial and Appeal (Rev. Ed.) § 242. It should also be stated as a general rule that findings are to be construed so as to support the judgment. It was evidently the intention of the trial court in this case to make a finding against the plaintiff in the identical language of the complaint, except as such finding was attempted to be cast in the negative form."

The intention of the court to find that the indorsements here in question were not made without the knowledge and consent of the makers of the note is too apparent to be questioned, and taking all of the findings together, it is equally apparent that the court has found that such indorsements were made with the knowledge and consent of the makers of the note. The important matter to be determined in this connection is the question of consent on the part of the makers of the note, to the indorsements referred to. The defendants having alleged in their answer that they did not consent to the indorsements, and this allegation having been found by the court to be untrue, it becomes immaterial whether or not such indorsements constituted a material alteration within the meaning of section 3205 of the Civil Code.

[4, 5] The next point raised is that the judgment is contrary to the findings and conclusions. It is argued that the allowing of interest from July 1, 1922, is in fatal conflict with other findings to the effect that the indorsements were made with the consent of the makers of the note, for the reason that if these indorsements were made with the consent of the makers, the date of maturity of the note was thus postponed to April 10, 1923, and therefore interest could be allowed only from that date. It is admitted that \$3,000 was paid on the principal of the note on June 22, 1923. The note on its face was payable on or before July 1, 1922, with interest at the rate of 7 per cent. from maturity, until paid. The note itself was a contract. The intention of the parties is to be gathered from the face of the instrument. There is an ex-

press agreement to pay on or before a certain date, and a provision that interest shall be payable from maturity. This was equivalent to saying that interest should be paid from July 1, 1922. That this was the intention of the parties, and that they contemplated that interest should be paid during any extension, is indicated by the provision on the face of the note that it shall bear interest from maturity, until it is paid. The indorsements later made merely postponed the date on which payment might be enforced, but there is nothing to indicate any intention to relieve the makers from paying the interest which is provided on the face of the note, to be paid from the date of maturity until the time of payment.

[6] It is further argued that since the judgment was for \$8,170 and the conclusions of law, drawn from the findings, were that the plaintiff was entitled to a judgment for \$6,500 (the balance remaining unpaid on the principal sum), together with interest thereon at the rate of 7 per cent. from July 1, 1922, and for the sum of \$343 attorney's fees, such a conflict appears that the judgment must be reversed. The claim is made that if the interest is correctly figured from April 10, 1923, to the date of the judgment, the amount will be less than the amount of the judgment actually given, whereas if the interest is correctly figured from July 1, 1922, the amount will be larger than the amount of the judgment actually entered. The court correctly found that interest was due from July 1, 1922, and the defendants cannot complain because by some erroneous computation the court has actually entered a judgment against them for slightly less than it should have been. *Moore v. Borgfeldt* (Cal. App.) 273 P. 1114.

We are of the opinion that the judgment is not contrary to the findings, that it is fully supported by them, and that the complaint stated a cause of action. No reversible errors appear upon the face of the judgment roll, and the judgment is therefore affirmed.

We concur: SLOANE, P. J.; MARKS, J.

103 Cal. App. 744

WARDEN v. BRANDES. (Civ. 3985.)

District Court of Appeal, Third District, California. Feb. 6, 1930.

1. Evidence $\Rightarrow$ 460(4)—Extrinsic evidence is admissible in aid of description in deed which is *prima facie* insufficient to identify the property.

Where description of land in a deed is *prima facie* insufficient to identify the property, extrinsic evidence is admissible as means of identification.

2. Evidence $\Rightarrow$ 460(4)—Defect in deed conveying fractional lot 78, introduced in action to quiet title to lot 78, could be cured by proof of identity.

In action to quiet title to lot 78, plaintiff introduced deed conveying fractional lot 78, referring to a specified tract and a recorded map thereof; there being therefore a variance. *Held* defect on face of deed would have been cured, if plaintiff had proved there was only one lot 78, whether described as fractional or otherwise, and only one such tract and only one map thereof.

Appeal from Superior Court, Los Angeles County; J. A. Smith, Judge.

Action to quiet title brought by Grace P. Warden against Lulu Brandes. From a judgment of nonsuit, plaintiff appeals. *Affirmed*.

J. Everett Brown, of Los Angeles, for appellant.

Goudge, Robinson & Hughes, of Los Angeles, for respondent.

BURROUGHS, Justice pro tem. The plaintiff commenced this action to quiet her title to "Lot Seventy-eight of Tract 1889 as per Map recorded in Book 21, page 29 of Maps, Records of Los Angeles County." The defendant answered denying the plaintiff's ownership and alleged title in herself.

At the close of plaintiff's case the defendant moved for a nonsuit, which was granted, and judgment of nonsuit was thereupon entered. The plaintiff appeals therefrom.

In support of her claim of title plaintiff offered and the court received in evidence records of proceedings of the city of Los Angeles, creating a certain sewer assessment district; also records purporting to levy an assessment upon the land in said district including fractional lot 78 of tract 1889, as per map recorded in book 21, p. 29, of maps, records of Los Angeles county. The plaintiff thereupon offered, and the court received, in evidence a deed made and executed by the treasurer of the city of Los Angeles to the plaintiff herein. Said deed recited the various proceedings in the matter of the above-mentioned assessment district, and also the levying of an assessment thereunder and the sale to the plaintiff of "Fractional Lot 78,

Tract 1889, Map Book 21, page 29, Records of Los Angeles County" for an unpaid assessment of \$55.98. The plaintiff thereupon rested, and on motion of the defendant the nonsuit was granted. The motion was made on the ground that lot 78, described in the complaint, and fractional lot 78, described in the assessment proceedings and in the plaintiff's deed, were not the same property.

[1] It seems to be conceded by both parties that there is a variance between the description contained in the complaint and that described in the assessment proceedings and the deed. We are of the opinion that such is the case. However, it has been held that, where a description of land in a deed is *prima facie* insufficient to identify the property intended to be described, extrinsic evidence is admissible as a means of identification. *Thompson v. McKenna*, 22 Cal. App. 129, 133 P. 512; *Green v. Palmer*, 68 Cal. App. 393, 229 P. 876; *Campbell v. Shafer*, 162 Cal. 206, 121 P. 737.

[2] Appellant contends that, because her deed recites the assessment numbers, bond numbers, and the district in which the improvements were made, the warrant, assessment roll, and map diagram introduced in evidence contain the same assessment numbers, bond numbers, and description contained in the deed thereby cures any defect on the face of her deed. But the same description appears throughout the assessment records as appears in her deed, and therefore does not constitute a connecting link between the land described in her complaint and that described in her deed, nor does it identify them as one and the same parcel of land. Had plaintiff proved that there was but one lot numbered 78 in the tract, whether denominated as fractional or otherwise, and but one tract numbered 1889, and but one map of such tract, then the parcels of land would be properly identified and the defect cured. The deed itself is *prima facie* evidence of its contents, and the other evidence introduced merely supports the *prima facie* showing made by the deed.

In *McLauchlan v. Bonyng*, 15 Cal. App. 239, at page 242, 114 P. 798, 799, it is said: "In order to identify the property by such description, there should be evidence, not only of the existence of a map, but such map itself, with proof that it was the only map of any tract in the city of Los Angeles known as the Clifton tract existing at the time when the assessment was made, and showing that the lots in question were delineated thereon, should be presented to the court." To the same effect is *Thompson v. McKenna*, 22 Cal. App. 129, 133 P. 512, and *Campbell v. Shafer*, 162 Cal. 206, 121 P. 737.

Under the above decisions the plaintiff was entitled to introduce evidence that lot 78 described in the complaint and fractional lot

78 were the same. This could have been done by the method pointed out in *McLauchlan v. Bonyng*, supra, or any other appropriate method, but, having failed to do so, the court was correct in granting the motion for a nonsuit.

The judgment is affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

103 Cal. App. 796

COHN v. SAN PEDRO, L. A. & S. L. R. CO.
et al. (Civ. 3922.)

District Court of Appeal, Third District, California. Jan. 28, 1930.

1. Eminent domain ☞323—Whether railroad abandoned property condemned for railroad purposes held question of fact.

Question of railroad's abandonment of property received by it by condemnation for use for right of way for side tracks, turnouts, roundhouses, switches, freight yards, and other uses necessary and incident to maintaining railroad, held one of fact for determination of trial court sitting without jury, in action by owner of naked legal title to quiet title.

2. Abandonment ☞2—"Abandonment" involves act of leaving property vacant and intention of not returning.

To constitute an "abandonment" of property, there must be concurrence of act and intent, that is, the act of leaving the premises or property vacant, so that it may be appropriated by the next comer, and the intention of not returning.

[Ed. Note.—For other definitions, see Words and Phrases, First, Second, and Third Series, Abandon; Abandonment.]

3. Eminent domain ☞323—Where railroad, after dismantling buildings and removing tracks, used property for storing railroad materials, and thereafter moved house thereon for foreman, finding that there was no abandonment of right acquired by condemnation to use property for railroad purposes held justified.

Evidence that railroad acquiring property by condemnation, after dismantling roundhouses and other buildings on the property and removing tracks, used the property for storing railroad materials, and thereafter moved house on lot to be used by section foreman in charge of railroad property, justified finding that there was no abandonment by railroad of use of property in question for railroad's purposes.

4. Eminent domain ☞323—Intention to abandon property condemned for railroad purposes was not shown by conversation of railroad's general manager looking to purchase of fee.

In action by holder of legal title to quiet title to property condemned for use by railroad, conversation with railroad's general manager looking to purchase of fee in property did not

alone establish intention on part of railroad to abandon.

5. Eminent domain ☞324—Trial court properly found railroad using property condemned for storing railroad materials and for headquarters and house of foreman did not violate condemnation decree permitting use for purposes incident to constructing, maintaining, and efficiently operating railroad.

In action by owner of naked legal title to quiet title to property acquired by railroad by condemnation, trial court properly found railroad, using property for storage of railroad materials incident to dismantling of buildings and removal of tracks, and thereafter moving house on lot to be used as headquarters and living accommodations for section foreman, did not use premises contrary to condemnation decree permitting use for purposes "necessary and incident to constructing, maintaining and efficiently operating plaintiff's line of steam railroad."

6. Appeal and error ☞169—Appellant may not raise point not submitted below.

Appellant is not permitted to urge point in reviewing court which was not made an issue by the pleadings, and was not contended for at the time of the trial, but was sought to be raised for the first time on appeal.

7. Eminent domain ☞317(3)—On city's abandonment of street abutting lot condemned for railroad purposes, right of fee owner in street was subject to railroad's easement.

Where lot was condemned by railroad for use for railroad purposes, reversion to fee owner of one-half of street on which lot abutted, as result of city's abandonment of street by ordinance, was subject to railroad's easement, and fee owner could not take possession of the abandoned portion of the street without regard to the rights of the railroad.

Appeal from Superior Court, Los Angeles County; William C. Doran, Judge.

Action by Abraham B. Cohn against the San Pedro, Los Angeles & Salt Lake Railroad Company and others. From a judgment for defendant named, plaintiff appeals. Affirmed.

Newby & Newby, and Dee Holder, all of Los Angeles, for appellant.

Fred E. Pettit, Jr., E. E. Bennett, and Harry B. Ellison, all of Los Angeles, for respondent.

PRESTON, Justice pro tem. Plaintiff, Abraham B. Cohn, brought this action to quiet title to a piece of real estate situated in the city of Los Angeles. The case was tried by the court without a jury, and judgment was entered in favor of the defendant railroad company, from which judgment plaintiff appeals.

The pleadings admit these facts: Appellant, Abraham B. Cohn, was, prior to December 8, 1902, the owner in fee of lot 9, block A of Jacoby & Thorne's subdivision of

a part of the "Blow Tract" in the city of Los Angeles. On December 8, 1902, the respondent, by its then corporate name, San Pedro, Los Angeles & Salt Lake Railroad Company, acquired the property above described from the appellant, Abraham B. Cohn, by its right of eminent domain. The final decree of condemnation reads in part as follows: "It is ordered, adjudged and decreed that the lands and premises described in plaintiff's complaint and in this decree hereinafter described, become the property of the plaintiff for use as a right of way for its side-tracks, turn-outs, roundhouses, switches, freight yards and such other uses and purposes as are necessary and incident to constructing, maintaining and efficiently operating plaintiff's line of steam railroad. The land and premises affected by this judgment and order are particularly described as follows, to-wit: Lot 9 in Block 'A,' * * * all in the Jacoby & Thorne's Subdivision of the part of the Blow Tract in the City of Los Angeles, County of Los Angeles, State of California, as per map recorded in Book 18, page 97, Miscellaneous Records of said County. * * *

At the time the final decree of condemnation was entered, Anderson street, which was 60 feet wide, bounded the lot in question on the east, but in 1905 the city of Los Angeles, by proper proceedings, abandoned Anderson street. The lot in question, together with the abandoned portion of Anderson street, has been used by respondent for railroad purposes ever since its acquisition by respondent, and particularly used for its roundhouses, shops, stores, building tracks, etc.

In September, 1924, respondent commenced the moving of its roundhouses, shops, storehouse, and tracks from the vicinity in which this property was situated to its new terminal known as "East Yards," near Telegraph road, city of Los Angeles, at which time the buildings above referred to were dismantled, and the tracks leading to and from said buildings were removed. The dismantling of said buildings and the removal of the tracks and the reconditioning of the property in question consumed considerable time. After the buildings were dismantled and the tracks removed, and during the period of removal, the property herein involved was used for the storing of railroad materials incidental to, and made necessary by, the dismantling of the buildings, the removal of the tracks, etc.

On or about the 12th day of June, 1925, respondent moved onto the lot here in question a house to be used as the headquarters of, and living accommodations for, its section foreman in charge of the railroad property and line of railroad in this vicinity. Respondent's line of railroad tracks are located between 350 and 400 feet west of the lot in question, between which there are several tracks used for storage and switching.

The plaintiff and appellant commenced this action during the removal period and while the railroad materials were being stored on the lot in question, and three days before the section foreman's house was moved onto the said lot. The house has been used by the railroad company as section foreman's house and headquarters in connection with the operation of its railroad ever since it was moved on said premises.

Added to these admitted facts, we have the testimony of plaintiff himself to the effect that on or about April 1, 1925, the general manager of respondent railroad company called upon him and admitted that plaintiff was the owner of the lot and also the 30-foot strip acquired by the abandonment of Anderson street, and offered to purchase the entire property from plaintiff, etc.

The trial court found that, by virtue of said final order of condemnation, the respondent entered into possession of said parcel of land described in plaintiff's complaint in this action, and "said parcel was thereupon placed in use for the purposes in said judgment and final order of condemnation mentioned; and that said parcel of land at all times since has continuously been so possessed and used, and is now so possessed and used; and that the plaintiff in this action, by virtue of said condemnation proceedings, has but a bare legal title to the land described; subject, however, to the right of way and easement hereinbefore mentioned."

[1, 2] Appellant contends that there has been an abandonment by the railroad company of the rights acquired by the eminent domain proceeding, and that the use of the premises by the railroad company has been contrary to the judgment and final decree in the condemnation proceeding.

We find no merit in either of these contentions. The law is well settled that the abandonment in such a case is made up of two elements, viz. "Act and Intention." *Wood v. Etiwanda Water Co.*, 147 Cal. 228, 81 P. 512, 514. See *Elliott on Railroads* (3d Ed.) Book 2, pp. 1171 and 1223. The "act and intention" were both questions of fact to be determined by the court; or, in other words, abandonment is a question of fact to be determined by a jury or the court, when sitting without a jury. *Wood v. Etiwanda Water Co.*, supra, and cases there cited.

In *Wood v. Etiwanda Water Co.*, supra, it is said: "To constitute such abandonment, there must be a concurrence of act and intent, viz., the act of leaving the premises or property vacant, so that it may be appropriated by the next comer, and the intention of not returning." *Judson v. Malloy et al.*, 40 Cal. 299; *Bell et al. v. Bed Rock Tunnel & Mining Co.*, 36 Cal. 214; *Moon v. Rollins*, 36 Cal. 333, 95 Am. Dec. 181; *St. John v. Kidd*,

26 Cal. 272; Richardson v. McNulty et al., 24 Cal. 345; Willson v. Cleaveland, 30 Cal. 192. The mere intention to abandon, if not coupled with yielding up possession or a cessation of user, is not sufficient; nor will the nonuser alone, without an intention to abandon be held to amount to an abandonment."

[3] The trial court found, as above indicated, that the respondent *never abandoned* the use of the property in question for railroad purposes. This finding is amply supported by the evidence; in fact, we are unable to find any substantial evidence that would support a contrary conclusion. The findings of the trial court are therefore conclusive on appeal.

[4, 5] Appellant lays great stress upon the conversation that he had with the general manager of respondent, looking toward the purchase of the fee in the land in question, to establish an intention to abandon on the part of respondent, but this evidence falls far short of establishing an intention to abandon on the part of the respondent. The conversation, viewed in its most favorable light to appellant, establishes nothing more than an attempt on the part of the respondent to purchase from the appellant *the fee in the property*, which, according to appellant's own testimony, he refused to sell, and as a result thereof the evidence clearly shows that respondent continued using the property for the purpose for which it was dedicated under the eminent domain proceedings.

There is no substantial evidence in the record to support the contention of appellant that the property in question was not being used for railroad purposes. The trial court also found against appellant upon this point, and we are fully satisfied that the trial court's conclusion was correct.

[6, 7] The next and final question presented by this appeal is this: Has plaintiff the right in this action to have his title quieted to that portion of Anderson street vacated by the city of Los Angeles in 1905, while respondent was using the lot in question for railroad purposes in accordance with the condemnation judgment? This contention is raised in this court for the first time. It was not made an issue by the pleadings, nor was it contended for at the time of the trial. For this reason alone the appellant is not permitted to urge this point in this court for the first time. However, when a city, by ordinance, abandons a public street, one-half thereof reverts to the abutting owner. Respondent admits this to be true, but contends that the *fee owner* may not in such a case take possession of the abandoned portion without regard to the rights of the person holding an *easement over the fee*. In view of the record here presented, we think this contention must be sustained. *Challiss v.*

Atchison Union Depot & Railroad Co., 45 Kan. 398, 25 P. 894.

We think the judgment of the court below was correct, and should be affirmed, and it is so ordered.

We concur: FINCH, P. J.; R. L. THOMPSON, J.

103 Cal. App. 786
LINDEMANN v. ANDERSON et al. ★

(Civ. 204.)

District Court of Appeal, Fourth District, California. Feb. 3, 1930.

As Modified on Denial of Rehearing Feb. 24, 1930.

1. Mortgages ⇨507—Mortgage foreclosure sale commissioner must file undertaking approved by judge with oath (Code Civ. Proc. §§ 726, 729).

Under Code Civ. Proc. §§ 726, 729, one appointed commissioner to sell realty under mortgage foreclosure decree must file an undertaking approved by the judge, together with his oath faithfully to perform the duties of his office.

2. Statutes ⇨205—Each part of statute should be given force and effect when possible.

Statutes should be so construed as to give each part thereof force and effect when possible.

3. Mortgages ⇨507—Statute providing for mortgage foreclosure sale of realty should be strictly complied with, and commissioner must qualify as therein provided.

Statute providing for sale of real property in mortgage foreclosure proceedings should be strictly complied with, and commissioner must qualify in manner set forth therein before acting as such.

4. Appeal and error ⇨607(1)—Notice to prepare transcript, transcript itself, and certificates of clerk and judge, held sufficient showing that undertaking of mortgage foreclosure sale commissioner was not approved by court (Code Civ. Proc. §§ 726, 729).

Appellant's notice to clerk, requesting preparation of transcript, including oath and bond of commissioner appointed to sell realty under mortgage foreclosure decree and order approving bond, transcript containing copy of bond showing no approval thereof by court or judge, clerk's certificate that such copy was correct, and judge's certificate that transcript was true and correct, held sufficient, in absence of contrary showing, to show that commissioner's undertaking was not approved by court, as required by Code Civ. Proc. §§ 726, 729.

5. Appeal and error ⇨905—Presumption of regularity of trial court proceedings does not supply omitted instrument required by statute.

Presumption in favor of regularity of proceedings in trial court does not go to extent of

★Rehearing denied.

supplying instrument made necessary by statute, when record shows entire absence of such instrument.

6. Mortgages ☞507—Mortgage foreclosure sale by commissioner whose bond was not approved by court was void, irrespective of substantial injury to mortgagor (Code Civ. Proc. §§ 726, 729).

Sale of realty under mortgage foreclosure decree by commissioner, whose bond was not approved by court as required by Code Civ. Proc. §§ 726, 729, was void, whether or not mortgagor was substantially injured; taking of property without due process of law being sufficient injury.

Appeal from Superior Court, Kern County; Howard A. Peairs, Judge.

Action by Gustaf Lindemann against D. A. Anderson, Robert Marsh, and others. From a deficiency judgment, entered after a purported sale of real property under a mortgage foreclosure decree, defendant Marsh appeals. Judgment reversed and set aside.

Clyde C. Shoemaker, of Los Angeles, for appellant.

Simon & Garber, of Bakersfield, for respondent.

BARNARD, J. This is an appeal from a deficiency judgment entered by the clerk after a purported sale of real property, by a commissioner, in an action for foreclosure of a mortgage on real estate. The mortgage in question had been given to secure a note for \$3,800, and the deficiency judgment, subsequently docketed, was for \$3,295.17. The decree of foreclosure, among other things, provided:

"And it is further ordered and decreed, that M. J. Davis of the County of Kern, state of California, be and he is hereby appointed commissioner to sell the hereinafter described property; and the court does hereby require of said commissioner an undertaking in the sum of \$500.00 with sufficient sureties in the manner and form required by law."

The commissioner named in the decree filed his oath as such commissioner, and on the same day filed a purported undertaking in the sum of \$500, executed by himself as principal with two sureties. Neither on the bond so filed nor anywhere else in the record does there appear any approval of the bond by the court or by the judge thereof. An order of sale having been issued, and the commissioner's report and account of sale filed, the clerk entered a deficiency judgment, from which the defendant has appealed. The only proposition presented as a ground for reversal is that, since the bond of the commissioner was not approved by the court, the sale, the deficiency judgment based upon the return of the commissioner, and all acts performed by the commissioner were void.

[1, 2] The most important question on this appeal is whether or not the provisions of sections 726 and 729 of the Code of Civil Procedure, relative to the approval and filing of the bond of a commissioner are mandatory; or, in other words, whether the failure of a commissioner to strictly comply with those provisions affects his jurisdiction and his right to act. The history of the legislation upon this subject throws some light upon the matter. Prior to 1901, the provisions of the Code in regard to the appointment of a commissioner did not require that the "undertaking so approved" should be filed. At that time the only provisions applicable were the following portions of section 726 and section 729 of the Code of Civil Procedure:

"The court may, by its judgment, or at any time after judgment, appoint a commissioner to sell the encumbered property." Section 726, Code Civ. Proc. (St. 1895, p. 98).

"The commissioner, before entering upon his duties, must be sworn to perform them faithfully, and the court making the appointment shall require of him an undertaking, with sufficient sureties, to be approved by the court, in an amount to be fixed by the court, to the effect that he will faithfully perform the duties of commissioner, according to law." (Section 729, Code Civ. Proc. (St. 1893, p. 119).)

In the case of *May v. Hatcher*, 130 Cal. 627, 63 P. 33, 34, which was decided in December, 1900, the Supreme Court held that the provisions of these sections did not require a written oath, nor that the same be filed, the court saying:

"* * * Appellant's position is that the facts that no written affidavit of the commissioner was on file in the clerk's office, and that the clerk's register of actions did not show that such affidavit had been filed, are conclusive proof that no oath was taken, and that no other evidence was admissible on the subject. But this position is not tenable. The statutory provision touching the matter is merely that 'the commissioner, before entering upon his duties, must be sworn to perform them faithfully.' Code Civ. Proc. § 729. There is no provision that he must make a written affidavit, or that an affidavit must be filed anywhere; and there is abundant evidence in the record not only that he was sworn, but that he made a written affidavit."

In 1901 the Legislature amended section 726 of the Code of Civil Procedure, making the portion of said section applicable to the question under consideration read as follows:

"The court may, by its judgment, or at any time after judgment, appoint a commissioner to sell the encumbered property. It must require of him an undertaking in an

amount *fixed by the court*, with sufficient sureties, *to be approved by the judge*, to the effect that the commissioner will faithfully perform the duties of his office according to law. Before entering upon the discharge of his duties he *must file* such undertaking, *so approved*, together with his oath that he will faithfully perform the duties of his office." (Italics ours.)

It will be noted that the Legislature thus inserted into section 726, directly after the old provision giving authority to the court to appoint a commissioner, a sentence which is in almost the same language as that portion of section 729 which is above quoted, and which had been interpreted in *May v. Hatcher*, supra, as not requiring a written oath nor the filing of the same. And immediately following that the Legislature inserted these words: "Before entering upon the discharge of his duties he *must file* such undertaking, *so approved*, together with his oath that he will faithfully perform the duties of his office." (Italics ours.) The Legislature may have considered that under the ruling of the Supreme Court the quoted portion of section 729 was of no very great benefit, since, to say the least, an oath not required to be in writing, and not to be filed anywhere, might make possible a very great uncertainty. From the language used, and the arrangement thereof, it would clearly appear that the change was intentionally made, and the statute was amended to read that, "before entering upon the discharge of his duties," a commissioner must file not only an undertaking, but one approved by the court, which must be accompanied by his oath that he will faithfully perform the duties of his office. Under these circumstances, the intention of the Legislature seems especially clear, and, in addition, the language of the statute is unequivocal in setting forth what is required in order to enable a commissioner to qualify for his office. We think it is incumbent upon the commissioner, not only to file some undertaking, but to file one that has been approved by the judge. If this were not so, that part of the requirement of the statute would be useless, and it is a general principle of statutory construction that they should be so construed as to give each part thereof force and effect when this is possible.

[3] The respondent urges that a sale under foreclosure is not to be set aside for light or trivial reasons, and in support thereof cites the following cases: *Hopkins v. Wiard*, 72 Cal. 262, 13 P. 687; *Meux v. Trezevant*, 132 Cal. 487, 64 P. 848; *Connick v. Hill*, 127 Cal. 162, 59 P. 832; *Anglo-California Bank v. Cerf*, 142 Cal. 303, 75 P. 902; *Humboldt Savings & Loan Society v. March et al.*, 136 Cal. 321, 68 P. 968; *Bechtel v. Wier*, 152 Cal. 443, 93 P. 75, 15 L. R. A. (N. S.) 549. So far as the question under consideration is concerned, these cases turn on the effect of the

sale of land in one parcel, rather than in separate parcels. All of them involved the acts of duly appointed, qualified, and acting officers. On the other hand, the instant case presents a question of whether the officer ever qualified. It would hardly be argued that the mere naming of a commissioner by the court would comply with the requirements of these statutes and enable him to act as such commissioner. He must qualify, and the manner of qualification is particularly set forth in the statutes providing for his appointment. The commissioner derives his power only from these statutory provisions, and we think it is equally true that he derives his power only after he has complied with the requirements of these same statutes. One of these is that he file the undertaking "so approved." If the requirement for a bond is compulsory, the requirement that he must file such bond "so approved" seems equally compulsory. There seems no good reason for sustaining respondent's contention that this particular provision may be omitted, and at the same time holding that the other provisions may not be omitted. Good reason exists for holding that slight variations in the method of sale by an officer who has duly qualified shall not invalidate a sale because those variations are as to matters not covered by the statutes. Being matters which could have been dispensed with by the court, they may well be held to be trivial, where no real injury is shown. But in a sale of real property under foreclosure proceedings, property is being taken by process of law, and under general principles the statutes providing therefor should be strictly complied with. We think the particular provisions herein involved are mandatory, and that under the provisions of these Code sections such an undertaking must be approved in writing, and both the bond and approval filed.

Section 566 of the Code of Civil Procedure provides that, if a receiver is appointed upon an ex parte application, the court, before making the order, must require an undertaking. The language of this section has been held to be mandatory. *Ryan v. Murphy*, 39 Cal. App. 640, 179 P. 517. In *Pryor v. Downey*, 50 Cal. 388, 19 Am. Rep. 656, it was held that an administrator appointed by the court does not become such administrator until he has qualified, and that a purported sale of real estate made by such a person prior to the time he has qualified was void. In view of the circumstances surrounding the adoption of these provisions, a reasonable interpretation of these sections of the Code leads to the same conclusion in regard to a purported sale of real estate by one appointed as a commissioner in a foreclosure proceeding, unless the record affirmatively shows that he has qualified himself as required by law.

[4, 5] As a second proposition, the respondent insists that the record on appeal does not

affirmatively show that the undertaking here involved was not approved by the court. Appellant's notice to the clerk requesting the preparation of a transcript and setting forth the matters and things desired to be included therein, includes the following: "The oath of commissioner; the bond of commissioner, together with any and all orders made in connection with said bond, last mentioned; and the order, if any, approving said bond." The transcript sets forth a copy of the bond, which copy shows no approval by the court or judge, nor is such approval shown anywhere else in the record. The certificate of the clerk, after setting forth that the transcript has been prepared in accordance with the provision of section 953a of the Code of Civil Procedure, and pursuant to the notice of appeal, certifies as follows:

"That each of said copies is a full, true and correct copy of the document of which it purports to be a copy, and full, true and correct copy of the bond showing all acts of the court taken thereon."

The judge who tried the case has also certified to the record as follows:

"The foregoing clerk's transcript is true and correct, and the same is hereby settled and allowed."

Section 953a of the Code of Civil Procedure provides a party desiring to appeal may give notice of what he desires included in the transcript, including "acts or statements of the court," and the judge shall examine the same, as to various matters set forth, including "acts or statements of the court," and then the judge shall certify to the truth and correctness of the transcript. In the instant case the appellant asked for the undertaking in question, together with any and all orders made in connection with said undertaking, and the order, if any, approving said bond. The clerk's certificate is to the effect that the transcript shows the bond and all acts of the court taken thereon, and the judge has certified this to be all true and correct. We feel that this is a sufficient showing, in the absence of any showing to the contrary. Appellant was entitled to bring this question up on appeal, and there would seem to be no other way to lay the foundation for his appeal than to show the entire record as it actually existed. While there is a presumption in favor of the regularity of the proceedings in the trial court, this presumption does not go to the extent of supplying something made necessary by a statute, when the record shows an entire absence of such required instrument.

[6] The further claim is made that the situation should not be disturbed, since there is no showing that the error complained of has resulted in any substantial injury to the appellant. Whether or not the sureties on the

bond were, in fact, sufficient, we, of course, do not know. It is not necessary, however, that we should guess as to this, nor that we should guess whether or not the amount of the deficiency would be less upon a new sale held by an officer properly authorized thereto. In any event, the taking of property without due process of law is a sufficient injury. A mortgagee is entitled to have the rights of the mortgagor foreclosed, but the mortgagor is entitled to have the jurisdictional requirements of the law strictly followed. The commissioner in this case, not being qualified had no right to act, and his acts are void; the question of injury being immaterial. The power of the court to appoint such a commissioner, and the authority of the commissioner to act, both depend upon these statutes, and both are limited by the provisions thereof. It follows that no judgment of deficiency can be entered until a legal sale has taken place.

The purported sale of real property in this proceeding is vacated and set aside, and the deficiency judgment appealed from is reversed.

We concur: SLOANE, P. J.; MARKS, J.

103 Cal. App. 718

ROBINSON v. McKNIGHT et ux. (Civ. 7113.)

District Court of Appeal, First District, Division 2, California. Feb. 5, 1930.

1. Evidence $\S$ 116—Plaintiff's testimony, in malicious prosecution suit, as to what was said and done when defendant testified that plaintiff brandished gun and threatened to kill her, held admissible.

Where defendant, in action for malicious prosecution of charge of assault with deadly weapon, testified that plaintiff brandished a gun before witness, and repeatedly threatened to take her life during visit to her home, plaintiff was properly permitted to testify in detail as to what was done and said during such time, though her statements were highly inflammatory, outside issues on question of truth or falsity, largely hearsay, and self-serving.

2. Malicious prosecution $\S$ 59(2), 60(3)—Plaintiff's testimony as to her statements reflecting on defendants' uprightness, honesty, and generosity with their relations held admissible on questions of malice and probable cause in action for malicious prosecution.

In action for malicious prosecution of charge of assault with deadly weapon, plaintiff's testimony as to statements by her seriously reflecting on defendants' uprightness and honesty and their generosity with their relations during time that defendants claimed plaintiff was threatening life of one of them with gun pointed toward her held admissible on questions of malice and probable cause.

3. Evidence ⇨99—Evidence admissible for one purpose is not inadmissible because not satisfying rules applicable thereto in some other capacity.

An evidentiary fact, admissible for the purpose for which it is offered, is not inadmissible, because it does not satisfy rules applicable thereto in some other capacity, nor because the jury might improperly consider it in latter capacity.

4. Appeal and error ⇨216(2)—Appellants not requesting further instruction on subject covered by instructions given on their request cannot complain of absence thereof.

Where court gave defendants' requested instruction at close of plaintiff's testimony not to consider her statements as proof of facts contained therein, and substantially repeated instruction of its own motion at close of all testimony, defendants, who requested no further instruction on subject, cannot complain of absence thereof on appeal.

5. Malicious prosecution ⇨60(1)—Testimony of defendant's father as to his demands on defendant, whose replies evidenced animus against his sisters, held admissible in trial for malicious prosecution of sister.

In action against husband and wife for malicious prosecution of husband's sister, testimony of their father that he asked son to give him automobile in place of one obtained from him by son, who replied that he would not do so as long as father associated with "those skunks of sisters of mine," and that witness demanded repayment of money, of which he claimed he was unjustly deprived by son, who replied that witness and his daughters were plotting to get son's money, held admissible.

6. Malicious prosecution ⇨60(1)—Evidence of defendant's financial controversies with his father held admissible in action for malicious prosecution of his sister, in view of father's claim that son deprived him of property which should have gone to daughters.

In action against husband and wife for malicious prosecution of husband's sister on charge of assaulting wife, evidence of financial controversies between husband and his father held admissible on question of malice, in view of father's claim that son deprived him of property which should have gone to his daughters and son's feeling of animus against daughters.

7. Malicious prosecution ⇨60(1)—Wide latitude is allowed in proving malice prompting prosecution.

In action for malicious prosecution, a wide latitude is allowed in proving malice.

8. Trial ⇨62(2)—Plaintiff in action for malicious prosecution could rebut defendants' evidence refuting claim that defendant deprived his father of property which should have gone to plaintiff.

Defendants having introduced evidence, in action for malicious prosecution to refute claims of father of one of them, that such defendant had deprived him of property which should have gone to his daughters, including plaintiff, it was open to plaintiff to rebut such testimony.

9. Malicious prosecution ⇨60(2)—Parties' previous relations may be shown in action for malicious prosecution.

In an action for malicious prosecution, the previous relations between the parties may be shown.

10. Appeal and error ⇨1050(1)—Admission of record of preliminary hearing, in action for malicious prosecution, solely to show termination of action in plaintiff's favor, held harmless.

Admission of record of preliminary hearing in action for malicious prosecution held harmless to defendants, even if dismissal of such proceeding had been unequivocally admitted by answer, where jury was correctly instructed that record was admissible solely for purpose of showing termination of action in plaintiff's favor and was no evidence of want of probable cause.

11. Appeal and error ⇨930(2)—Appellate court must assume that jury followed trial court's instruction as to purpose of evidence.

The Court of Appeal must assume that trial court's instruction as to purpose for which evidence was admitted was followed by the jury.

12. Malicious prosecution ⇨64(2)—Evidence in action for malicious prosecution held to support finding of malice and want of probable cause.

In action for malicious prosecution, evidence held sufficient to support finding of malice and want of probable cause for plaintiff's arrest on charge made.

13. Malicious prosecution ⇨32—Malice may be inferred from want of probable cause for prosecution.

In action for malicious prosecution, malice may be inferred from want of probable cause.

14. Malicious prosecution ⇨22—That defendants, falsely stating facts to district attorney, acted on his advice, is no defense in action for malicious prosecution.

That defendants acted on advice of district attorney is no defense, in action for malicious prosecution, if they falsely stated facts to such officer.

15. Malicious prosecution ⇨40—That defendant testified under subpoena at preliminary hearing was no defense, in action for malicious prosecution, if she testified falsely.

That defendant in action for malicious prosecution testified against plaintiff at preliminary hearing under subpoena was no defense, if she testified falsely.

16. Malicious prosecution ⇨59(1)—Evidence of police officer's advice held properly excluded in action for malicious prosecution.

In action for malicious prosecution, exclusion of evidence of advice of police officer was not error.

17. Malicious prosecution ⇨58(1)—Plaintiff's checks to her father, who claimed that defendant deprived him of money which should have gone to plaintiff, held inadmissible in action for malicious prosecution.

In action for malicious prosecution, checks showing that plaintiff had given small sums of

money to her father, who claimed that defendant deprived him of property which should have gone to plaintiff, *held inadmissible*.

18. Appeal and error ⇨1050(1)—Admission of plaintiff's checks to her father, who claimed that defendant deprived him of money which should have gone to plaintiff, *held not prejudicial to defendants in action for malicious prosecution*.

Admission in evidence of checks showing that plaintiff had given small sums of money to her father, who claimed that one defendant in action for malicious prosecution deprived him of money which should have gone to plaintiff, *held not prejudicial to defendants*.

19. Appeal and error ⇨1050(1)—Introduction of jail record, showing plaintiff's possession of toy pistol, *held not prejudicial to defendants, in action for malicious prosecution, on charge of assault with deadly weapon*.

In action for malicious prosecution of charge of assault with a deadly weapon, introduction in evidence of jail record, to which words "one toy pistol" were added at later date, *held not prejudicial to defendants, where jailer's testimony that plaintiff had only \$1.76 on her person when received at jail was not contradicted and no attempt was made to show that she had any deadly weapon at such time*.

20. Appeal and error ⇨1004(3)—Excessiveness of verdict for plaintiff, in action for malicious prosecution, was primarily for trial judge.

Excessiveness of verdict for plaintiff, in action for malicious prosecution, was a question primarily for consideration of the trial judge.

21. Malicious prosecution ⇨69—\$10,000 damages for malicious prosecution of lecturer, spending 11 days in jail, becoming unable to continue work and losing lecture contract, *held not excessive*.

Verdict awarding \$10,000 actual damages for malicious prosecution of lecturer, who spent 11 days in jail, became highly nervous, upset physically, and unable to continue work because of her experience therein, and lost a lecture contract as result of newspaper account of charge, *held not excessive*.

22. Malicious prosecution ⇨68, 77—Allowance of \$100 attorney's fees and \$500 punitive damages to plaintiff, in action for malicious prosecution, *held proper*.

Allowance of \$100 attorney's fees and \$500 punitive damages to plaintiff in action for malicious prosecution *held not error*.

23. New trial ⇨143(1)—Verdict cannot be impeached by dissenting juror's affidavit.

A verdict cannot be impeached by the affidavit of a dissenting juror.

24. New trial ⇨142—Verdict cannot be impeached by juror's hearsay affidavit as to what another juror's husband told her about complaining party.

A verdict cannot be impeached by juror's hearsay affidavit as to what another juror's husband told her about party against whom the verdict was rendered.

25. New trial ⇨56—Statement to juror by her husband during trial as to what he heard about defendant *held not prejudicial, where 11 jurors voted for verdict against defendants*.

Where 11 jurors voted for verdict against defendants, the latter were not seriously prejudiced by statement to one of such jurors by her husband during trial as to what he had heard about one of defendants.

26. New trial ⇨104(1)—Denial of new trial for newly discovered merely cumulative evidence on collateral matter *held not abuse of discretion*.

Trial court did not abuse its discretion in denying a new trial on ground of newly discovered evidence which was merely cumulative and on a collateral matter.

Appeal from Superior Court, San Diego County; Charles C. Haines, Judge.

Action by Lillian E. Robinson against John F. McKnight and wife. Judgment for plaintiff, and defendants appeal. *Affirmed*.

Hamilton & Lindley and Hamilton, Lindley & Higgins, all of San Diego, for appellants.

P. A. Whitacre and Thomas Whelan, both of San Diego, for respondent.

DOOLING, Justice pro tem. In this action for malicious prosecution, tried with a jury, plaintiff had judgment for \$20,600. On motion for new trial the amount of the judgment was reduced to \$10,600. From this amended judgment defendants appeal.

Appellants are husband and wife, and respondent is the sister of appellant John F. McKnight. Appellant John F. McKnight swore to a criminal complaint charging respondent with assault with a deadly weapon upon the person of his wife, the other appellant. Upon this charge respondent was arrested, confined in jail for 11 days, and, after a hearing before a committing magistrate, dismissed.

The incident out of which the criminal charge grew occurred at the home of appellants on the morning of December 14, 1925. On that morning respondent went to the home of the McKnights and saw Mrs. McKnight, Mr. McKnight having left for his office before respondent's arrival. Although there was a maid present in the McKnight home during the interview, she was not present in the room with respondent and Mrs. McKnight, and the only witnesses to what occurred during the interview are respondent and Mrs. McKnight. As to what occurred during that visit, which is agreed to have consumed one and one-half hours or longer, the two witnesses are in sharp conflict.

Mrs. McKnight testified, both at the preliminary hearing and on the trial of this action, that at the outset of their interview respondent leveled a revolver at her and said that she had come with the avowed intention

of killing her; that this revolver was held in the same threatening position during practically the entire time that respondent was present in her home, and that respondent further stated that "she had a second gun loaded with gas that they used during the war to get two of my boys." Respondent testified, on the other hand, that she made no threats of any sort against the life of either Mrs. McKnight or her children, although she admits that she took with her a child's toy pistol, which was not exhibited, but which she intended to use to make her escape if she was threatened with injury by either of the appellants while she was in their home.

[1] As a part of her case in chief, respondent's counsel examined Mrs. McKnight, under Code of Civil Procedure, § 2055. Having elicited from her her testimony that respondent had held the gun leveled at her during practically the entire visit, and had repeatedly threatened her life and that of the children, counsel for respondent questioned her at some length as to what else had been said by respondent during the interview. Respondent was afterwards placed on the stand, and, over the objection of counsel for appellants that the matters were hearsay, self-serving declarations, and not within the issues, was permitted to testify in detail as to what was said while she was present in the McKnight home. This consisted largely of a long, accusatory harangue by respondent in which she recited the catalogue of her real or fancied grievances against the McKnights from the time of John McKnight's birth to the date of the interview. In this conversation, as testified to by respondent, she accused Mrs. McKnight of committing perjury in proceedings to have her husband declared a bankrupt, "with your diamonds pinned in your corset"; that she had cared for John McKnight when a baby at the sacrifice of her own health; that John McKnight had repudiated a child in bastardy proceedings that grew up "to be his image and is called John McKnight"; that the McKnights had dishonestly deprived the father of John McKnight and respondent of \$23,000 and an automobile; that the McKnights had accused respondent of killing her husband, of being a dope fiend, and of stealing \$4,000 of her mother's money. Enough has been recited to show that these statements were highly inflammatory before the jury, and, on the question of their truth or falsity, outside the issues of the case. They were also largely hearsay and all self-serving. Appellants claim that they were inadmissible, and that their admission, over repeated objection, constituted prejudicial error.

In an opinion written by the learned trial judge in passing on the motion for new trial he has this to say concerning this phase of the case: "There is no sort of doubt that much of the matter which the plaintiff testified that

she then told Mrs. McKnight, and which, so far as appears from the evidence she may actually have told Mrs. McKnight, was of a character seriously to reflect on the uprightness and honesty of both the defendants, as well as upon their generosity in dealing with their relations. The jury were charged, however, with the duty here of deciding whether or not the defendants in charging the plaintiff with a crime were animated by malice. To determine that question it was vital that they have the means of deciding whether the defendants in charging the plaintiff with a crime really believed that she had committed it. The plaintiff's whole conduct on the day of the occurrence was what was presented to Mrs. McKnight and what she must be deemed to have taken into consideration in charging the commission of the crime. * * * The whole conversation on the part of Mrs. Robinson is objected to as self-serving. But if it is important to show, not the truth of what she said, but what she did say, and if the jury is entitled to know what she said, as necessary in determining the defendants' motives in what they did, I apprehend that it was admissible."

This language of the trial judge, in our opinion, presents a correct solution of this problem. The first question in issue before the jury was whether the conduct of respondent in the McKnight home was such as to lead appellants reasonably to believe that she had committed the crime with which they charged her. Her conduct was a composite of acts and words, what she did and what she said during the hour and a half that she was in their home. Mrs. McKnight contended that during the entire period she was brandishing a gun before her and making repeated threats to take her life and that of her children. To meet this testimony respondent had two alternatives—she could deny categorically that she brandished the gun and made the threats, or she could give her own version of what she said and what she did during the period covered by Mrs. McKnight's testimony. The effectiveness of a categorical denial is questionable under the circumstances of this case. Accused before a jury of threatening Mrs. McKnight for an hour and half with a revolver, her answer would be a simple, "I did not." Who can doubt the comparative force and effect of a detailed statement by Mrs. McKnight of what was done and what was said during an hour and a half of conversation when opposed by a simple, unelaborated denial. Being confronted by such a detailed statement of what she said and what she did, respondent would find herself at a decided tactical disadvantage unless she could meet such testimony by her own version of what was said and done on that occasion.

In *Johnson v. Opfer*, 58 Neb. 631, 79 N. W. 547, 548, plaintiff introduced evidence of a conversation with defendant, in which defend-

ant was alleged to have made certain admissions. Defendant offered a witness to prove his version of the conversation, and an objection on the ground that such testimony would be of self-serving declarations was sustained. In holding that this was reversible error the Supreme Court of Nebraska said: "The evidence sought to be elicited by the interrogatory to which the objection was sustained was open to the criticism of it that an answer to it would allow of evidence a 'statement of the defendant in error in his own favor, a self-serving declaration.' It would be thus objectionable if *to be* considered as substantive evidence, or as in any degree bearing directly on the question of the execution of the note by the party who made the statement; but, notwithstanding this, here was a matter, a conversation relative to which all who testified of it agreed that it had transpired, and that there had been but one, and they but differed in regard to its time and place, and what was said. We think clearly the evidence offered was competent, and should have been received. Its tendency would have been to show that the defendant in error and his witness had been mistaken in regard to the time and place of the conversation, and further, to prove that when it did take place no admissions were made by plaintiff in error. For such purposes it was entirely pertinent, and should have been admitted, and submitted to the * * * jury under proper instructions stating, limiting, and prescribing the purpose of its reception and consideration."

More succinctly the same rule was stated by the Supreme Court of the United States in *Carver v. U. S.*, 164 U. S. 694, 17 S. Ct. 228, 229, 41 L. Ed. 602, 603: "If it were competent for one party to prove this conversation, it was equally competent for the other party to prove their version of it. * * * Where the whole or a part of a conversation has been put in evidence by one party, the other party is entitled to explain, vary, or contradict it." 22 C. J., p. 417; *Fidelity, etc., Co. of New York v. Dorough* (C. C. A.) 107 F. 389, 393, 394; *Dalton v. Bowker*, 8 Nev. 190, 202.

[2] However, we do not solely justify the reception of this evidence on this narrow ground, but on the broader ground that, in order to fairly determine the questions of malice and probable cause, the jury were entitled to be placed in possession of all the evidence as to what actually transpired during the hour and a half that appellants claim respondent was almost wholly occupied in threatening Mrs. McKnight's life with a gun pointed toward her. What actually was done and what actually was said during that hour and a half was the first essential subject of this inquiry.

[3, 4] The evidence being admissible and competent for this limited purpose, the rule respecting it is covered by *Adkins v. Brett*, 184 Cal. 252, 256, 193 P. 251, 253: "When an evi-

dentiary fact is offered for one purpose, and becomes admissible by satisfying all the rules applicable to it in that capacity, it is not inadmissible because it does not satisfy the rules applicable to it in some other capacity, and because the jury might improperly consider it in the latter capacity. This doctrine, although involving certain risks, is indispensable as a practical rule." In the *Adkins* Case the court further held that, if he requests it, the opposing party for his protection is entitled to have the jury instructed as to the limited purpose for which the evidence is admitted, and such an instruction may at times be necessary at the very time that the evidence is received, but the failure to ask for such an instruction will constitute a waiver. At the close of respondent's testimony on this phase counsel for appellants asked the court to instruct the jury "that they are not to consider the statements made by this witness as proof of the facts contained in those statements to Mrs. McKnight." The court immediately so instructed the jury. In their requested instructions in writing appellants' counsel submitted no instruction on this subject, but the court of its own motion repeated the instruction in substantially the language above quoted, which was the language chosen by counsel for appellants themselves. If they had desired any further instruction on the subject they should have asked for it, and, having failed to do so, they have no valid ground for complaint.

[5] To prove malice counsel for respondent placed the father of respondent and John McKnight on the stand to prove certain conversations had by the father with John McKnight, in which the latter had evidenced animus against his sisters, including respondent. These statements, which occurred prior to the prosecution, were certainly admissible. But inextricably interwoven with them were the claims by the father that John McKnight had unjustly deprived his father of \$23,000 and an automobile for which the father was endeavoring to get restitution partly for himself and partly for his daughters. As examples, the father testified that he asked his son to give him an automobile to take the place of the one the son had obtained from him, and John McKnight in substance replied that he would not give him one so long as he associated with "those skunks of sisters of mine." On another occasion the father testified that he demanded the repayment of \$23,000, and John McKnight flew into a rage and said: "I know, because I am rich, you and the girls are plotting how you can get my money." That so much of the father's statements to his son which drew forth such replies, as is necessary to a clear understanding of the replies, is admissible cannot be questioned. *Estate of Arnold*, 147 Cal. 583, 82 P. 252. Counsel for respondent went no further than this in their case in chief.

[6-8] As a part of their defense, however, counsel for appellants recalled father McKnight to the stand and had him identify a number of promissory notes given by John McKnight to the father at various times and receipts signed by the father and given to the son. Counsel for respondents had these documents marked for identification, but did not offer them in evidence. On cross-examination counsel for appellant offered the documents so marked and identified, and they were received in evidence over objection. It may well be, although we do not express an opinion on the question, that by examining father McKnight concerning these documents, counsel for respondent opened the door to their admission on cross-examination. 40 Cyc. pp. 2499, 2500. From that time forth, however, both parties devoted a good deal of time to developing the financial controversies between father and son. Of this counsel for appellants complains that it was outside the issues and highly prejudicial. We think, however, that it was properly admitted on the question of malice.

Inextricably bound up with the claims of father McKnight against the son was his contention that John McKnight had deprived him of what should properly have gone to his daughters, including respondent, and the feeling of animus against the daughters in the breast of John McKnight because of what he felt, or claimed to feel, was an unjust claim by his sisters or on their behalf. In the proof of malice a wide latitude is necessarily allowed. Certainly it was open to respondent to prove in a general way that her brother harbored ill will against her on account of claims by her father against him on her behalf, particularly in view of the fact that, according to her testimony, it was to press those very claims that she went to the McKnight home on the day of the alleged assault. That the testimony on this phase bulked so large in the trial is chiefly due to the fact that appellants chose to introduce evidence calculated to refute the claims of the elder McKnight. Once that evidence was in, it was open to respondent to rebut it. That, though the zeal of respective counsel, it assumed such proportions toward the close of the trial that there may have been danger of the tail wagging the dog is chiefly due to the insistence of counsel for appellants in undertaking to explain it away.

In its general outlines the jury was entitled to have before it the evidence of this family feud, involving, as it did, a claim by, or on behalf of, respondent against John McKnight. It was competent on the question of malice.

In the early case of *Lyon v. Hancock*, 35 Cal. 372, 376, 377, our Supreme Court said: "Malice, like fraud, is generally to be inferred from facts and circumstances. Hence the plaintiff is entitled to prove any

facts or circumstances which tend, even in the slightest degree, to show malice on the part of the defendant. For the same reason, the defendant is entitled to prove any facts and circumstances which tend, in the slightest degree, to show a contrary motive. * * * It certainly is not contrary to human experience to find a unity of feeling and action accompanying the family relation. Feuds descend from father to son. An injury to one is an injury to all. * * * It certainly is not contrary to human experience for the wife to sympathize with her husband, to share his feelings, to look upon his enemies and friends as hers also. Such are the teachings of our instincts and of our observation and experience."

In *Monske v. Klee*, 38 Idaho, 314, 221 P. 152, 154, the Supreme Court of Idaho said, in holding admissible evidence of family differences in an action for malicious prosecution: "The rule contended for by appellant is based upon the broad principle that evidence of malice of defendant against persons other than the plaintiff, in an action for malicious prosecution, does not show malice against the plaintiff. Admitting the rule in so far as it applies to persons not members of plaintiff's family, and the reasons for the rule, we think an entirely different rule applies where defendant's acts tend to show malice toward a member of plaintiff's family, particularly his wife. The family is perhaps the strongest human tie. Many who are indifferent to personal abuse or attack are aroused to the highest pitch of fury by unwarranted attacks upon the person, character, or reputation of a member of the family."

[9] In such an action the previous relations between the parties themselves may be shown. *Pickles v. Anton*, 49 N. D. 47, 189 N. W. 684; *Allison v. Bryan*, 50 Okl. 677, 151 P. 610. We are satisfied, under the circumstances here shown, particularly in view of the fact that the father's claim was largely made on behalf of respondent and his other daughters, and the animus shown against respondent by John McKnight in connection with such claim, that it was not error to admit the evidence complained of.

[10, 11] Appellants likewise complain of the admission of the record of the preliminary hearing on the ground that the dismissal of that proceeding was admitted by the answer. The admission of the answer was not entirely unequivocal and was connected with an allegation that the committing magistrate stated: "Under all the circumstances the case must fall." But even if the admission of the record was erroneous, which is at least doubtful (*Martin v. P. G. & E. Co.*, 203 Cal. 291, 264 P. 246), it is hard to see how appellants were harmed. The jury were correctly instructed that the record was admissible sole-

ly for the purpose of showing the termination of the action in favor of plaintiff, and that it was no evidence of want of probable cause. We must assume that this instruction was followed by the jury.

[12, 13] Appellants insist that malice and want of probable cause were not shown. In addition to the testimony above summarized, evidence was introduced that John McKnight had stated that, if respondent ever came to his house, he would have her arrested. This would support a finding of malice. If respondent's testimony was believed by the jury, and it must have been, Mrs. McKnight testified falsely as to the facts and there was no assault, and hence no probable cause for her arrest on that charge. Malice may also be inferred from want of probable cause. *Burke v. Watts*, 188 Cal. 118, 204 P. 578.

[14-16] Appellants also claim protection from the fact that they acted on the advice of the district attorney. But if, as the jury must have found, they falsely stated the facts, that advice was no protection. *Murphy v. Davids*, 181 Cal. 706, 186 P. 143; *Franzen v. Shenk*, 192 Cal. 572, 576, 221 P. 932. Nor is it a defense that Mrs. McKnight testified under subpoena, if her testimony was false. 16 Cal. Jur. 733. It was not error to exclude evidence of the advice of a police officer. 38 C. J., p. 431, and cases cited in notes 72-75.

[17-19] It was error to admit in evidence checks showing that respondent had given her father small sums of money, but we are satisfied that appellants were not prejudiced thereby. Nor do we think appellants were prejudiced by the introduction of the jail record, to which record had been added at a later date: "One toy pistol." The jailer testified that when respondent was received at the jail she had on her person only \$1.76. This was not contradicted, nor was it attempted to be shown that she had any deadly weapon at that time. In this state of the record appellants can have suffered no prejudice.

[20-22] The verdict, as cut down by the court, was not excessive. This was a question primarily for the consideration of the trial judge. Respondent spent 11 days in jail. She testified at the trial that she had spent many years in Europe assembling material for lectures, that she had been giving lectures for some time, and that by reason of her experience in jail she was highly nervous and upset physically and unable to continue this work. An account of the charge appeared in two San Diego papers, and as a result a contract to give a series of lectures was canceled. Under the circumstances we cannot say that \$10,000 actual damages is excessive, or shows passion and prejudice. No complaint can be made of \$100 for attor-

ney's fees for her defense or \$500 punitive damages.

[23-25] On motion for new trial appellants produced the affidavit of the sole dissenting juror that a woman juror had told him after the verdict that during the trial her husband had told her that he had heard John McKnight was a prince of an S. B. Another affidavit recited that the husband when interviewed had admitted this. The verdict cannot be impeached by the affidavit of a dissenting juror (*Saltzman v. Sunset T., etc., Co.*, 125 Cal. 501, 504-506, 58 P. 169), nor by the hearsay affidavit of what the husband said. Nor, since 11 jurors voted for the verdict, can it be seen how appellants could have been seriously prejudiced.

[26] Appellants' claim of newly discovered evidence was merely cumulative and on a collateral matter. The trial court did not abuse its discretion in denying a new trial on this ground. We are satisfied from an examination of the entire record that appellants suffered no prejudice from the few errors that may have crept into the trial.

Judgment affirmed.

We concur: NOURSE, Acting P. J.; STURTEVANT, J.

103 Cal. App. 757
LEMKA v. NAUMAN et al. (Civ. 3874.)★

District Court of Appeal, Third District, California. Feb. 7, 1930.

Rehearing Denied March 8, 1930. Hearing Denied by Supreme Court April 7, 1930.

1. **Automobiles** ⇨242(6) — Inference arising from defendant's ownership of automobile and that driver was acting within scope of employment held not overcome by clear, positive, and uncontradicted evidence.

In action for damages for personal injuries arising out of automobile accident, inference that driver of defendant's automobile was acting within scope of employment arising from defendant's ownership of automobile and driver's general employment held not overcome by clear positive and uncontradicted evidence.

2. **Trial** ⇨140(2) — Truth of defendant's contradictory statements in action for personal injuries held for jury.

Truth of contradictory statements of defendant in action for personal injuries arising from automobile accident held for jury.

3. **Appeal and error** ⇨994(2) — Appellate court on defendant's appeal from judgment in action for personal injuries cannot determine jury was wrong in their estimate of defendant's testimony.

On defendant's appeal from judgment in action for damages for personal injuries, appellate court cannot determine jury was wrong in their estimate of defendant's testimony.

Appeal from Superior Court, Sacramento County; Malcolm C. Glenn, Judge.

Action by Claud Lemka against Harry A. Nauman and another. Action was dismissed as to defendant Robert Parks, and from a judgment for plaintiff, defendant Harry A. Nauman appeals. Affirmed.

Irving D. Gibson and Gilford G. Rowland, both of Sacramento, for appellant.

Martin I. Welsh and Joseph W. Mento, both of Sacramento, for respondent.

PLUMMER, J. Plaintiff had judgment against the defendant Harry A. Nauman in the sum of \$750 for and on account of injuries alleged to have been received by the plaintiff by reason of a collision between an automobile in which the plaintiff was riding and an automobile belonging to the defendant Harry A. Nauman, and driven by the defendant Robert Parks, an employee of the defendant Nauman. From this judgment the defendant Harry A. Nauman appeals.

The record shows that on or about the 26th day of July, 1926, at the intersection of Nineteenth and L streets in the city of Sacramento, there was a collision between an automobile owned and driven by the plaintiff, and an automobile owned by the defendant Nauman and driven by the defendant Parks. The record shows that for some years prior to the incident just mentioned the defendant Nauman owned and at the time in question was conducting an undertaking establishment at 1811 G street in the city of Sacramento; that during all the times mentioned in this proceeding defendant Nauman resided at 1712 N street, being at a place about seven blocks south of his place of business; that Eighteenth and Nineteenth streets were the ones usually traveled in going from the undertaking establishment to the residence of the defendant Nauman at 1712 N street. It further appears from the transcript that the defendant Nauman maintained a garage at his undertaking establishment, and also at the place of his residence; that at times the Studebaker car belonging to the defendant Nauman, involved in this action, was kept at the garage maintained at the undertaking parlors, and at times would be kept at the garage belonging to the defendant Nauman, and situate at 1712 N street; that the defendant Robert Parks, an employee of the defendant Nauman, slept at the undertaking establishment. The record further shows that the defendant Nauman usually left his place of residence on N street to go to the undertaking parlors at about 8 o'clock each morning. It further appears that frequently the defendant Nauman would telephone to Parks, when the Studebaker car was housed in the garage on G street, to bring the car over to the residence of the defendant Nauman and take the defendant Nauman from his

residence to the undertaking parlors. In doing this Parks would drive down either Eighteenth or Nineteenth street and return by one of said streets. The collision referred to in this action occurred at about 8 o'clock in the morning. During the night previous the Studebaker car had been housed in the garage maintained on G street in connection with the undertaking parlors. The collision was on Nineteenth street, being one of the streets used in traversing the distance between the two places mentioned, and one of the streets ordinarily used by Parks when on his way to the residence of the defendant Nauman to pick him up and take him to the undertaking parlors. The ownership of the car is admitted; nor is it disputed that the defendant Parks was in the employ of the defendant Nauman. The only issue tendered in this case is whether the evidence of the defendant Nauman is sufficient not only to rebut the prima facie case made out by showing the ownership of the car involved in the issue and the fact that the defendant Parks was an employee of the defendant Nauman, and the reasonable inferences to be drawn from the circumstances that the defendant Parks, as an employee of the defendant Nauman, was acting in the course of his employment when driving the car southward on Nineteenth street toward the residence of the defendant Nauman. It is contended on the part of the appellant that the testimony of the defendant Nauman is such as to demand a judgment in his favor; that it is of such a character that the jury was unwarranted in bringing in a verdict in favor of the plaintiff; that the inference to be drawn from the fact of ownership of the car and the general employment of the defendant Parks is so squarely met by the testimony of the defendant Nauman that a conclusion that the defendant Parks was engaged on a mission in the course of his employment for the defendant Nauman is wholly unwarranted.

In the case of Fahey v. Madden, 56 Cal. App. 594, 206 P. 128, this court, in considering the legal relation necessary to charge the owner of a car, held as follows (we quote from the syllabus): "In an action for damages for personal injuries caused by being struck by an automobile, proof of ownership of the machine by one person and its operation by another with the knowledge and consent of the former makes out a prima facie case of agency between the owner and the operator, based on an inference, but that inference will not serve to create a conflict in the evidence as against clear, positive, and uncontradicted evidence that such relationship did not exist." A number of cases are there cited which we need not review, but we may call attention to the case of Perry v. Paladini, 89 Cal. App. 275, 264 P. 580, where a number of cases are cited having to do with the same subject, and where the same rule of

law is affirmed. This leaves but one question to determine: Is the prima facie case made out by the admitted ownership of the Studebaker automobile by the defendant in this action, and the fact that it was being driven by an employee of the defendant Nauman, been met by clear, positive, and uncontradicted evidence that while the relationship of principal and agent existed between the defendant Nauman and the defendant Parks, that the defendant Parks was not acting within the scope of his agency on the morning of July 26, 1926, at the time of the collision? This is best answered by quoting the testimony of the defendant Nauman, touching the vital question in this case. Called under the provisions of section 2055, Code of Civil Procedure, the defendant Nauman testified as follows:

"Q. Mr. Parks slept at the undertaking establishment, did he not? A. Yes, sir.

"Q. Now, isn't it a fact that Mr. Parks would go to your house and take you from your place of residence to your place of business? You would telephone him to come over with the car and he would take you over as a matter of custom? A. No, it was not, no; unless I telephoned to him. I usually walked over if the car was over there. Some mornings I would feel indisposed, so I would telephone for him to come for me.

"Q. Now, isn't it true this particular morning you telephoned for Mr. Parks to come over there with the car to take you from your place of residence to your place of business? A. No; I cannot testify to that because I do not know.

"Q. You cannot say whether you did or not, can you? A. No.

"Q. On the particular morning of the accident, Mr. Nauman, the Studebaker car was not in your garage back of your place of residence that morning, was it? A. As near as I know it was not at the residence that morning.

"Q. It was not at the residence that morning? A. No.

"Q. Isn't it true, the times when Mr. Parks would go from the undertaking establishment over to your place of residence to your place of business, was when the car would be at the undertaking establishment during the night? A. Yes.

"Q. So far as calling him on this particular occasion on the telephone, you cannot swear whether you did or not, can you? A. I cannot, I cannot, no sir."

On examination by defendant's own counsel, the defendant testified as follows:

"Q. Now, Mr. Nauman, you knew, as a matter of fact, did you not, that on this particular morning, at the time of the accident, namely, about 7:40 a. m. on the morning of July 26, 1926, that Robert Parks was not do-

ing anything for you with the automobile? A. That I am positive, yes.

"Q. You are positive he was not doing anything for you at the time of the accident, with the automobile? A. I am positive of that.

"Q. You are also positive you had given him no directions that morning to drive the automobile for you? A. Yes, I am positive.

"Q. You recollect hearing afterwards there was a collision at Nineteenth and L streets? A. Oh, yes.

"Q. If Mr. Parks was driving the automobile at 20 minutes to 8 on the morning of July 26, 1926, then he was driving the car without your permission, was he? A. He was, yes.

"Q. And without your consent? A. Yes, sir.

"Q. Had you previously notified Mr. Parks, on different occasions, that he should not use the Studebaker automobile without your consent? A. I had.

"Q. Had you heard of his using the car without your consent before you had told him not to use it? A. Yes.

"Q. And told him not to do it again? A. Yes, sir."

On redirect examination by counsel for plaintiff, Mr. Nauman further testified as follows:

"Q. Now, Mr. Nauman, you testified just a moment ago that you could not swear whether or not you had telephoned Mr. Parks to bring that car, that Studebaker car, to your house, and take you over to your place of business, didn't you? A. On what day?

"Q. On the morning of the accident? A. I testified I did not know.

"Q. That you did not know whether you had telephoned him to bring the car over to your place of residence and take you over to your place of business? A. If I testified, I testified erroneously, because I am positive I did not instruct him to call for me."

Here the witness was shown a statement made by him in a deposition taken before a notary public, containing the following questions and answers:

"Q. Well, had you given him permission to use it on this particular morning, the morning of the accident? A. That I cannot tell, either.

"Q. Do you remember that question being asked you, and you having made that answer? A. Yes, sir.

"Q. (Reading). 'Q. You cannot tell whether you did or not? A. No, no.' Was that question asked you, and did you make that answer? A. Yes, sir.

"Q. (Reading). 'Q. And, you don't remember whether you telephoned to him to come and to bring the automobile over there, or

drive it over there to take you to the undertaking establishment, do you? A. No, I could not tell you that.'

"Q. Do you remember that question being asked you and you making that answer? A. Yes, sir.

"Q. (Reading). 'Q. There were occasions when you would telephone to him and tell him to bring the automobile over to the house to bring you to the undertaking establishment? A. Yes, sir.'

"Q. That was asked you, and answered? A. Yes, sir.

"Q. (Reading). 'Q. And that was quite a common practice on your part, was it? A. Yes, sir.'

"Q. (Reading). 'Q. As to whether or not you called him up on this particular morning, and asked him to bring the automobile over there to take you back, you do not recall at this time? A. Not positively, no.'"

Upon further examination of the defendant by his own counsel, the witness stated that he was confused at the time of the examination.

[1-3] It is evident from a reading of this testimony that there is no clear, positive evidence on the part of the defendant rebutting the inference arising from the fact of ownership of the car and the general employment of the defendant Parks by the defendant Nauman. To be sure, testimony is not directly contradicted. However, the testimony is of such a nature that the jury might very well draw the conclusion that the witness had contradicted himself. Again, the circumstance that the employee Parks was driving directly from the undertaking parlors toward the residence of the defendant Nauman, at the hour in the morning when he would usually be driving in that direction for the purpose of picking up the defendant Nauman and taking him to the undertaking establishment, was a matter to be considered by the jury in connection with the testimony of the defendant Nauman, in determining the true facts. Another thing the jury had a right to take into consideration in determining whether the employee Parks was on a mission in the interest of his employer Nauman, on the morning in question, was the leading character of the questions to which he made answer. When questioned by counsel for the plaintiff, the witness testified that he did not know whether he had called Parks on the telephone on the morning of July 26, 1926, and likewise had given the same testimony in a deposition previously taken, but when led by his counsel, he was positive that he had not so telephoned. This presented an issue for the jury to determine as to which statement set forth the truth. If the jury believed the statement of the witness given in answer to questions propounded by counsel for the plaintiff, then and in that case the verdict is amply supported.

We cannot, upon appeal, determine that they were wrong in their estimate of the testimony of the defendant; and hence the requirements set forth in the cases which we have cited and the ones there referred to have not been met so as to justify a reversal. It may be stated that the defendant Parks did not appear upon the trial, and his whereabouts appear to have been unknown to the respective parties, and the cause of action as to him was dismissed.

The judgment is affirmed.

We concur: FINCH, P. J.; R. L. THOMPSON, J.

KLING v. GUSTASON. (Civ. 5530.)

103 Cal. App. 575

District Court of Appeal, Second District, Division 2, California. Jan. 30, 1930.

Costs $\$237$ —Where trial court failed to determine merits of defendant's counterclaim, he was entitled to costs on his appeal, although judgment was partially affirmed.

In action for attorney's fees where defendant interposed counterclaim for negligence, and court gave judgment for attorney's fees but failed to make any findings on issues raised by counterclaim, contention that defendant was not entitled to costs on his appeal could not be supported even though judgment for attorney's fees, which was affirmed as modified, might have been corrected in lower court, in view of fact that defendant was successful in obtaining partial reversal based on court's failure to pass upon merits of counterclaim.

Appeal from Superior Court, Los Angeles County; P. E. Keeler, Judge.

Action by David G. Kling against David G. Gustason. From judgment for plaintiff, defendant appealed. Modified and affirmed in part, reversed in part (Cal. App.) 281 P. 407. Motion by plaintiff to recall the remittitur issued therein and to issue another remittitur refusing allowance of defendant's costs. Motion denied.

Van Lee Hood, of Los Angeles, for appellant.

D. G. Kling and William Ellis Lady, both of Los Angeles, for respondent.

BURNELL, Justice pro tem. Respondent moves this court to recall the remittitur issued herein on part reversal of the judgment ([Cal. App.] 281 P. 407) and to issue another remittitur in its place, omitting therefrom the words "appellant to recover costs on appeal."

The action was one for attorney's fees, the defendant responding thereto by a pleading referred to by the parties both as a cross-com-

plaint and a counterclaim—and to which the plaintiff interposed an answer—seeking to recover damages for alleged negligence of the plaintiff as an attorney in the handling of various matters for the defendant. On the issues tendered by the counterclaim and the answer thereto the court below failed to make any findings. As to the award of attorney's fees the judgment was affirmed on appeal, as modified, however, by the deduction therefrom of interest erroneously allowed and a small sum representing a mistake in addition. The reversal was based upon the failure of the court below to find upon the issue as to plaintiff's alleged negligence and the damage claimed to have been suffered by defendant therefrom.

The fact that the error as to amount of the award of attorney's fees might have been corrected in the trial court is immaterial for any purpose relevant to the present motion. Had it been there corrected and judgment entered for the amount as to which we affirmed that portion of the judgment, appellant would still have had the right to prosecute an appeal for the purpose of reviewing the action of the court below as to the other branch of the case. Having successfully done so, he is entitled to his costs.

The motion is denied.

We concur: CRAIG, Acting P. J.; IRA F. THOMPSON, J.

103 Cal. App. 747

PEOPLE v. SMITH. (Cr. 1563.)★

District Court of Appeal, First District, Division 2, California. Feb. 7, 1930.

Rehearing Denied Feb. 21, 1930. Hearing Denied by Supreme Court March 3, 1930.

1. Escape ☞—One given indeterminate sentence was, after sentence was fixed, prisoner "committed to state prison for term less than life," within law relating to escape (Pen. Code, §§ 106, 1168).

Where term of one convicted for robbery and given indeterminate sentence under Pen. Code, § 1168, was thereafter fixed by board of prison directors at ten years, he was thereafter a prisoner "committed to the state prison for term less than for life," within meaning of section 106, relating to escape or attempt to escape by a prisoner committed to state prison for a term less than for life.

2. Escape ☞—"Prison guard," as used in law relating to escape of prisoner, does not mean position or office existing at prisons (Pen. Code, § 106; St. 1923, p. 667).

"Prison guard," as used in Pen. Code, § 106, relating to escape or attempt to escape by

prisoner committed to state prison for term less than life, does not mean position or office which exists at each of prisons, there being nothing in St. 1923, p. 667, showing that when in road camps the prisoners are to be guarded by or under surveillance of persons holding appointments as prison guards.

3. Criminal law ☞778(11)—Instruction on flight was proper in prosecution under law relating to escape of prisoner (Pen. Code, § 106).

In prosecution under Pen. Code, § 106, relating to escape or attempt to escape by prisoner committed to state prison for term less than for life, instruction on flight was proper as being pertinent to gravamen of charge under investigation.

Appeal from Superior Court, Monterey County; Maurice T. Dooling, Judge.

Russell Smith was convicted of violating law relating to escape of prisoners committed to State Prison for a term less than for life, and he appeals. Affirmed.

Ernest Spagnoli and Walter F. Lynch, both of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Lionel Browne, Deputy Atty. Gen., for the People.

STURTEVANT, J. The defendant was convicted of violating section 106 of the Penal Code and has appealed from the judgment.

On May 25, 1925, the defendant was convicted of robbery in the second degree and was given an indeterminate sentence under section 1168 of the Penal Code. Thereupon he was sent to San Quentin. On August 13, 1927, the board of prison directors fixed the term of the defendant at ten years. On February 2, 1928, the defendant made an application to be sent to one of the road camps. On April 16, 1928, he was sent to "Camp 15." On September 16, 1928, the records show he escaped. It was that escape which the district attorney charged in the information on file in this action.

[1] The defendant contends that the evidence is insufficient to show: (1) That the defendant was, prior to the filing of this information, committed to a state prison for a term less than life; (2) that he escaped while under the surveillance of a prison guard; (3) to identify him with the person who was convicted of robbery; and (4) to show that the defendant was under any surveillance. All of these attacks except the third rest on the construction which the defendant places on the statute and the information which purports to plead the provisions of the statute. The defendant calls attention to the fact that the judgment entered in Los Angeles county was for robbery in the second degree. He then asserts that he was sent to prison for a life term (Pen. Code, § 671) as distinguished from a term for less than life. In making this contention the defendant claims that in

every instance under the Indeterminate Sentence Law the defendant is sent to prison for the maximum term. In *re Lee*, 177 Cal. 690, 171 P. 958. Conceding that for certain purposes such is the rule, we think that even the defendant must concede that the very nature of the new statute is that it provides that every sentence will be indeterminate. So far as the facts of this case are concerned, the sentence was required to be, and in fact was, indeterminate when the trial judge rendered the sentence. It is equally clear that thereafter when the board of prison directors fixed the term, the sentence which was theretofore indeterminate became determinate. All of these facts had transpired before the defendant was sent to camp 15. As stated above, the indeterminate sentence was imposed on May 25, 1925. If on a subsequent day he had been pardoned, thereafter his status would not be that of a prisoner "committed for life" or for any other term. Likewise, when on August 13, 1927, the board of prison directors fixed his term at ten years, thereafter he was a "prisoner committed to the state prison of the State of California at San Quentin for a term less than for life."

[2] In asserting that when the defendant escaped he was not "under the surveillance of a prison guard," the defendant uses the words "prison guard" as meaning the position or office which exists at each of the prisons. There is nothing in the Penal Code, section 106, showing that the words were so limited and there is nothing in chapter 316 of the Statutes of 1923 showing that when in road camps the prisoners are to be guarded by or under the surveillance of persons holding appointments as "prison guards." However, at such times and places, the prisoners are to be under surveillance.

In claiming that the evidence is insufficient to identify the defendant with the person who was convicted of robbery in the second degree, the defendant does not quote the record and does not cite any authorities sustaining the point, therefore we pass on.

[3] The trial court gave an instruction on flight. The defendant contends the instruction should not have been given. In effect he concedes that the law was stated correctly in the instruction, but that the subject-matter was not pertinent to the case on trial. As the gravamen of the charge under investigation was flight, it is not clear why the law on that subject was not pertinent. The defendant cites no authority supporting his contention.

The trial court gave an instruction defining "a term less than life" within the meaning of section 106 of the Penal Code. The defendant claims the instruction was erroneous. If our construction of the statute as above set forth is correct, and we have no doubt

but what it is, then there was no error in the instruction.

We find no error in the record.

The judgment is affirmed.

I concur: NOURSE, J.

103 Cal. App. 577

In re WHITNEY'S ESTATE.

**PELKEY v. SOUTHERN CALIFORNIA
ASS'N OF SEVENTH DAY AD-
VENTISTS et al.**

(Civ. 7040.)

District Court of Appeal, Second District,
Division 2, California. January 30,
1930.

Wills ⇨ 132—Instrument in testator's handwriting, except for printed portions of place and date line, on sheet of corporation's office stationery, held holographic will.

Purported will written on one sheet of corporation's office stationery in testator's handwriting, except for printed names of city and state and figures "192-", following blank space for month and day, held an holographic will; names of corporation, its officers and directors, not being part of instrument, while presence of words "last will and testament of" testator at top of sheet was immaterial, even if essential portion of will.

Appeal from Superior Court, Los Angeles County; Charles S. Crail, Judge.

Proceedings by the Southern California Association of Seventh Day Adventists, a corporation, and another, to probate the will of Joseph M. Whitney, deceased, contested by Clara Louise Pelkey. From an order refusing to revoke the probate of the will, contestant appeals. Affirmed.

Thomas W. Cochran, of Los Angeles, for appellant.

Kemper Campbell and Chas. L. Nichols, both of Los Angeles, for respondent Southern California Ass'n of Seventh Day Adventists.

BURNELL, Justice pro tem. The appeal is from an order refusing to revoke the probate of an alleged holographic will. Although the contestant had included several grounds in her petition, all but one of these were abandoned at the hearing, so that the only question presented to the court below and to us on this appeal is whether or not the document was "entirely written, dated and signed by the testator himself."

The purported will was written upon one sheet of what appears to be the office stationery of the Allied Petroleum Corporation, and

except for the printed matter thereon was in the handwriting of and signed by the testator. Approximately one and one-quarter inches below the top of the sheet, and in large type, are printed or embossed the words "Allied Petroleum Corporation." There is a margin of about two and a quarter inches on each side of these words, which occupy a space of about three and one-half inches in length. In the upper left-hand corner of the sheet are printed in much smaller type the words "Officers and Directors," and directly under these words the names and titles of the president, vice president, and secretary-treasurer, while in the corresponding position in the right-hand upper corner, and in the same sized type, appears the word "Directors," and under it the names of three individuals. Commencing at the middle of the sheet, and about three-eighths of an inch below the words "Allied Petroleum Corporation," is the following: "Montebello, California. ——— 192-." This is all the printed matter which is contained on the sheet, all else being admittedly in the handwriting of the testator and consisting of the following: At the top of the sheet, between the list of officers and directors occupying the right and left-hand upper corners thereof, and just above the printed words "Allied Petroleum Corporation," are the written words "Last Will an [sic] Testament of Joseph M. Whitney." To the left of the printed words "Montebello," etc., appear the words "In the Name of God Amen," this phrase being written at so slight a distance below the line of the word "Montebello" that the upper loops of the letters extend above said line prolonged to the left. The space above the line between the word "California" and the figures "192-" has written in it the date "January 9th," while the figure "4" is written in the space following the figures "192." Below the words "In the Name," etc., and the date line filled in as above described is the body of the will, the last paragraph of which (excepting for an addition or codicil) reads: "In witness heref [sic] I have set my hand and seal this 10th day of Jany Nineteen hundred & Twenty four A. D." Below this is the signature of the testator.

It is appellant's contention that the presence of the printed matter on the sheet on which the will was written, and particularly of the date line reading "Montebello, California, *January 9th, 1924*," the italicized portion of which was in the testator's writing and the rest printed, vitiates the document as an holographic will. In support thereof she relies on *Estate of Thorn*, 183 Cal. 512, 192 P. 19; *Estate of Francis*, 191 Cal. 600, 217 P. 746, and *Estate of Bernard*, 197 Cal. 36, 239 P. 404, in each of which cases it was held that the presence of printed matter in and forming a part of the instrument involved vitiated it as an holographic will.

These decisions, however, are distinguished, if not in effect overruled, by the later rulings of the Supreme Court in *Estate of Oldham*, 203 Cal. 618, 265 P. 183, 184, and *Estate of De Caccia* (Cal. Sup.) 273 P. 552, 554, 61 A. L. R. 393.

In the first of the cases last cited the will in question was written by the testator on three sheets of paper, each of which had printed at the top thereof the name and office address of the testator, below which appeared the words, also printed, "Los Angeles, Calif." In other words, the paper used was the office stationery of the decedent. On the first sheet the words "Los Angeles, Calif." were followed by the date, written approximately on the same line. Discussing the *Bernard Case*, relied on there, as here, by the appellants, the court noted that it had there held that the instrument in question was not an holographic will because the printed words were incorporated in and doubtless were intended to be made a part of the heading of the document, and that "it was expressly held that, by the use of this heading, the deceased had made not only the date, which was absolutely necessary to the validity of the document as a testamentary disposition, but also 'the printed portion, designating the place of the making of the document, an essential part of the document.'" Distinguishing the instrument involved in the *Bernard Case* from that in the case under review, the opinion proceeded: "In the instrument now before us, and which, it is contended, is the last will of John Y. Oldham, deceased, we find no reference whatever to the printed words appearing upon stationery used by the deceased in the preparation of said instrument. These printed words are not expressly, by direct reference, or impliedly, by inference or otherwise, made a part of the written instrument set forth on the sheets of paper upon which they appear." Referring particularly to the contention that the testator had, by writing the date after and on approximately the same line as the words "Los Angeles, Calif.," made those printed words a part of the written document, the court said: "In *Estate of Bernard* a similar situation was referred to, and was considered as a possible circumstance which taken in connection with the fact that these printed words appeared in the caption of the instrument along with the words written by the deceased, tended to show an intent on the part of the deceased to make the printed words a part of the instrument itself. This circumstance, standing alone, as it does in the present proceeding, is so slight that it would not warrant the conclusion that the deceased, by simply writing after the printed words the date of the document, thereby intended to make such printed words any part of the document itself." The opinion closes with the following language: "The printed words appearing upon the three sheets of pa-

per upon which the deceased attempted to write his will are wholly disconnected from the writing itself, and they form no part thereof. Our attention has not been called to any authority, nor are we aware of any such, which holds that the mere presence of printed words upon a sheet of paper, used by a person for the purpose of writing thereon an holographic will, renders the will invalid when such printed matter is no part of the writing, and is wholly dissociated therefrom. It follows from the views expressed herein that the document admitted to probate was the valid will of said deceased, and the order denying appellants' contest and admitting to probate said document as the last will and testament of said deceased should be, and is hereby, affirmed."

In the De Caccia Case the will was written on stationery upon which the words "Oakland, California," were printed; these words being followed by the date, written by the testator, as was the balance of the instrument. The body of the will commenced near the upper left-hand corner of the sheet on which it was written. The first three lines terminated but a short space beyond the center of the sheet, or over an inch to the left of the printed words, and the first line commenced directly opposite the same. The decedent, however, did not follow a straight line in his chirography, with the result that the last words of the first line written by him were slightly nearer the top of the page than were the printed words. The whole of the second line was below the level of the printed words. The entire will consisted of nine lines only. It contained no date except as above stated. The trial court had held "that the printed words 'Oakland, California' were a part of the instrument executed and signed by the decedent, and therefore, that the instrument was not entirely in the handwriting of the deceased, and for that reason could not be and was not his last will and testament."

Reversing this ruling, the Supreme Court held that the rule announced in the Oldham Case was applicable, and again distinguished the Bernard Case. We quote from the opinion: "The instrument now before us resembles in many respects that held to be a valid holographic will in the Estate of Oldham, supra. The date simply follows the printed words appearing upon the instrument. The printed words are not preceded by any writing of the decedent in which a reference is made to said printed matter, as was found to be the case in Estate of Bernard, supra, indicating that it was the intention of the testator to make them a part of the instrument. It is true that decedent in the writing of the document began the same to the left and directly opposite to the printed words, and that the first line written by him ended slightly nearer the top of the page than were the words, 'Oakland, California,'

but there was nothing in this line, or, for that matter, in any part of the instrument, referring in any manner to said printed words, much less indicating an intention to make them, as was said in Estate of Bernard, supra, 'an essential part of the document.' Respondents make mention of the fact that the first line of the will is slightly above the printed words, and rely upon this circumstance as indicating an intention by the testator to make the printed words a part of the will. * * * It is further contended by respondents that the deceased used scrupulous care to write the date, 'Feb. 14th-27,' on the same line and as close as possible to the printed words, 'Oakland, California,' and thus manifested a clear intention to connect the printed words in the instrument with the date of its execution. The difference between the relative position of the printed words and the written date following in the instrument now before us and in that considered in Estate of Oldham, supra, is so slight as to be almost negligible. In the Oldham will the date was so nearly in line with the words, 'Los Angeles, Calif.,' that in deciding that case we referred to them as 'being followed by the date, written approximately on the same line.' We do not believe that this slight difference in the two instruments in this respect would justify a decision in one upholding it as a legal instrument and in the other a decision declaring it invalid. In other words, we are of the opinion that the two instruments in the respect just referred to are so similar that the rules governing their construction must apply alike to both documents, and that, if one was upheld as a valid will, the same ruling must apply to the other. * * * The mere fact that the decedent placed the date immediately after and upon the exact line with the printed words in the instrument is not in itself sufficient to show that he thereby intended to make said printed words a part of said instrument. Nowhere in said instrument is there any reference made to the printed words upon the sheet of paper used by said decedent for the purpose of writing his will. The printed words are in no way essential to the validity of the instrument as an holographic will, and we are not to presume that the decedent made them a part of the instrument he executed without some evidence appearing upon the face of the instrument itself manifesting such an intention. The mere presence of printed matter upon stationery used by a person for the purpose of writing his holographic will which forms no part of the written instru-

ment, and to which no reference directly or indirectly is made in the written instrument, will not destroy the effect of such instrument as an holographic will."

The will under consideration here presents even a stronger case for the proponents than did either of the instruments found to be holographic wills in the two cases just reviewed. Here the date written at the top of the instrument following the printed words "Montebello, California," may be deemed not to have been intended by the decedent at the date of the instrument at all, since the last sentence of the will proper states that it was executed on January 10th, a day later than the date first written. It most certainly could not be deemed that the name of the corporation or the names of its officers and directors were intended by the testator as any part of the instrument. The presence of the words "Last Will an [sic] Testament of Joseph M. Whitney" at the top of the sheet as above described is immaterial even if such words be deemed an essential portion of the will, which they are not.

The order is affirmed.

We concur: CRAIG, Acting P. J.; IRA F. THOMPSON, J.

103 Cal. App. 698

PEOPLE v. HILLARD. (Cr. 1906.)★

District Court of Appeal, Second District, Division 2, California. Feb. 4, 1930.

Rehearing Denied Feb. 19, 1930. Hearing Denied by Supreme Court March 3, 1930.

1. Criminal law $\S$ 1211—Increased punishment for petty theft was properly imposed under statute dealing with larceny, where amendment required substitution of word "theft" therein (Pen. Code §§ 484-490 amended, and section 490a added, by St. 1927, p. 1046; Pen. Code § 666).

Contention that Pen. Code, § 666, dealing with larceny, did not include petty theft, could not be sustained in view of sections 484-490 amended, and section 490a added, by St. 1927, p. 1046, requiring the term "theft" to be substituted in any statute referring to larceny, and therefore second conviction of crime of theft was a felony and within jurisdiction of superior court.

2. Statutes $\S$ 118(6)—Amending statute substituting word "theft" for "larceny" was applicable to statute dealing with larceny, although not specifically referred to (Pen. Code § 666; St. 1927, p. 1046).

Contention that Pen. Code, § 666, not being mentioned by title or number, was not re-enacted or otherwise affected by St. 1927, p. 1046,

was fallacious, since it did not violate constitutional requirement that it must include but one subject which must be expressed in its title.

3. Statutes $\S$ 109—Statute does not violate Constitution if terms can reasonably be deemed to be described by title, or necessary to attainment of purpose.

If provisions of statute can fairly be regarded as falling within subject-matter indicated in title, or necessary to attainment of its object, it will not be held to conflict with Constitution.

4. Constitutional law $\S$ 45—Objection to statute substituting "theft" for "larceny," on ground it increased scope of larceny, cannot be passed on in case where alleged offense was committed after enactment (St. 1927, p. 1046).

Objection that Pen. Code, § 490a, added by St. 1927, p. 1046, by substituting the word "theft" for the word "larceny," had widened scope of larceny and hence might include some offense other than stealing, could not be passed on as applied to a case where alleged offense occurred after passage of statute.

Appeal from Superior Court, Los Angeles County; Charles W. Fricke, Judge.

Corries Hillard was convicted of petty theft after conviction upon a charge of having previously committed petty theft. From an order granting his motion for a new trial, the People appeal. Reversed.

U. S. Webb, Atty. Gen., John L. Flynn, Deputy Atty. Gen., Buron Fitts, Dist. Atty., and Tracy Chatfield Becker, Deputy Dist. Atty., both of Los Angeles, for the People.

Frederic H. Vercoe, Public Defender, and Franklin Padan, Deputy Public Defender, both of Los Angeles, for respondent.

CRAIG, Acting P. J. The people appeal from an order granting the defendant's motion for a new trial upon conviction in the superior court of Los Angeles county of petty theft, after conviction in the municipal court of the city of Los Angeles, upon a charge of having previously committed petty theft.

Respondent was alleged by information to have unlawfully taken away personal property of another on or about August 1, 1929, and by a second paragraph it was charged that on or about May 2, 1929, he was tried in the municipal court and there found guilty of petty theft, and thereafter sentenced and served a term of imprisonment. He pleaded guilty to the last-mentioned charge and, after a trial before the court, was convicted of the later offense. A motion for a new trial was interposed and was granted upon the theory that section 666 of the Penal Code, increasing the punishment upon the commission of a second offense, does not include petty theft among the prior offenses therein specified, and hence that the supe-

rior court had no jurisdiction of the instant case. It is argued that, being convicted of petty theft as defined by sections 486 and 488, inclusive, of the Penal Code, the charge and plea of guilty upon the bare allegation of a previous conviction of the defendant having committed "petty theft," might subject him to punishment for either of several offenses, since larceny, embezzlement, stealing, and false pretenses were by amendment embraced within the single definition, but that section 666 of the Penal Code was not amended accordingly.

The Legislature of 1927 (Stats. 1927, ch. 619, p. 1046), expressly amended sections 484 to 489, both inclusive, and section 490 of said Code and added thereto section 490a, providing that:

"Wherever any law or statute of this state refers to or mentions larceny, embezzlement, or stealing, said law or statute shall hereafter be read and interpreted as if the word 'theft' were substituted therefor."

Section 666 reads as follows:

"Every person who, having been convicted of petit larceny and having served a term therefor in any penal institution, commits any crime after such conviction, is punishable therefor as follows:

"* * * If the subsequent conviction is for petit larceny then the person convicted of such subsequent offense is punishable by imprisonment in the state prison not exceeding five years."

[1] It is obvious that while this section is not specifically mentioned by said amendment, the quoted provisions are plainly within the language of the new section. In *People v. Giron* (Cal. App.) 270 P. 462, it was contended that an information drawn in the language of the statute did not charge a public offense, for the reason that larceny might be committed in various ways. It was there held that: "So far as the new definition of larceny is concerned, the change of name is one of form and not of substance. The amendments did not wipe out the common-law definition of larceny, nor did they destroy the universal meaning of the word wherever English is spoken, that larceny is a form of theft. To think otherwise would be to defy common sense." To the same effect are *People v. Campbell*, 89 Cal. App. 646, 265 P. 364, and *People v. Maddux* (Cal. App.) 282 P. 996. Again, as recently held by this court, "former crimes of larceny, embezzlement, and obtaining property by false pretenses are merged into the one crime of theft." *People v. Plum*, 88 Cal. App. 575, 263 P. 862, 265 P. 322." *People v. Stevenson* (Cal. App.) 284 P. 487. The Legislature must be presumed to have been familiar with and to have had in mind the acts of previous Legislatures when it enacted the amendments to the Penal Code above mentioned. *Rosenberg*

v. Bump, 43 Cal. App. 376, 185 P. 218. And all its parts must be harmonized and construed together, so that it may stand as an entirety. *People v. Strickler*, 25 Cal. App. 60, 142 P. 1121; *People v. Merrill*, 24 Cal. App. 206, 140 P. 1075; *People v. Pryal*, 25 Cal. App. 779, 147 P. 114, 115.

From the foregoing we think it apparent that section 666 of the Penal Code must be included with the other laws and statutes of this state in which the term "theft" is substituted for "larceny," without special mention. This being true, it necessarily follows that the term was inserted in said section with the effect with which sections 486 to 488, inclusive, were intended to operate. Hence, if respondent had previously committed the crime of "theft" within the purview of the sections last mentioned, and had served a sentence therefor, the subsequent conviction of a like offense would constitute a felony, and fall within the jurisdiction of the superior court.

[2, 3] Another point urged by respondent is that section 666 of the Penal Code was not mentioned by title nor by number in the amending statute, and was not re-enacted. We think this contention fallacious in that the title to the enactment of 1927 does indicate a scope and purpose which clearly include the substitution of the word "theft" for the word "larceny" in said section. Its object was "to amend sections four hundred eighty-four * * * and to add a new section to the Penal Code, to be numbered four hundred ninety a, defining the crime of theft and prescribing punishment therefor." It is not in conflict with the constitutional requirement that it must "embrace but one subject, which subject shall be expressed in its title." This case is not analogous to that presented in *Lewis v. Dunne*, 134 Cal. 291, 66 P. 478, 55 L. R. A. 833, 86 Am. St. Rep. 257, as an endeavor to deal "with a vast variety of subjects, many of which are totally distinct from each other," "for the purpose of revising said code." Comprehensive as it is asserted to be, its sole object and express purpose is but to define and denounce the crime of theft. "It is enough if it intelligibly refers the reader to the subject to which the act applies, or which is affected by it." *Hellman v. Shoulters*, 114 Cal. 136, 44 P. 915, 919, 45 P. 1057. Rather than embarrass legislation by too strict construction, if the provisions of an act can by fair intentment be considered as falling within the subject-matter indicated in its title, or necessary to the attainment of its object, it will not be held to conflict with the Constitution.

[4] The remaining objection that since "theft" is now of broader range than was the offense commonly known as "larceny" prior to the amendments of 1927, and might imply a prior violation of law other than

stealing, is not presented by the facts. It is admitted that both of the alleged offenses were committed in 1929. Hence we are not permitted to pass upon the question which might be presented if the act constituting the offense had occurred previously to the taking effect of the section in question. We are not required to say that it was the intention of the makers of this law that it should apply to any prosecution occurring before its enactment, nor to consider whether or not if such had been their intention the statute would have been unconstitutional on that account. No rule is better established than that a statute will never be so construed as to render it unconstitutional unless such an interpretation is clearly indicated, and here there is nothing to suggest an intent of that character.

What we do hold is that section 666 of the Penal Code as applied to acts committed after it became effective is not violative of the Constitution upon any ground argued by the respondent in this case.

The order granting a new trial is reversed.

We concur: IRA F. THOMPSON, J.; BURNELL, J. pro tem.

103 Cal. App. 473

MERCHANTS' TRUST CO. v. HOPKINS,
County Assessor. (Civ. 7118.)

District Court of Appeal, First District, Division 2, California. Jan. 28, 1930.

1. Taxation ☞466—"Boards of equalization" are quasi judicial bodies established to remedy excessive assessments.

Boards of equalization of taxes are quasi judicial bodies established by law to remedy excessive assessments made by assessor.

[Ed. Note.—For other definitions, see Words and Phrases, Third Series, Board of Equalization.]

2. Taxation ☞453—Taxpayer must submit question of property valuation to board of equalization to be entitled to attack its determination in court.

Taxpayer must fairly submit question of value of his property to board of equalization in order to be entitled to attack its determination in court.

3. Taxation ☞453—Taxpayer making no showing of inequality of assessment before board of equalization could not attack assessment on appeal on such ground.

Where taxpayer made no showing of inequality of assessment before board of equalization, taxpayer *held* precluded from attacking assessment on ground of inequality on appeal.

4. Evidence ☞113(15, 16), 142(1)—Evidence of sales of other property or of offers to buy or sell property in question is not competent to prove value for taxation.

Value of property for taxation purposes cannot be proved by evidence of sales of other property, or of offers to buy or sell property in question.

5. Taxation ☞453—Taxpayer held not to have sustained burden of proving before equalization board that assessment was unequal, and hence, on appeal, could not attack board's action (Pol. Code, § 3821).

In action to enjoin sale of property for taxes under authority of Pol. Code, § 3821, taxpayer *held* not to have sustained burden of proof in proceeding before board of equalization to show that assessment was either unequal or excessive, and hence could not attack action of board in appellate court.

6. Taxation ☞576—Assessor could not sell ownership in perpetuity of mineral rights in ground under authority to sell possession of, or claim to, land; the perpetuity being realty (Pol. Code, §§ 3820, 3821).

In view of Pol. Code, § 3617, where taxpayer had perpetuity in mineral rights in ground, but did not own fee simple, in surface estate, assessor could not sell, for taxes, ownership in perpetuity, under sections 3820, 3821, which provides that assessor may collect taxes by seizure and sale of right to possession of, or claim to, land, when, in his opinion, taxes are not a lien upon real property sufficient to secure payment thereof, as perpetuity was fee simple ownership which assessor had no authority to sell.

7. Taxation ☞550—Assessor's power to collect taxes being purely statutory, it must be measured by statute.

Since assessor's power to collect taxes is purely statutory, it must be measured by terms of statute.

8. Taxation ☞63—Ownership in perpetuity of minerals in ground held taxable as "real estate" (Pol. Code, §§ 3628, 3650; Const. art. 13, § 3).

Ownership in perpetuity of minerals in ground *held* assessable as real estate, in accordance with Pol. Code, §§ 3628, and 3650 and Const. art. 13, § 3, although owner of mineral estate was not owner of surface estate.

[Ed. Note.—For other definitions, see Words and Phrases, First, Second, and Third Series, Real Property.]

9. Action ☞6—Prayer in action to enjoin sale of property for taxes for 1926 held insufficient to advise court that taxpayer was seeking declaratory judgment as to validity of 1925 assessment (Code Civ. Proc. § 1060).

Prayer, in action to enjoin assessor from selling property for taxes for year 1926, *held* insufficient, under Code Civ. Proc. § 1060, to advise court that taxpayer was seeking declaratory judgment as to validity of assessment for 1925.

10. Appeal and error $\S$ 900—Appellate court must indulge every presumption not contradicted in trial court's favor.

Appellate court must indulge every presumption not contradicted by record on appeal in favor of action of trial court.

11. Appeal and error $\S$ 172(1)—Appellate court would not decide whether assessments for certain year were valid, where it was not brought to attention of trial court that appellant was seeking declaratory relief therefor (Code Civ. Proc. $\S$ 1060).

Where, in action to enjoin assessor from selling property for taxes for year 1926, it was not clearly brought to attention of trial court that taxpayer was seeking declaratory relief under Code Civ. Proc. $\S$ 1060, for assessments for 1925, appellate court would not decide whether assessments for 1925 were valid.

12. Taxation $\S$ 610—Taxpayer is not entitled to equitable relief unless he pays or tenders amount of taxes which he is bound to pay.

Taxpayer is entitled to no relief in equity, unless he pays or tenders amount of taxes which he is fairly bound to pay.

13. Costs $\S$ 230—Taxpayer entitled to enjoin tax sale could recover cost on appeal, although he could not obtain return of tax deposit, as assessment was not shown excessive or unequal.

In action to enjoin sale of perpetuity in mineral rights for taxes, where trial court, as condition of issuance of injunction, required taxpayer to deposit in court sum to insure payment of taxes and costs, if court should adjudge tax valid, taxpayer held entitled to cost on appeal, although he could not obtain return of deposit as amount of assessment was not shown to have been excessive or unequal, since taxpayer was entitled to injunction, on ground that property was not assessed as realty.

Appeal from Superior Court, Los Angeles County; C. W. Miller, Judge.

Action by the Merchants' Trust Company against Edward W. Hopkins, County Assessor of the County of Los Angeles. Judgment for defendant, and plaintiff appeals. Affirmed in part, and reversed in part, with directions.

J. E. Hannon, of Los Angeles (Joseph C. Meyerstein, of San Francisco, of counsel), for appellant.

Everett W. Mattoon, Co. Counsel, and W. Sumner Holbrook, Jr., Deputy Co. Counsel, both of Los Angeles, for respondent.

DOOLING, Justice pro tem. Appellant commenced this action to enjoin the respondent, as assessor of Los Angeles county, from selling certain property for taxes under the authority of section 3821 of the Political Code and praying for other relief. The form and effect of the prayer, in so far as such other relief is concerned, is more fully discussed hereinafter.

Appellant is the owner in fee of the coal and mineral rights in certain land in Los Angeles county, such rights having been expressly reserved by appellant's predecessor in interest when the fee in the land was sold by such predecessor in interest in 1883. The coal and mineral rights were never separately assessed for taxes until 1926, when the assessor for the first time attempted to assess these rights at the aggregate value of \$80,700; and, on the theory that they had escaped taxation in 1925, assessed them also for that year. Subsequently the assessor advertised the coal and mineral rights for sale for the 1926 taxes only, amounting to \$2,565.58, and such sale was enjoined by preliminary injunction in this action. As a condition of the issuance of such injunction the trial court required appellant to deposit in court the sum of \$2,800 to insure the payment of the taxes and costs if the court should after trial adjudge the tax to be valid and collectible. Final judgment was entered in the action on February 11, 1927, adjudging the property to have been validly assessed for 1926, and requiring the payment out of the sum deposited in court of the amount of the tax and \$3 costs of sale, and for defendant's costs.

Appellant contends on appeal: (1) That the assessment was grossly exorbitant and excessive; (2) that the assessor had no power to collect the taxes on a fee simple interest in minerals; (3) that the property was not properly assessed, in that the assessment was not entered in the proper assessment book or in the manner required by law. Other points are also made by appellant which will be later noticed.

It is appellant's first contention that the assessment was both excessive and unequal. In this connection appellant contends that the property had at most a value of \$30,000, and that similar property similarly situated was assessed at a much lower value. It is to be remarked in this connection that before the board of supervisors, sitting as a board of equalization, no evidence was introduced of the assessments upon other property of a similar character, and the only evidence of the value of appellant's property was of sales by appellant of other similar rights outside of the tract in question and the offer by appellant to sell its right in the tract in question as a whole for \$30,000. By this showing before the board of equalization we are satisfied that appellant laid no predicate for an attack upon the amount of the assessment in a court of equity.

[1, 2] Boards of equalization are quasi judicial bodies established by law to remedy excessive assessments made by the assessor. The taxpayer must fairly submit the question of the value of his property to them in order to be entitled to attack their determination in

court. Were this not true the taxpayer could practically disregard them by making only a perfunctory showing before them and could reserve his real showing for a later appeal to the courts. Such a procedure cannot be countenanced for obvious reasons. This rule is clearly laid down in *Wild Goose C. Club v. County of Butte*, 60 Cal. App. 339, commencing at page 341, 212 P. 711, 712, where the court says: "The evidence shows without conflict, and the court found, that at the hearing before the board of equalization no evidence was presented or offered bearing upon the value of the plaintiff's lands or the value of any property in Butte county or tending to show that any property in the county was assessed at other than the full cash value thereof. * * *

In *Los Angeles, etc., Co. v. County of Los Angeles*, 162 Cal. 164, 9 A. L. R. 1277, 121 P. 384, it was held that, after the board of equalization has upheld an assessment in a case such as this, any fraud on the part of the assessor becomes immaterial, and that the determination of the board 'cannot be avoided, unless the board has proceeded "arbitrarily and in wilful disregard of the law intended for their guidance and control, with the evident purpose of imposing unequal burdens upon certain of the taxpayers," * * * or unless there be something equivalent to fraud in the action of the board.' The assessment is presumed to be fair, and the burden of proof rested upon petitioner in the proceeding before the board. *Sunday Lake Iron Co. v. Township of Wakefield*, 247 U. S. 350, 62 L. Ed. 1154, 38 S. Ct. 495. In the absence of evidence tending to show the value of plaintiff's lands, or of other lands in the county, the premises were wanting from which a conclusion could be drawn by the board that inequality of assessments existed."

[3] Appellant having made no showing of inequality of assessment before, the board of equalization is precluded, under this rule, from attacking the assessment on the ground of inequality here.

[4] Its showing before the board of equalization on the question of the value of its own property was, in our judgment, equally futile. No rule is better settled in California than the rule that the value of property cannot be proved by evidence of sales of other property, or of offers to buy or sell the property in question. *Central Pac. R. Co. v. Pearson*, 35 Cal. 247; *Spring Valley W. W. v. Drinkhouse*, 92 Cal. 528, 28 P. 681; *Santa Ana v. Harlin*, 99 Cal. 538, 34 P. 224; *San Luis Obispo v. Brizzolara*, 100 Cal. 434, 34 P. 1083, 1084; *Reclamation District v. Inglin*, 31 Cal. App. 495, 160 P. 1098; *Palladine v. Imperial Valley F. L. Ass'n*, 65 Cal. App. 727, 225 P. 291, 303. This rule was examined at large and restated in *Estate of Ross*, 171 Cal. 64, 151 P. 1138, and in *Palladine v. Imperial, etc., Ass'n*, *supra*, it was held reversible error to

refuse to instruct a jury that in determining value "they should not consider whether land of similar character could have been purchased at a lower price in other localities," the court saying: "The prices at which other lands of like quality and adaptability and similarly situated could be purchased do not constitute a proper standard for ascertaining the actual value of the land in question." In *San Luis Obispo v. Brizzolara*, *supra*, the court said that such "evidence was proper in cross-examination of the plaintiff's witnesses, for the purpose of testing the accuracy and honesty of the opinions which they had given of the value of the land in their direct examination; but, as it would not have been admissible as affirmative evidence for the purpose of establishing the value of the land in question, it was not competent for the court to consider it for that purpose."

[5] We have then, so far as this phase of the case is concerned, no evidence of inequality of assessment, and no competent evidence of the value of the property assessed, presented to the board of equalization. It is evident from this that appellant did not sustain the burden of proof which rested upon it in the proceeding before the board of equalization to show that the assessment was either unequal or excessive, and hence cannot now attack the action of the board on either of those grounds.

There is nothing in *Mahoney v. City of San Diego*, 198 Cal. 388, 245 P. 189, inconsistent with this conclusion. In that case the complaint alleged and the court found "that the said board of equalization in regular session had and held a hearing thereon whereat the plaintiff herein appeared before said board and presented to said board all of the facts in his complaint herein alleged as to the irregularity and invalidity of said assessment and demanded the correction and equalization of the same, but that the said board at said hearing denied said plaintiff said relief, and that said action was taken by said board with full knowledge of all of the facts pleaded herein." 198 Cal. 393, 245 P. 191. In the *Mahoney* Case the evidence of inequality was presented to the board. In the instant case it was not.

[6] Appellant's second point, that the assessor had no power to sell its coal and mineral rights for the taxes, is well taken. Its predecessor in interest in reserving the coal and mineral rights in perpetuity reserved a fee simple interest in that portion of the land. This is conceded by respondent. But respondent claims that, even though appellant's interest is in fee, the assessor is nevertheless authorized by Political Code, §§ 3820, 3821, to sell it for the taxes, relying on the rule laid down in *Bakersfield, etc., Co. v. Kern County*, 144 Cal. 148, 77 P. 892; *Graciosa Oil Co. v. County of Santa Barbara*, 155 Cal. 140, 99 P. 483, 20 L. R. A. (N. S.) 211, and *Mohawk*

Oil Co. v. Hopkins, 196 Cal. 148, 236 P. 133. In all of these cases the interest taxed was a mere leasehold right to take minerals from the land and not the ownership of the minerals in fee simple. The difference between such a leasehold right and a fee simple title is well stated in the *Graciosa Case*, supra, at page 144 of 155 Cal., 99 P. 486: "The plaintiff, it is true, does not own an absolute present title to the oil strata in place. Such an absolute estate in an underlying stratum may be created and the estate of the owner of the overlying land and of the owner of the subterranean stratum will be as distinct and separate as is the ownership of respective owners of two adjoining tracts of land. For purposes of separate ownership, land may be divided horizontally as well as superficially and vertically. Jones on Real Prop. § 537; *State v. Moore*, 12 Cal. 70. But contract in question vests no present title in a stratum in place. It leaves the title to the oil in the landowner until it is brought to the surface."

Section 3820 above referred to reads: "The assessor must collect the taxes on all property when, in his opinion, said taxes are not a lien upon real property sufficient to secure the payment of the taxes. The taxes on all assessments of possession of, claim to, or right to the possession of land, and the taxes on taxable improvements located upon land exempt from taxation, shall be immediately due and payable upon assessment and shall be collected by the assessor as provided in this chapter." In the three cases relied upon by respondent the leasehold right to take minerals was treated as a claim to or right to possession of land under the second sentence of this section. Respondent concedes that appellant's fee simple interest is something more than a possession of, claim to, or right to, possession of land; but insists that, because of the frequently transitory and ephemeral value of the mineral rights, the assessor may collect the taxes on such rights under the authority of the first sentence of section 3820, "when, in his opinion, said taxes are not a lien upon real property sufficient to secure the payment of the taxes."

[7] But in making such contention respondent fails to take into consideration other material sections of the Political Code. Section 3821 reads: "In the case provided for in the preceding section, at the time of making the assessment, or at any time before the first Monday of August following the assessment, the assessor may collect the taxes by seizure and sale of any personal property owned by the person against whom the tax is assessed, or if no personal property can be found, then the assessor may collect the taxes by seizure and sale of the right to the possession of, claim to or right to the possession of land." Sections 3820 and 3821 must be read and construed together. The limit of the assessor's authority, so far as sales for taxes are con-

cerned, is if, and only if, no personal property can be found to seize and sell the possession of, claim to, or right to, the possession of land. Nowhere is the assessor authorized to sell a fee simple ownership of land or of any part of land. That such a fee simple ownership is not a mere "possession of, claim to, or right to the possession of land" within the meaning of these sections is made certain, if any doubt could otherwise exist, by the language of Political Code, § 3617, which enumerates as "real estate" "the possession of, claim to, ownership of, or right to the possession of land." The inclusion of the words "ownership of" in section 3617 and their omission from sections 3820, 3821, compels the conclusion that the "ownership of" land was not intended to be included among the classes of property which the assessor may sell for taxes. Since the assessor's power in this regard is purely statutory, it must be measured by the terms of the statute. So measured it does not extend to the sale of the ownership in perpetuity of minerals in the ground.

[8] What has just been stated is applicable in large part to appellant's third major point. Political Code, § 3617, divides property into "real estate" and "personal property" for purposes of taxation. Subdivisions 1 and 2, enumerate under real estate: "1. The possession of, claim to, ownership of, or right to possession of land. 2. All mines, minerals, and quarries in or under the land. * * *" Appellant's interest may be classified either as "ownership of" a portion of the land or as "minerals" under the above enumeration. It is certainly more than "the possession of, claim to, or right to the possession of land." In *Bakersfield, etc., Co. v. Kern County*, supra, the Supreme Court held that, even the possessory leasehold right to take oil from the land was properly assessable as real estate. There can be no doubt on that point where the interest is in fee simple as here. What logical distinction can exist between fee simple estates divided horizontally, to repeat the language of the *Graciosa Case*, and those divided superficially and vertically? In either case the owner has an interest in perpetuity in a portion of the land. It follows that appellant's interest should have been assessed in accordance with sections 3628 and 3650 of the Political Code and section 3, article 13, of the Constitution. This was not done. Instead the assessment was entered in the unsecured property assessment book with no sufficient description to clearly identify the separate parcels. This, in our judgment, was error on the part of the assessor and of the board of equalization, who were asked by appellant to correct the assessment in this particular.

Appellant further complains of the failure of the trial court to find and adjudicate the invalidity of the assessment for 1925. In this connection appellant claims that it sought a

declaratory judgment of the court as to the validity of the assessment for that year, and that the court's failure to give such a judgment is reversible error.

The provisions for declaratory relief added to the Code of Civil Procedure in 1921 are still somewhat of a novelty in our system of judicial procedure. It may be questioned whether, in the absence of an actual threat by the assessor to collect the taxes for 1925, appellant would be entitled to such declaratory relief without making the county of Los Angeles a party. Once the assessment is made, the county would seem to become the real party in interest to sustain the validity of the assessment. However, this question was not argued by counsel, and we do not find it necessary to decide it.

[9] Code of Civil Procedure, § 1060, provides that in certain enumerated cases "any person interested * * * may, in cases of actual controversy relating to the legal rights and duties of the respective parties, bring an action in the superior court for a declaration of his rights and duties in the premises. * * * He may ask for a declaration of rights or duties, either alone or with other relief." In construing this section it must be borne in mind that it provides for a new and additional form of relief to that theretofore available in the courts, and, where an action is brought seeking affirmative relief and declaratory relief in addition thereto, the complaint and the prayer should be so framed as to clearly advise the trial court and the adverse party that the plaintiff is seeking, in addition to some affirmative relief theretofore open to him, a declaratory judgment under this section of the code. The language of the section itself, being simply permissive in form, makes this perfectly clear: "He *may* ask for a declaration of rights or duties, either alone or with other relief."

While appellant's complaint contains allegations concerning the validity of the 1925 assessment, the actual controversy between it and the respondent assessor was precipitated by the assessor's threat to sell the property for the 1926 taxes only, and, when we look to the prayer of the complaint, we fail to find any clear prayer for declaratory relief, as to the 1925 assessment. The prayer may be fairly summarized as follows: "That it be adjudged and declared that defendant as assessor is without authority to collect any taxes upon plaintiff's real estate, and that such taxes are collectible by the tax collector only at the times and in the manner provided by section 3746, Political Code; that it further be adjudged that the assessment is exorbitant, excessive, invalid, illegal and void; for a temporary and permanent injunction restraining the assessor from demanding or collecting any taxes on such property or making a sale and for general relief."

Having in mind that the immediate controversy concerned a threatened sale by the assessor for 1926 taxes, we are satisfied that nothing in the prayer was calculated fairly to advise the court that appellant was seeking declaratory judgment as to the validity of the assessment for 1925. Fairly construed, the prayer asks that it be adjudged: (1) That the tax collector and not the assessor is the proper officer to collect the taxes; (2) that the assessment is excessive and void; (3) for a temporary and permanent injunction to prevent the assessor from proceeding to collect the taxes as threatened; and (4) for general relief. Nowhere in the prayer is the 1925 assessment mentioned in terms.

[10, 11] We must indulge every presumption not contradicted by the record on appeal in favor of the action of the trial court. The right to ask for declaratory relief is optional with the plaintiff. We must, and do, in support of the trial court's action, presume that neither by prayer of the complaint nor otherwise was it brought clearly to the attention of the trial judge that appellant was seeking declaratory relief under section 1060, Code of Civil Procedure. For that reason we deem it unnecessary to consider or decide whether the assessment for 1925 was valid or not, although, from what has already been said, it is clear that it was not sufficiently entered in the assessment book.

[12] Finally, appellant complains of that portion of the judgment that the sum of \$2,565.58, the amount of the tax on its property for 1926, be paid out of the amount deposited by it in court. Appellant in its complaint alleged the tender of \$1,200, the amount which it claimed and admitted to be a proper amount due as taxes for 1926 on the property involved, renewed the tender in its complaint and further offered to furnish such security as the court might deem adequate to secure the payment of such taxes as the court might finally determine to be due. As a condition to the issuance of the temporary injunction, the court required the deposit of \$2,800 for this purpose. This was in accordance with the settled rule that a taxpayer is entitled to no relief in equity unless he pays or tenders the amount of taxes which he is fairly bound to pay. *Stege v. City of Richmond*, 194 Cal. 305, 228 P. 461; *Steele v. County of San Luis Obispo*, 152 Cal. 785, 93 P. 1020; *Esterbrook v. O'Brien*, 98 Cal. 671, 33 P. 765; *Couts v. Cornell*, 147 Cal. 560, 82 P. 194, 109 Am. St. Rep. 168.

In *Couts v. Cornell*, *supra*, the assessment was invalid because the property was not sufficiently described in the assessment book. The plaintiff brought suit in equity for a decree declaring the assessments and sales made for such taxes invalid and enjoining the delivery of a tax deed. No tender or payment of the taxes was made by plaintiff. The court

held that, in the absence of such tender or payment, plaintiff was entitled to no relief, the court saying, at pages 561-563 of 147 Cal., 82 P. 195:

"We think the case thus presented is without equity, and that on the familiar principle that he who seeks equity must do equity, the plaintiff should be denied the equitable relief which he demands. The obligation to pay his just proportion of the taxes legally levied is one of the highest civic duties of the citizen to the state. * * * The principle justly applicable to the case is thus tersely stated in *Esterbrook v. O'Brien*, 98 Cal. 674, 33 P. 765: 'So long as the moral obligation to pay any portion of the tax exists, a court of equity will not lend its aid to prevent a cloud upon the title, but will leave the party to his remedy at law.' * * *

"Nor can the rule be limited to cases where it appears that only a part of the original tax is just. If the entire tax or charge should justly be paid, the complainant would have no standing at all in equity, and he is allowed relief in any case solely because he offers to pay all that is just. * * *

"The fact that the assessment is imperfect as to the description does not, in view of the circumstances here appearing, destroy the moral obligation to pay the tax."

This case appears to us to be controlling on this point. Holding, as we do, that appellant is in no position to attack the amount of the tax, because of its failure to make any sufficient showing on that question before the board of equalization, it stands in court entitled to relief solely because the assessment was insufficient in form and the assessor was without authority to collect the tax by sale. It is precluded from questioning the amount of the assessment, because it failed properly to present that question at the outset to the body constituted by law to afford it relief. Being in no position to question the amount of the tax, it must pay it in order to have standing in a court of equity.

There is nothing in *Las Animas, etc., Co. v. Preciado*, 167 Cal. 580, 140 P. 239, cited by appellant, in conflict with this conclusion. In that case lands not within the jurisdiction of the taxing officers were sought to be taxed. The distinction is pointed out by the court in that case at page 587 of 167 Cal., 140 P. 242: "The equitable consideration of a disturbance of revenues is entirely absent, in that this is an assessment, not by an authorized power which has irregularly exercised its power, but is an assessment by a school district acting absolutely without jurisdiction and authority."

The foregoing discussion makes it unnecessary to consider certain minor points urged by appellant.

By the judgment appealed from it was adjudged: 1. That appellant's property was validly assessed on the unsecured property roll for 1926; (2) that the amount of the taxes for 1926 on appellant's property in the sum of \$2,565.58, together with \$3 costs incurred in the sale of said property, be paid out of the sum deposited in court; (3) that defendant recover his costs; (4) that any balance of the sum paid into court be refunded to plaintiff.

[13] It is clear from what has been said that appellant, rather than respondent, is entitled to its costs of suit, since it was entitled to have the assessor enjoined from making the sale and to a decree adjudging the 1926 assessment invalidly made; and that the \$3 costs of the unauthorized sale should not be charged to appellant. It is likewise clear that that portion of the judgment adjudging the appellant's property to have been validly assessed on the unsecured property roll is erroneous.

The judgment is accordingly affirmed only as to that part which provides for the payment of the sum of \$2,565.58 taxes out of the fund deposited in court, striking therefrom the portion providing for the payment of \$3 incurred in the sale of said property, and as to that part which provides for the payment to plaintiff of the balance of the sum previously deposited in court; and as to all other portions thereof the judgment is reversed, with directions to the trial court to enter judgment in accordance with this opinion. Appellant to recover its costs on appeal.

We concur: NOURSE, Acting P. J.; STURTEVANT, J.

108 Cal. App. 610

AYRES et al. v. WRIGHT et ux. (Civ. 6897.)

District Court of Appeal, First District, Division 1, California. Jan. 31, 1930.

1. Landlord and tenant §169(11)—Where tenant's injuries were caused by collapse of rotted porch railing, issue of defective condition, being admitted, was properly withheld from jury.

In action for personal injuries caused by collapse of porch railing, where evidence showed that interior of railing had rotted, issue whether porch was in fact decayed was properly withheld from jury, where such condition was admitted by answer.

2. Landlord and tenant §169(6)—Landlord's knowledge of rotted condition of porch railing could not be inferred from act of driving spikes therein three years before.

In action by tenant for injuries caused by defective porch railing, statement by landlord

that at some time prior to 1923 spikes were driven into railing to assure its security raised no inference of any knowledge on his part of any known defect when cottage was rented to plaintiff in June, 1925.

3. Landlord and tenant ⚡164(7)—Landlord, having knowledge of latent defects, must reveal them, if not reasonably discoverable, but landlord is not insurer of safety of tenement.

A landlord is not an insurer of safety of the premises, although it is his duty to disclose hidden defects known to him, but not discoverable by tenant on reasonable inspection.

4. Landlord and tenant ⚡169(11)—Tenant's evidence that rotted condition of porch railing was concealed, in absence of landlord's knowledge thereof, entitled landlord to directed verdict.

In action by tenant for fall caused by rotted porch railing, where tenant insisted that bark on railing prevented him from detecting rotted condition, landlord as matter of law was exempt from liability; there being no evidence to charge him with any more notice than that of tenant.

5. Landlord and tenant ⚡169(11)—Court properly refused submission of question whether by reasonable care landlord could have discovered rotted condition of porch railing.

In action by tenant for injuries resulting from collapse of rotted porch railing, contention that jury should determine whether by reasonable care landlord could have discovered defect could not be sustained; the question in such case being what the landlord did know, and not what he ought to have known.

6. Depositions ⚡96—Witnesses ⚡56(3)—Deposition by husband was inadmissible against wife under statute, and also because taken before wife was made defendant (Code Civ. Proc. § 1881, subd. 1).

In tenant's action for injuries caused by breaking of rotted porch railing, where negotiations for renting cottage had been conducted by owner's husband, deposition by husband was properly excluded under Code Civ. Proc. § 1881, subd. 1, and also because taken before wife was made a party to action.

7. Evidence ⚡123(10)—Landlord's statement, two days after collapse of rotted porch railing, that he knew railings were weak, was not part of *res gestæ*.

In action for injuries caused by breaking of rotted porch railing, wherein owner of premises and her husband were made defendants, husband's statement that he knew railings were weak, made two days after accident, when he went to premises at wife's request, was properly excluded, since any statement as to past incidents or state of mind was no part of the *res gestæ*.

Appeal from Superior Court, Sonoma County; Rolfe L. Thompson, Judge.

Action by Florence C. Ayres and another against C. A. Wright and Mamie C. Wright.

Action dismissed as to defendant first named. From a judgment for defendant last named, plaintiffs appeal. Affirmed.

Raymond Perry, of San Francisco, for appellants.

Geary & Geary and C. J. Tauzer, all of Santa Rosa, for respondent.

JOHNSON, Justice pro tem. This action was instituted to recover damages for personal injury sustained by the plaintiff Florence C. Ayres in consequence of a fall, resulting from the sudden disjunction of a rustic railing, forming the outer barrier of the porch of a cottage owned by the defendant Mamie C. Wright, and hired by plaintiffs.

The action was tried by a jury, which under direction of the court, returned a verdict in favor of the defendant Mrs. Wright. From the judgment entered upon that verdict, the plaintiffs have appealed.

The legal question presented is the familiar one as to the liability of a landlord for injury to a tenant, due to a defect unknown to either.

The defendant Mamie C. Wright, a resident of Santa Rosa, was the owner of a summer cottage at Rio Nido, on the Russian river, which had been built by her in 1908. Attached to the cottage was a porch running along the front and one side, where a flight of steps led to the ground. The porch, both in the front and on the side, was guarded by a railing made of redwood saplings, toenailed into the redwood uprights. The front porch was covered with a roof, but the side porch, built as a pergola, was exposed to the action of the elements; and through a hole cut in the floor near the junction of the front and the side porch there grew a redwood tree, stretching above the porch and the cottage. When the guardrail was constructed, the saplings, both those in the front and those on the side, had their covering of bark. In course of time the bark had been abraded from the front rails, but still clung to the lengths composing the side railing and also to the uprights.

Beneath that bark, and in a way to be unobservable to the eye, the wood had rotted at the joints, particularly at the spot where the side railing was nailed to the corner upright near the redwood tree. It was at this point that the side railing broke loose from the upright when Mrs. Ayres and a friend were leaning against it, and caused Mrs. Ayres to be precipitated several feet to the ground, whereby she suffered grave injury to the neck and spine.

The plaintiffs had taken possession of the cottage on July 1, 1925; Mr. Ayres having rented it for the use of his family for the month of July. The accident occurred on July 5th.

The owner, Mrs. Wright, being an invalid and of the age of about 67 years, had not visited the cottage for more than a year and a half prior to the accident; and in hiring the cottage Mr. Ayres dealt with Mr. Wright, whom he supposed to be the owner. Accordingly, when the suit was brought, Mr. Wright was named as the sole defendant; and it was only when his deposition was taken that Mrs. Wright became known to the plaintiffs as the owner, whereupon she was joined as a defendant. Between that time and the time of trial Mr. Wright died; and thereafter the action was dismissed as to him. One of the points urged as justification for reversal is the ruling of the court in sustaining objection to the introduction by plaintiffs of Mr. Wright's deposition, upon the ground that, under subdivision 1 of section 1881, Code of Civil Procedure, testimony of the husband cannot be received without the consent of the wife; and on the further ground that a deposition taken before Mrs. Wright was made a defendant was not admissible against her.

While Mrs. Wright's answer admitted a hidden defect in the railing, it denied all knowledge of the defect on the part of Mrs. Wright or her husband, who acted as her agent in renting the cottage on this occasion. The evidence was directed largely, therefore, to the question of knowledge.

The Wrights themselves had not occupied the cottage, except occasionally at the weekend, for a period of about ten years; but had been in the habit of renting the house, furnished, during the summer months, or allowing members of their family to occupy it. And, in preparation for the occupancy of the plaintiffs, Mr. Wright had taken a carpenter to the premises in the latter part of June. This was done at Mrs. Wright's suggestion, and under her instructions to repair certain doors and windows and "anything else that needed attention." A few days later Mrs. Wright sent her housekeeper, together with Mr. Wright and a daughter-in-law, to set the house in good order. No weakness of the railing was observed by any of these persons; and two days before the accident Mrs. Ayres remarked to her husband that the cottage was "about the best house we have occupied since we have been coming up the river with the children."

Indeed, it is conceded by plaintiffs and all their witnesses that the bark on the side rails looked new, and the railing appeared sound; in fact, stronger than the bare front railing. Even Mrs. Ayres herself testified that the side railing looked safe because the bark was heavy, and one could not see that it was rotten underneath. The testimony of the witnesses of the defendant is to like effect. The railing gave way when Mrs. Ayres and a visitor were "resting against it"; their combined weight being about 315 pounds,

According to the testimony of some of the defendant's witnesses, the railing had been subjected to lesser strains in June, 1925, without showing weakness. On June 20th a party composed of the son of the Wrights, his wife and children, and two friends, Mr. and Mrs. Woodward, had visited the cottage, and Mr. Woodward had walked without any mishap along the top of the side railing from opposite the redwood tree to the corner and then along the entire front railing. And a few days later, on the visit of the daughter-in-law with Mrs. Wright's housekeeper to set the house in order, bedding and mattresses were hung over the side railing and beaten. On that occasion, also, the daughter-in-law had sat upon the rail, holding her young child, but noticed no weakness. Likewise, occupants of the cottage in 1924 testified that, though their children had climbed upon the railing, they had had no reason to fear for its soundness.

[1] Because of this evidence, in contrast with evidence of the actual rottenness of the wood beneath the bark, as disclosed after the accident, plaintiffs contend that the case should have gone to the jury without a specific direction. But it must be remembered that the defendant admitted that there was a condition of decay. Hence this point was not in issue. The issue was whether the circumstances showed Mrs. Wright to have had knowledge of the dangerous condition. Upon this issue there is really no conflict. All the testimony is in agreement that the defect was so latent as to be beyond suspicion to an observer.

[2] In the appellants' brief stress is laid upon a statement by Mrs. Wright that at some time prior to 1923, but otherwise undefined, she had had her husband drive some spikes into the railing. She further testified that this was done, not because of any noticeable defect, but "to be sure that it was secure." Such testimony raises no inference of any known defect when the cottage was let to plaintiffs in June, 1925.

There being not a glimmer of evidence imputing to Mrs. Wright either knowledge or a want of knowledge due to her own culpability, the sole question upon the conclusion of the testimony was the question of law, which the court resolved correctly in its direction to the jury.

The controlling principle has been so clearly expounded in our decisions as to require no elaboration here.

[3] A landlord is not an insurer of the safety of premises about to be let. If there are patent defects discoverable by reasonable examination, knowledge of them is imputed to the tenant. On the other hand, if there are hidden defects known to the landlord, and not discoverable by the incoming tenant by a reasonable inspection, the landlord is then under

duty to make disclosure. But, where the defect is hidden and unknown to the landlord, and there is nothing to charge him with bad faith, fraud, or concealment, the tenant, on entering the premises, takes them without implied warranty, for better or for worse, in the condition in which he finds them, and must assume the risk of injury from defects of which both parties are innocently unaware. After-acquired knowledge of pre-existing defects will not alone suffice to make the landlord liable.

Discussion of these rules in their relation to liability for injury suffered through collapse of a railing is to be found in *De Motte v. Arkell*, 77 Cal. App. 610, 621, 247 P. 254, and *Hassell v. Denning*, 84 Cal. App. 479, 481-482, 258 P. 426. For a general exposition of the law on the subject, reference may be made, also, to *Daley v. Quick*, 99 Cal. 179, 183, 33 P. 859; *Smelser v. Deutsche Kirche*, 88 Cal. App. 469, 473, 263 P. 838; *Nelson v. Myers* (Cal. App.) 270 P. 719; *Farber v. Greenberg* (Cal. App.) 277 P. 534.

[4] Throughout the trial the plaintiffs were insistent in impressing upon the judge and the jury that the defect in the railing was so effectually concealed beneath the bark as to escape their notice; and, there being no evidence before the court to charge Mrs. Wright with notice any more than the plaintiffs themselves, she was exempt from liability, and entitled to a verdict at the direction of the court.

[5] The plaintiffs urge, however, that the jury should have been permitted to determine, not merely whether Mrs. Wright did know of the latent defect, but whether by reasonable care she could have discovered the unsafe condition. In this contention reliance is placed on the decision in *Hines v. Wilcox*, 96 Tenn. 148, 33 S. W. 914, 34 L. R. A. 824, 832, 54 Am. St. Rep. 823. This annexation of a new element imported from the law of negligence is, as said by the writer of the annotation in 34 L. R. A. 824, and again in 34 L. R. A. (N. S.) 798, a departure from the law of landlord and tenant as almost universally administered. And, while the Tennessee court has been followed in Georgia, its innovation has been expressly repudiated in Iowa in *Kutchera v. Graft*, 191 Iowa, 1200, 184 N. W. 297, 26 A. L. R. 1257; in Kentucky in *Franklin v. Tracy*, 117 Ky. 267, 77 S. W. 1113, 78 S. W. 1112, 63 L. R. A. 649; in Maine in *Whitmore v. Orono P. & P. Co.*, 91 Me. 297, 39 A. 1032, 40 L. R. A. 377, 64 Am. St. Rep. 229; in Massachusetts in *O'Malley v. Twenty-Five Associates*, 178 Mass. 555, 60 N. E. 387, the opinion being written by Judge Holmes; and in Ohio in *Shinkle Co. v. Birney*, 68 Ohio St. 328, 335, 336, 67 N. E. 715, where the court says that in cases of this character there is no place for the doctrines or phrases of the law of negligence,

and that what the law exacts is not care, but honesty.

An enlightening discussion of the topic is furnished in *Stumpf v. Leland*, 242 Mass. 168, 136 N. E. 399, which likewise presented a case of injury suffered by reason of a fall due to the defective railing of a porch. The trial court had instructed the jury that, if the landlord was aware of the defect, or, in the exercise of ordinary care and prudence, ought to have been aware of it, and had left the tenant unaware, he had failed in his duty. This instruction was declared on appeal to be a misconception of the principles governing the relation of landlord and tenant. After reiterating the general rule, the court said: "This obligation does not exist in the absence of knowledge on the part of the landlord. It does not impose the duty of inspection in order to find defects and consequent liability for negligent performance of such inspection."

It may sometimes happen, indeed, that there are conditions which may tend to create a nuisance, with surrounding circumstances such as would reasonably and justly put an owner on inquiry. And, when a landlord knows of specific facts calculated to subject occupants to dangers, his actual knowledge of such facts may justify the conclusion, based on the teachings of common experience, that there was notice of defects equivalent to knowledge. Hence when, under such circumstances, liability attaches, it is because, in the eye of the law, the landlord did know, not because he ought to have known.

In the case last cited the court, referring to such instances, says (page 173 of 242 Mass., 136 N. E. 399, 401): "That is far different from allowing anybody to infer a duty of inspection and then to impose liability for that which it may be thought 'he ought to have known' if he had performed such inferred duty. There is no duty of inspection resting on the landlord in such a case. It is only when the knowledge of specific facts concerning the condition of the tenement, constituting defects, has come to him, that the question of liability can arise."

And in closing its discussion the court restates the rule in these words: "It is plain that the rule is now as it has been that, in the absence of express contract or of fraud or misrepresentation, a tenant cannot recover of his landlord for injuries resulting from a hidden defect in the demised premises unless the landlord actually knew of the facts constituting the defect and failed to disclose the defect to the tenant. There is no duty resting on the landlord to make, for the benefit of the tenant, search for hidden defects. Whether the landlord ought to have known of the defect is an inquiry which does not arise in this connection and which has no relevancy upon the question of liability."

A landlord is always under duty not to expose his tenant to risks of which he has knowledge. But there must be proof of knowledge or its equivalent; and knowledge is not shown by evidence of inspection which failed to lead to discovery. The question is, not what the landlord ought to have done or known, but what he did in fact do and know. *Clark v. Sharpe*, 76 N. H. 446, 447, 83 A. 1090, 41 L. R. A. (N. S.) 47.

[6] It remains to consider plaintiff's objections to the rulings of the court excluding certain evidence. Objection was sustained to the introduction by plaintiffs of Mr. Wright's deposition, taken before Mrs. Wright was made a defendant. It is insisted that, notwithstanding the language of subdivision 1 of section 1881, Code of Civil Procedure, the testimony of the husband was admissible, because, it is contended, he was his wife's agent in supervising the premises.

In some jurisdictions not governed by statutory regulation, an exception is made by judicial decree in favor of admission of testimony by a spouse who acted as agent for the other. Then, again, some states have a statute expressly embodying such an exception, as in Arkansas (*Kirby's Digest*, § 3095), Missouri (Stat. 1919, § 5415), Oklahoma (Comp. Laws 1909, § 5842), and perhaps others.

We are governed, however, by a Code provision which makes no such exception, and it is presumed that, in the absence of an express exception, no such qualification of the rule was intended. *Trout v. Ogilvie*, 41 Cal. App. 167, 174, 182 P. 333; *Forbes v. City of Los Angeles* (Cal. App.) 282 P. 528. In construing an enactment identical in language, the Supreme Court of Idaho declared that the statute was controlling, and admitted no exceptions other than those placed there by the Legislature. *Watkins v. Lord*, 31 Idaho, 352, 171 P. 1133. See, also, *Falk v. Wittram*, 120 Cal. 479, 481, 52 P. 707, 65 Am. St. Rep. 184; *Marple v. Jackson*, 184 Cal. 411, 414, 193 P. 940.

Likewise, in Michigan, under a statute reading, "A husband shall not be examined as a witness for or against his wife without her consent," the court declared, in *People v. Werner*, 225 Mich. 18, 22, 195 N. W. 697, 698, that even to call the husband as a witness, and put the wife to the necessity of refusing consent in the presence of a jury, was a transgression of the rule, which in that particular case was deemed sufficiently prejudicial to cause reversal.

While there may be reasons in favor of modification of the rule embodied in our statute, there are also reasons against it, which are vigorously expressed in *State v. Kephart*, 56 Wash. 561, 563-565, 106 P. 165, 26 L. R. A. (N. S.) 1123.

Even where the exception is made, the power to compel the testimony of a spouse is close-

ly guarded. The agency must be one in fact; and not merely activity, unexpected and unauthorized, but exercised as an accompaniment of a harmonious conjugal relationship. *Oklahoma Natural Gas Co. v. Crenshaw*, 91 Okl. 269, 217 P. 370. And, after proof of factual agency and its scope, the questions must be so framed as to confine the evidence within its legitimate limits. The testimony of a husband whose competency as a witness depends on his agency for the wife must be limited strictly to those things which he did and had a knowledge of by reason of his agency, and cannot be extended to matters not embraced within the real scope of his agency. *Goesel v. Davis*, 100 Wis. 678, 76 N. W. 768; *Gottschall v. Geiger*, 207 Mo. App. 89, 107-110, 231 S. W. 87; *Council Grove Ry. Co. v. Center*, 42 Kan. 438, 22 P. 574; *St. Louis Ry. Co. v. Courtney*, 77 Ark. 431, 92 S. W. 251.

We approve the action of the trial court in excluding the husband's deposition, both by reason of the statutory disability of the witness and because the deposition had been taken before the wife was made a party. *Wright v. Sparks*, 127 Ga. 365, 56 S. E. 442. In consequence of the latter fact, she had not had her opportunity to cross-examine. We may add that our examination of the deposition convinces us that, even if it had been admitted, it contained nothing to alter the aspect of the case. The effort was to show that at times prior to 1925 some repairs had been made to the railing, and to ascertain how often Mr. Wright had tested it. Yet there was no proof that in making such repairs or any tests or examination Mr. Wright was acting as an agent, or doing more than rendering those helpful amenities customary between husband and wife. His actual agency, so far as shown in the evidence, did not go beyond the letting of the premises to plaintiffs and the preparations immediately preceding their occupancy.

[7] Exception is taken, also, by plaintiffs to the refusal to admit certain proffered testimony to the effect that, after the accident, Mr. Wright was heard by a witness to say to Mr. Ayres that he knew the railings were weak, but hoped they would last another year. This statement is represented to have been made on July 7, 1925, when Mr. Wright visited the premises at his wife's request for the purpose of having the railings removed. He was present for that special purpose, and not to make declarations concerning matters dissociated from the business in hand. Any statement as to past incidents or former state of mind or opinions constituted no part of the *res gestæ* in the cause before the court, and under the settled rule could in no way be binding on Mrs. Wright. Hence there was no error in exclusion of the offered testimony. 10 Cal. Jur., 1116-1118.

The accident was, indeed, most unfortunate; and we doubt not that the trial court,

equally with ourselves, entertained sympathy for plaintiffs both on account of the serious injury to Mrs. Ayres and the heavy medical and hospital expenses incident to her care. The evidence was not of a character, however, to cast legal liability upon Mrs. Wright; and, accordingly, the court was in duty bound to direct a verdict in her favor.

The judgment is affirmed.

We concur: TYLER, P. J.; CASHIN, J.

103 Cal. App. 430

GREEN v. HANSON et al. (Civ. 6887.)

District Court of Appeal, First District, Division 1, California. Jan. 27, 1930.

1. Action ⇨27(1)—Though relationship between parties is contractual, liability in tort action may nevertheless arise from negligent manner of performing contract.

Where relationship between parties is contractual, liability of one to the other in action of tort may nevertheless arise from negligent manner in which some act provided for in contract is done.

2. Negligence ⇨111(1)—In action for damages for negligently performing contract to raise building, complaint held sufficient to state cause of action.

In action for damages for negligence in performing contract to raise building, complaint alleging facts showing violations of contract in failing to perform work in good and workmanlike manner and negligence in manner of doing work causing damage to plaintiff held sufficient to state cause of action.

3. Appeal and error ⇨1040(10)—Error in overruling demurrer to complaint for uncertainty is without prejudice, where defendant is not misled and cause of action is fairly apparent or allegations are immaterial.

Error, if any, in overruling demurrer to complaint for uncertainty is without prejudice, where defendant is not misled by defects in pleading and cause of action is fairly apparent, or where allegations attacked are immaterial and not essential to recovery.

Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Action by Marian G. Green against Ben Hanson and others, copartners doing business under the firm name and style of Hanson Brothers. Judgment for plaintiff, and defendants appeal. Affirmed.

W. H. Clay, of San Francisco, for appellants.

Tobin & Tobin, of San Francisco, for respondent.

PER CURIAM. The defendants in the above-entitled action undertook, for a consideration, to raise a building owned by plaintiff; the object being to make the same correspond with a change in the grade of an adjoining street. It was agreed that the structure be raised 28 inches above its foundation. After the building had been raised to the stipulated height, it was found that the proper level was a few inches lower, and accordingly, by agreement, it was lowered to a level about 25 inches above the original foundation, which in the meantime had been built up by the plaintiff to the new level.

Plaintiff alleged that the defendants neglected, before raising the building, to free the sills in front and on the sides thereof from the steps and cement sidewalk, thus causing the building when raised to be wrenched and warped; that when the same was lowered to the new foundation it was warped to such an extent that the south side of the structure was about 6 inches above the foundation, and also overlapped an adjoining lot for a distance of 3½ to 4 inches; that defendants after much delay shored up and braced the structure so that the same, with the exception of a portion which overlapped about half an inch, rested upon the new foundation; that the wrenching of the building was due to the negligent manner in which the work was done, and caused the plaster in the building to crack and considerable portions to fall, the roof and pipes thereof to be broken, and the paint to be damaged; and that defendants after shoring up the building removed their braces and tools used therefor without bracing or tying the structure, to remedy which plaintiff was compelled to employ labor. She alleged an expenditure of \$544.50 in that connection, and also that the building, due to defendants' negligence, was permanently injured, causing her further damage. Defendants denied that the injuries alleged were due to their negligence, alleging that the same, if any, were caused by the improper construction of the new foundation, which they claimed was not level. They also sought by a counterclaim to recover a balance of \$200 unpaid on their contract with plaintiff and \$470 for extra work in connection with the raising and lowering of the building.

The court found for the plaintiff and entered judgment in her favor for \$350.

Defendants, who have appealed therefrom, contend that their general and special demurrer to plaintiff's amended complaint should have been sustained on the ground that owing to the contractual relations between the parties no liability for negligence could arise, and that the findings are unsupported.

[1-3] It is well settled that where the relationship between the parties is contractual the liability of one to the other in an action

of tort may nevertheless arise from the negligent manner in which some act which the contract provides for is done. *Coleman v. Iowa R., etc., Co.*, 189 Iowa, 1063, 178 N. W. 365; *Hanna v. Chicago, etc., R. Co.*, 89 Kan. 503, 132 P. 154; *Coen v. Central Tel. Co.*, 95 Neb. 814, 146 N. W. 998; *Hasbrouck v. Armour & Co.*, 139 Wis. 357, 121 N. W. 157, 23 L. R. A. (N. S.) 876; 45 Cor. Jur., Negligence, § 17, p. 643. And while the contract in the present case provided that the work should be performed in a good and workmanlike manner, the facts alleged showed violations of the contract in this respect, and also negligence in the manner in which the work was done, causing damage to the plaintiff, and were sufficient to state a cause of action. The only averments of the complaint which could reasonably be said to be uncertain or ambiguous were immaterial allegations. Error in overruling a demurrer to a complaint for uncertainty is without prejudice where the defendant cannot be said to have been misled by the defects in the pleading and the cause of action is fairly apparent from the complaint. *Contreras v. Merck*, 131 Cal. 211, 63 P. 336; *Alexander v. Central Lumber, etc., Co.*, 104 Cal. 532, 38 P. 410; *Irrgang v. Ott*, 9 Cal. App. 440, 99 P. 528. Nor is such error ground for reversal where the allegations attacked are immaterial and not essential to recovery. *Hill v. Horsley*, 142 Ga. 12, 82 S. E. 225; *Lammers v. Wolfertz* (Tex. Civ. App.) 164 S. W. 1102; 4 Cor. Jur., Appeal and Error, § 2910, p. 937.

The testimony on the issues presented was conflicting, and a review of the voluminous record in the case would answer no useful purpose. It will be sufficient to say that plaintiff's contentions were supported by the testimony of competent witnesses familiar with the work undertaken, and the conclusions of the trial court are fully sustained by the evidence.

The judgment is affirmed.

103 Cal. App. 465

ARMSTRONG et al. v. DAY. (Civ. 6890.)★

District Court of Appeal, First District, Division I, California. Jan. 28, 1930.

Rehearing Denied Feb. 27, 1930. Hearing Denied by Supreme Court March 27, 1930.

1. Appeal and error ⇨1002—Jury finding on conflicting testimony as to how automobile accident occurred cannot be disturbed on appeal.

In pedestrians' action for personal injuries sustained when struck by automobile at street intersection, finding on conflicting testimony as to how accident occurred cannot be disturbed on appeal.

2. Pleading ⇨236(5), 237(3)—Allowance of amendment to complaint to conform to proof rests within sound discretion of trial court, and may be made at any stage of trial.

Allowance of amendment to complaint during trial to conform to proof rests in sound discretion of trial court, and may be made at any stage of trial.

3. Pleading ⇨236(5)—Allowing amendment to complaint to conform to proof in action for personal injuries sustained in automobile accident held not abuse of discretion.

In pedestrians' action for personal injuries arising out of automobile accident where original complaint alleged plaintiff sustained fracture of left side of pelvis and numerous bruises and contusions, causing her to become permanently disabled, allowing amendment to complaint so as to allege in detail injuries in sacroiliac region, resulting in arthritis and injuries to pelvic bones, bladder, and nerves, held not abuse of discretion.

4. Trial ⇨260(8)—Refusing defendant's instruction, in personal injury action, substantially covered by instruction given, held not error, though offered instruction was proper.

Refusing defendant's instruction, in action for personal injuries sustained in automobile accident, substantially covered by instruction given at defendant's request, held not error, though offered instruction was proper.

5. Appeal and error ⇨1170(9)—Giving instruction in personal injury action on imminent danger, though error, held not to have resulted in miscarriage of justice precluding reversal (Const. art. 6, § 4½).

In pedestrians' action for personal injuries sustained in automobile accident, giving instruction regarding care required of one suddenly confronted with imminent danger, though error because not supported in evidence, held not to have resulted in miscarriage of justice, precluding reversal under Const. art. 6, § 4½.

6. Automobiles ⇨246(20)—Instruction that jury should find defendant striking pedestrian was not driving automobile at unlawful speed held properly refused (California Vehicle Act, § 113, subd. (a)).

In pedestrians' action for personal injuries sustained in automobile accident, refusing defendant's instruction that there was no evidence that defendant was driving at unlawful speed, to wit, 15 miles per hour, and that consequently jury should find defendant was not driving at unlawful speed, held proper under California Vehicle Act, § 113, subd. (a), St. 1923, p. 553, prescribing speed limit of 15 miles per hour, where accident occurred, provided, however, that every person driving vehicle on public highway shall drive same at careful and prudent speed under circumstances.

7. Automobiles ⇨168(2)—Speed of automobile greater than is reasonable and proper under circumstances is unlawful, irrespective of whether greater rate of speed is specified (California Vehicle Act, § 113, subd. (a)).

California Vehicle Act, § 113, subd. (a), St. 1923, p. 553, does not fix speed at which driver

may propel automobile and escape liability by claim that he is not exceeding speed limit, but, under its provisions, speed greater than is reasonable and proper under circumstances is unlawful, irrespective of whether greater rate of speed is specified in any other subdivision of same statute.

8. Negligence ⚡86—One whose faculties are impaired must exercise degree of care sufficient to make good these defects.

One whose faculties are impaired is required to exercise degree of care sufficient to make good these defects.

9. Automobiles ⚡246(58)—Refusing defendant's instruction on care required by pedestrian with defective eyesight held not error, where it undisputably appeared pedestrian saw everything which normal vision would have disclosed.

In pedestrians' action for personal injuries sustained when struck by automobile, refusing defendant's instruction to effect that one whose eyesight is defective must exercise greater care and caution than required of one whose vision is normal held not error, where it undisputably appeared plaintiff saw everything which normal vision would have disclosed.

10. Automobiles ⚡246(57)—Refusing defendant's instruction, in pedestrians' action for personal injuries, on defendant's nonliability for injuries resulting from independent cause, held not error under evidence.

In pedestrians' action for personal injuries sustained when struck by automobile at street intersection, refusing defendant's instruction to effect that, if injury was sustained by reason of interposition of some independent cause, there could be no recovery, held not error, in absence of evidence showing intervening cause.

11. Trial ⚡260(10)—Refusing instruction that pedestrian struck by automobile could not recover exemplary damages held not prejudicial, in view of complaint asking for only compensatory damages and other instructions.

In pedestrians' action for personal injuries sustained when struck by automobile, refusing defendant's instruction that plaintiff could recover actual damages only, and that no allowance could be made for exemplary damages, held not prejudicial, where complaint did not ask for exemplary damages, and jury was fully instructed that under circumstances compensation was proper measure of damages, and they might include reasonable value of physicians' and nurses' services.

Appeal from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

Action by Nellie Armstrong and husband against William C. Day. Judgment for plaintiffs, and defendant appeals. Affirmed.

Myrick & Deering and Scott, of San Francisco, for appellant.

Charles W. Dooling and Edwin V. McKenzie, both of San Francisco, for respondents.

PER CURIAM. This action was brought by Nellie Armstrong (who will be hereinafter referred to as the plaintiff) and her husband against William C. Day to recover damages alleged to have been sustained by reason of defendant's negligent operation of an automobile. A jury returned a verdict for the plaintiff. The defendant has appealed from the judgment entered thereon.

As grounds for reversal it is claimed that the evidence is insufficient to sustain the verdict, that the court erred in allowing an amendment to the complaint during the trial, and in giving and refusing certain instructions.

The injuries occurred at the corner of Post and Kearny streets in San Francisco. These streets run east and west and north and south, respectively. On each street, and occupying the center thereof, are double tracks of a street railway, and a track connecting the northerly track on Post street with the westerly track on Kearny street rounds the northwest corner of the intersection. The westerly sidewalk on Kearny street is 14 feet wide, and it is 11 feet 7 inches from the most northerly rail of the tracks on Post street to the northerly curb line of said street.

On Saturday, October 23, 1926, at about 2:45 o'clock p. m., the plaintiff, who was about 60 years of age, and in good physical condition, except for the entire loss of vision of the left eye, started to cross Post street. She was walking in the center of the pedestrian pathway about 7 feet from the westerly curb line of Kearny street; her course being from south to north. According to her testimony, before stepping from the sidewalk into Post street, she looked both ways, ascertained that it was safe to proceed, and continued to look while crossing the street. When she reached a point between the most northerly rail of the car tracks on Post street and the northerly curb of that street, she was struck by a Buick sedan driven by defendant, which rounded the corner from Kearny street, and it was testified that no audible signal of its approach was given. Plaintiff testified that she first saw the automobile when it suddenly rounded the corner, and was about 7 feet away, and that the front of the automobile struck and knocked her down. Her left hip and left arm and head were abraded, and the left side of her body bruised, and she also received internal injuries.

[1] According to the testimony, a person riding with the defendant declared in his presence immediately after the accident, "We struck her. We do not deny it," and the defendant at the same time and place said, "We don't deny striking her." The defendant and his witnesses testified that plaintiff

stumbled and fell against the automobile; and testimony as to where her body lay after the accident tended to confirm their testimony. On the other hand, according to the plaintiff and another witness, she had reached a point 5 or 6 feet from the northerly curb of Post street, when she was struck by the front of the car. While it is contended that the only reasonable conclusion as to how the injury occurred corresponds with the testimony of defendant's witnesses, we cannot say that the finding of the jury to the contrary is unsupported. The question was properly submitted to them, and, the evidence being conflicting, their finding cannot be disturbed.

[2] The original complaint alleged that plaintiff suffered a fracture of the left side of the pelvis and numerous bruises and contusions, causing her to become permanently disabled. During the trial an amendment to conform to the proof was permitted. The amended pleading alleged: "A separation of the ilium from the sacrum, causing a sacro-iliac slip and consequent arthritis in and about the left sacro-iliac joint, and a separation of the right ilium from the right side of the sacrum, causing on the left side thereof a sacro-iliac slip and a consequent arthritis in and about said joint." Further, that "by reason of said injuries to the pelvic bones the bladder and nerves thereof were injured and the normal function thereof disturbed." These allegations received support from the testimony of a physician called by the plaintiff.

The allowance of such amendments rests in the sound discretion of the trial court (*Hancock v. Board of Education*, 140 Cal. 554, 74 P. 44), and may be made at any stage of the trial (*Gartlan v. G. A. Hooper & Co.*, 177 Cal. 414, 170 P. 1115).

[3] The facts of the present case afford no ground for the contention that the defendant was prejudiced thereby or that the court abused its discretion.

[4] Defendant offered, and the court refused, an instruction in effect that the presence or absence of negligence is not to be tested by the event. While the offered instruction was proper, the subject was substantially covered by the following instruction given by the court at defendant's request: "Upon plaintiffs rests the burden of showing by a preponderance of the evidence that it was the negligence of the defendant which caused the injury. Unless plaintiffs make this proof they cannot recover. A mere surmise that there may have been negligence on the part of defendant, or the mere fact that an accident happened to the plaintiff, Mrs. Armstrong, does not entitle the plaintiff to a verdict."

[5] The court instructed as to the care required of one suddenly confronted with im-

minent danger. Appellant complains that the instruction was erroneous in omitting to state that one seeking the benefit of the rule must be without fault; and, further, that there was no evidence to which such an instruction was applicable.

While the authorities leave the correctness of the instruction as an abstract statement of law in doubt, the second contention must be sustained. It is the rule that instructions must find support in the evidence (*Thomas v. Gates*, 126 Cal. 1, 58 P. 315; *Risdon v. Yates*, 145 Cal. 210, 78 P. 641); but notwithstanding this, to justify a reversal it must appear that a miscarriage of justice resulted (*Const. art. 6, § 4½*; *Estate of Baird*, 193 Cal. 225, 223 P. 974; *Lawrence v. Goodwill*, 44 Cal. App. 440, 186 P. 781; *Hoffman v. Pacific Elec. Ry. Co.*, 45 Cal. App. 751, 188 P. 597; *Straten v. Spencer*, 52 Cal. App. 98, 197 P. 540; *Freeman v. Adams*, 63 Cal. App. 225, 218 P. 600), and there is nothing in the present case to support that conclusion.

[6] The court refused to instruct that there was no evidence that defendant was driving at a rate of speed in excess of that allowed by law, viz., 15 miles per hour, and that consequently it was the duty of the jury to find that he was not traveling at a speed in excess of that allowed by law.

While there was no evidence that the defendant was traveling more than 15 miles per hour, the instruction nevertheless was properly refused. Section 113 of the Vehicle Act (St. 1923, p. 553) provided that: "Subject to the provisions of subdivision (a) of this section and except in those instances where a lower speed is specified in this act, it shall be lawful for the driver of a vehicle to drive the same at a speed not exceeding the following. * * * Subd. (b). This section fixed a limit of 15 miles per hour for the locality where the accident occurred, subject, however, to subdivision (a) thereof, which was as follows: "Any person driving a vehicle on the public highways of this state shall drive the same at a careful and prudent speed not greater than is reasonable and proper, having due regard to the traffic, surface and width of the highway, and no person shall drive any vehicle upon a public highway at such a speed as to endanger the life, limb or property of any person."

[7] It has been held repeatedly that the Vehicle Act does not fix the speed at which a driver may propel an automobile and escape liability by a claim that he is not exceeding the speed limit prescribed by the act, as under the provisions of subdivision (a) of the above section a speed greater than is reasonable and proper under the circumstances is unlawful, irrespective of whether a greater rate of speed is designated in other subdivisions of the same section. *Reaugh v. Cudahy Packing Co.*, 189 Cal. 335, 208 P. 125; *Griffith v. Oak Ridge Oil Co.*, 190 Cal. 389,

212 P. 913; *Power v. Crown Stage Co.*, 82 Cal. App. 660, 256 P. 457; *Davis v. Brown*, 92 Cal. App. 20, 267 P. 754.

[8, 9] Defendant offered two instructions to the effect that one whose eyesight is defective is for that reason required to exercise greater care and caution for his own protection than would be required of one whose vision is normal. Both instructions were refused. As stated, the testimony shows that plaintiff had lost the use of her left eye. Her other eye, however, was good. It further appears that, although the defendant did not see the plaintiff until his automobile had turned the corner, she saw the approaching vehicle from the time it commenced to turn, the distance from this point to her position in the pedestrian pathway being about 7 feet. According to her testimony, the turn was made so rapidly that she was unable to avoid the collision. It is the rule that one whose faculties are impaired is required to exercise care sufficient to make good these defects. *Furtado v. Bird*, 26 Cal. App. 152, 146 P. 58; 45 Corp. Jur., Negligence, p. 996, §§ 549, 550. But here, it being undisputed that plaintiff saw everything which normal vision would have disclosed, the only question was whether, after seeing the approaching automobile, she used due care to avoid it. Under these circumstances, the refusal of the instruction was not error.

[10] The court also refused an instruction to the effect that, if the injury was sustained, not as the natural consequence of some act of the defendant, but by reason of the interposition of some independent cause, there could be no recovery. In the present case there is no evidence of an intervening cause of the injury, and the instruction was properly refused.

[11] An instruction that the plaintiff was entitled to recover actual damage only, and that no allowance could be made for exemplary damages, was also refused. The refusal was not prejudicial. The complaint prayed for no punitive damages; and the jury was fully instructed that in cases of this character compensation is the measure of damages; furthermore, that this might include the reasonable value of physicians' and nurses' services and hospital care, with such reasonable sum as the jury might award as general damages for the mental and physical pain caused by the injury or certain to be suffered in the future, not exceeding the amount prayed for in the complaint.

We are satisfied that the verdict is fairly supported, and, after an examination of the entire record, including the evidence, are of the opinion that no error is disclosed which can reasonably be said to have resulted in a miscarriage of justice.

The judgment is affirmed.

WHITE v. DAVIS et al. (Civ. 41.)

District Court of Appeal, Fourth District, California. Jan. 29, 1930.

Rehearing Denied Feb. 24, 1930. Hearing Denied by Supreme Court March 27, 1930.

1. Automobiles ⇨216—Pedestrian exercising reasonable care has same right to travel on highway as automobile driver.

A pedestrian has the same right to travel on a public highway as has the driver of an automobile, subject to the right being exercised with reasonable amount of care under existing circumstances.

2. Automobiles ⇨160(1)—Driver of automobile may not proceed under assumption that, while traveling on right side of highway at low speed, path will remain clear.

A driver of an automobile may not proceed on a public highway under the assumption that, so long as he is on the right side of the highway, and proceeding at a low rate of speed, the path in front of him will remain clear.

3. Automobiles ⇨146—Driver must keep control of automobile and use reasonable care under circumstances.

It is incumbent on the driver of an automobile being operated on public highway to keep control of his automobile at all times and to use reasonable care and caution under the circumstances and conditions of the particular time.

4. Automobiles ⇨245(9)—Whether driver of truck striking automobile stopped on highway at night without lights, and person standing alongside was negligent, held for jury.

Whether or not driver of automobile truck striking another automobile stopped on public highway at night without lights, and injuring person who was attempting to repair lights of unlighted automobile, was guilty of negligence, held question of fact for jury to determine.

5. Automobiles ⇨244(8)—Evidence supported findings that driver of truck striking automobile without lights stopped on highway and person standing alongside was negligent.

Jury's finding of negligence on part of driver of truck striking automobile without lights, stopped on highway, and person who was attempting to repair lights of automobile, held to be sufficiently supported by evidence.

6. Negligence ⇨136(26)—Whether facts constitute contributory negligence as matter of law or whether question is for jury depends on circumstances.

Solution of question as to whether given state of facts constitutes contributory negligence as matter of law or whether it is matter that should go to jury as question of fact depends entirely on the existing circumstances in each particular case.

7. Automobiles ⇨245(75)—Whether man struck by truck while standing alongside automobile without lights, stopped on highway at night, was contributorily negligent, held for jury.

Whether man standing alongside of automobile without lights, stopped on highway at

night, attempting to repair lights, and who was struck by automobile truck attempting to pass, was contributorily negligent, *held* question of fact for jury to determine.

8. Automobiles ⇨160(1)—Driver of automobile must anticipate presence of other persons on highway.

The driver of an automobile must anticipate the presence of other persons on the highway.

9. Trial ⇨253(4)—Instruction held erroneous as omitting question whether driver of truck striking plaintiff knew of his presence or whether pedestrian knew of truck's approach.

Instruction, in action for injuries sustained when plaintiff was struck by passing automobile truck while standing on highway at night alongside of automobile without lights, *held* erroneous as leaving out of consideration question as to whether driver of truck should have known of presence of plaintiff or whether or not plaintiff himself knew of approach of truck and was oblivious thereto.

10. Negligence ⇨67—General rule that person may assume others will perform duty and obey law applies only to one who is himself not negligent.

General rule that every person has right to presume that every other person will perform his duty and obey law, and that, in absence of reasonable ground to think otherwise, it is not negligence to assume he is not exposed to danger coming to him only from violation of law or duty by other person, does not apply to every person, but only to one who is himself not negligent.

11. Negligence ⇨68—Person must use reasonable care to observe conduct of other person as it may affect own safety.

A person may not blindly rely on the unaided care of another, but must use reasonable care to observe the conduct of such other person so far as it may affect his own safety.

12. Negligence ⇨136(26)—Whether reasonable care is used under circumstances in relying on presumption other person will perform duty and obey law is for jury.

Whether or not reasonable care is used under the circumstances in relying on presumption that every person may presume that every other person will perform his duty and obey law is question for jury to determine.

13. Trial ⇨191(7)—Instruction held erroneous as assuming that plaintiff, struck by truck while standing on highway alongside unlighted automobile at night, had right to be there without taking additional precaution.

Instruction, in action for injuries plaintiff sustained when he was struck by automobile truck while standing on highway at night alongside unlighted automobile, *held* erroneous as assuming that plaintiff had right to be where he was without taking additional precaution, where question whether he had right and also right to assume driver of truck would see him were questions for jury.

14. Automobiles ⇨163(5)—Negligence of driver of truck striking pedestrian and unlighted automobile stopped on highway at night facing in opposite direction depended on whether he used reasonable care under circumstances (California Vehicle Act 1923).

Question of negligence on part of driver of automobile truck striking man standing alongside unlighted automobile facing in opposite direction on highway at night depended on whether he used reasonable care under circumstances, and not on whether he complied with California Vehicle Act (Gen. Laws 1923, Act 5128), requiring that any vehicle overtaking another vehicle proceeding in same direction shall pass at least two feet to left thereof.

15. Appeal and error ⇨1064(1)—Automobiles ⇨246(41)—Instruction that driver of truck striking pedestrian was negligent, if lights did not reveal pedestrian, *held* misleading and prejudicially erroneous, where evidence showed pedestrian was not revealed (California Vehicle Act 1923).

Instruction, in action for injuries sustained when plaintiff was struck by automobile truck while standing on highway at night alongside unlighted automobile, in effect telling jury driver of truck was guilty of negligence as matter of law, if his lights did not in fact reveal plaintiff to him, *held* misleading and prejudicially erroneous, where evidence showed that plaintiff was not actually revealed to driver of truck prior to collision, California Vehicle Act (Gen. Laws 1923, Act 5128) requiring only that vehicle at night have ample driving light.

16. Automobiles ⇨245(9)—What constituted ample driving light on truck striking pedestrian standing alongside automobile on highway without lights at night *held* for jury (Gen. Laws 1923, Act 5128, § 101).

What constituted an ample driving light on automobile truck striking pedestrian standing on highway at night alongside automobile without lights, as required by General Laws 1923, Act 5128, § 101, under the circumstances, was question for jury to decide.

17. Trial ⇨296(3)—Instructions submitting contributory negligence did not cure prejudicial error in instruction that driver of truck striking pedestrian was negligent, if lights did not reveal pedestrian.

Instructions submitting question of contributory negligence to jury did not cure prejudicial error in instruction that driver of truck striking pedestrian standing on highway at night alongside automobile without lights was negligent, if lights did not actually reveal plaintiff to him, which implied that plaintiff was justified in relying on being seen by driver of truck.

18. Damages ⇨132(9)—\$30,000 for injuries necessitating amputation of man's leg slightly below knee, where man earned \$140 monthly, and total expense was \$605, *held* excessive; "miscarriage of justice" (Const. art. 6, § 4½).

\$30,000 for injuries necessitating amputation of man's leg slightly below knee four days after injury, where total expense was \$605, and injured person received \$140 per month as employee of gasoline station, *held* excessive, re-

sulting in "miscarriage of justice" within contemplation of Const. art. 6, § 4½, and to require reversal.

[Ed. Note.—For other definitions, see Words and Phrases, Third Series, Miscarriage of Justice.]

Appeal from Superior Court, San Bernardino County; Chas. L. Allison, Judge.

Action by George White against R. M. Davis and H. E. Smith, doing business under the fictitious name and style of Coachella Valley Transportation Company, and another. Judgment for plaintiff, and defendants appeal. Reversed.

Swing & Wilson, of San Bernardino, Gilligan & Cobb, of Los Angeles, and Nichols, Cooper & Hickson, of Pomona, for appellants.

H. L. Thompson, of Riverside, and B. P. Gibbs, of Los Angeles, for respondent.

BARNARD, J. This is an appeal from a judgment, based upon the verdict of a jury, in a personal injury action. The accident out of which the action arose occurred on the night of June 1, 1925, between midnight and 1 o'clock a. m. on the main traveled state highway between Los Angeles and the Imperial Valley, generally known as the Valley boulevard, and at a point just within the westerly corporate limits of the city of Ontario. The total width of the street at the point of the accident was 80 feet, but there was a drainage ditch on each side of the highway. There was a pavement 16 feet in width, with a 3-foot oiled shoulder on each side of the pavement, and 4 feet of graded dirt surface between the shoulder and the ditch on each side of the road, giving a total width of 30 feet of roadway available for travel. While proceeding in a westerly direction immediately prior to the accident, at a point nearly a mile east of where the accident later occurred, plaintiff passed the truck which was involved in this controversy. The truck was traveling westward at from 12 to 15 miles an hour. Shortly after passing the truck, plaintiff observed a Ford car which had stopped on the highway, with neither front nor rear lights. Plaintiff stopped his own car about 30 to 35 feet in front of the Ford, and, leaving both his headlights and tail-light burning, walked back to the standing car, where he found a lady, Mrs. De Frates, who told him her lights had gone out. He stepped up beside the hood of the Ford, and attempted to fix the lights for her. The Ford was headed west, and was standing mostly on the pavement, its left wheels being about 4 feet south of the north edge of the paved portion of the highway.

Plaintiff testified that, as he walked back to the Ford, he could see the truck coming, a little over a quarter of a mile away, that it was a few minutes, he thought between 3 and 5 minutes, after he left his car before the

truck came up, and that while he was working on the car he looked up and saw the truck again. He estimates the distance between himself and the truck, at that time, at around 100 to 150 yards. At that time Mrs. De Frates was standing about 4 feet from the Ford toward the center of the highway, and plaintiff warned her, saying: "Look out for that truck, he almost got me a while ago." Mrs. De Frates stepped behind the Ford; the plaintiff turned around, resumed his work on the Ford, and, as he testified, "as I turned around the truck was on top of me you might say, within a few feet. I couldn't do anything and couldn't get out of the way and threw myself over next to the Ford as best I could, grabbing hold of the windshield and pulled myself over. The truck was hit and I was hit. I meant the Ford was hit and I was hit." The truck struck the rear left corner of the Ford, and the plaintiff was knocked down and his left leg crushed in such a manner that it was amputated four days later. The plaintiff testified that the last time he saw the lights of the truck before the impact he thought the truck was slightly to the left of the road; that is, not entirely on its own right-hand side. He also testified that the truck appeared to be going directly toward him, that he saw the truck, heard it, and that he did not pay any particular attention to it.

The driver of the truck testified that, when he was about 75 to 100 yards away, he observed plaintiff's car standing on the north side of the highway, and that he could see the tail-light and the light from the headlights; that he did not see the Ford coupé which was between him and the car of the defendant; that he did not look close, but saw the lighted car and nothing else; that he started to turn his truck over to the left at what he thought was 25 or 30 feet before he reached plaintiff's car, and suddenly collided with the Ford car; that, before he started to turn to the left, the right wheels of his truck were 12 inches from the right-hand side of the pavement; that his truck was equipped with electric headlights, and that he could see probably 100 feet ahead as he was approaching the scene of the accident. At another time he testified that his headlights were burning good, and he could see the pavement and obstacles ahead of him for a distance of perhaps 200 feet.

There was a conflict in the evidence as to the degree of darkness that night. Plaintiff testified there was a full moon, and that it was as light as day. There was evidence that the moon was in its first quarter, and that it set at 2 o'clock that morning; also Mrs. De Frates testified she was afraid to drive her car farther off the pavement, as she could not see how close she was to the ditch. The driver of the truck testified that the Ford had no lights whatever, that he did not see

the Ford or the plaintiff because he was watching the lights of plaintiff's parked machine, and making ready to pass around it, and that that machine was standing at a slight angle to the right. He testified that he was wide awake at the time, but he admitted that he had been on this trip for more than 24 hours immediately preceding the accident, during which time he had been either driving or loading his truck, except that he had had about one hour of sleep about 3 o'clock the afternoon before. He also said he had come through a wind and sand storm that afternoon, and that his windshield was somewhat dusty and scarred. It is admitted that the speed of the truck immediately preceding the accident was 15 miles per hour. The plaintiff testified he saw no automobiles approaching just before the accident other than the truck in question. Mrs. De Frates testified it was only a second or two at the most after the plaintiff warned her until the truck struck the Ford.

The truck driver testified as follows:

"Q. And immediately prior to the accident you could see through your windshield, in the condition that it was, with your lights in the condition that they were, an object ahead of you for a distance ahead of you on the highway for a distance of 100 feet, is that true? A. Yes, sir.

"Q. How fast were you going? A. About 15 miles an hour.

"Q. Then, if you could see an object on the highway for 100 feet ahead of you, why did you not see this Ford coupé? A. It was setting in between those lights, and I saw the one car there, and I never looked for any more, for there was no lights, only the one set of lights is all I could see, and I couldn't see anybody.

"Q. The lights you speak of were headed away from you, were they not? A. No, sir, they were headed angling across the road.

"Q. Which way? A. Kind of north and south.

"Q. That is to the right hand side? A. The tail lights were to the left hand side and the headlights were to the right.

"Q. This car was ahead of this Ford coupé wasn't it? A. It was ahead of it, but the coupé stood right between the lights."

[1-3] Appellants insist that the judgment in favor of the plaintiff is not supported by the evidence. It is their contention that, since the driver of the truck was proceeding on his own right side of the highway at a reasonable rate of speed, and since the plaintiff voluntarily placed himself on the highway in the path of the truck without giving any warning of his presence, no negligence on the part of the driver of the truck is shown by the evidence. As was pointed out in the case of *Hatzakorjian v. Rucker-Fuller Desk Co.*,

197 Cal. 82, 239 P. 709, 713, 41 A. L. R. 1027, a pedestrian has the same right to travel upon a public highway as has the driver of an automobile, subject to this right being exercised with a reasonable amount of care, under existing circumstances. And a driver of an automobile may not proceed under the assumption that, so long as he is on the right side of the highway, and proceeding at a low rate of speed, the path in front of him will remain clear. It is incumbent upon the driver of an automobile to keep control of his automobile at all times, and to use reasonable care and caution under the circumstances and conditions of the particular time. There was evidence here that the driver of the truck had been driving and loading his vehicle for more than 24 hours next preceding the accident, with only 1 hour's sleep. It was also in evidence that some miles back he had passed through a sandstorm, and his windshield was dusty and scarred, and had not been wiped off. There was conflicting evidence as to whether the night was very light or very dark. The driver testified he did not see the Ford, or the plaintiff, as his attention was upon the lights of the plaintiff's car, which was parked slightly in advance of the Ford. Whether, in the exercise of reasonable care, he should have seen these objects, or whether, in the condition thus created, the Ford was so obscured or so blended with the plaintiff's machine, that it could not be seen by the driver of the truck in the exercise of reasonable diligence, are questions of fact.

"The rule by which appellate courts must be guided in passing upon the question whether findings of fact or verdicts of juries are sufficiently supported by the evidence is this: 'That where an honest difference of opinion between men of average intelligence can arise as to the effect of the evidence—that is, if the evidence is such as that different conclusions upon the matter can rationally be drawn from the evidence—then the case presented is one for the jury, or the court, if the questions of fact be submitted to its arbitrament.' *Firth v. Southern Pac. Co.*, 44 Cal. App. 511, 514, 186 P. 815, 816."

[4, 5] In view of all the circumstances here present, we are of the opinion that the question as to whether or not the driver of the truck was guilty of negligence was one of fact for the jury, and that the jury's finding of negligence on his part is sufficiently supported by the evidence.

It is next urged that the plaintiff was himself guilty of contributory negligence, as a matter of law. This claim is based upon the following facts, as testified to by the plaintiff: That he had passed the truck shortly before he saw the unlighted Ford standing on the highway; that, after he had parked his car and started back to the Ford, he saw the truck approaching, it being then between

a quarter and a half mile away; that he engaged in attempting to repair the Ford while it was parked upon a main traveled highway, without lights; that he again saw the truck approaching when it was 100 to 150 yards away; that the approach of the truck at that time was such that it caused him to warn Mrs. De Frates to move off the highway; that thereafter he paid no further attention to the truck, although he knew it was coming toward him, and that it was headed straight for him; and that during all of this time he was working on the south side of the Ford car, standing right up to the edge of the car, bending over the front fender, where he could not be seen.

In support of their theory that the plaintiff was guilty of contributory negligence, as a matter of law, defendants cite a number of cases. In *Mayer v. Anderson*, 36 Cal. App. 740, 173 P. 174, it was held to be negligence, as a matter of law, where the plaintiff walked out into a crossing, in heavy traffic, without glancing to either side, and being, up to the moment of impact, absolutely oblivious to an approaching automobile. In *Moss v. Boynton Co.*, 44 Cal. App. 474, 186 P. 631, 632, the plaintiff stepped into the street without looking in the direction from which traffic was first to be expected. This was held to be negligence, as a matter of law. In *Ogden v. Lee*, 61 Cal. App. 493, 215 P. 122, the plaintiff was held guilty of contributory negligence where he saw a light which he thought was standing still, and then proceeded to cross the street with an umbrella obstructing his view, without any precaution to see if any machine was coming. *Atkins v. Bouchet*, 65 Cal. App. 94, 223 P. 87, is a similar case. The case of *Chrissinger v. Southern Pacific Company*, 169 Cal. 619, 149 P. 175, and the case of *Klusman v. Pacific Electric Railway Company*, 190 Cal. 441, 213 P. 38, are both cases where no precautions were taken by the plaintiff. In *Reynolds v. Los Angeles Gas & Electric Company*, 162 Cal. 327, 122 P. 962, 39 L. R. A. (N. S.) 896, Ann. Cas. 1913D, 34, the court holds that the temporary forgetfulness of a known danger, which is not induced by some sudden and adequate disturbing cause, is itself negligence, as a matter of law. In *Finkle v. Tait*, 55 Cal. App. 425, 203 P. 1031, the court held that the only possible view of the evidence was that the plaintiff either did not look at all, or, if he did, that he saw the automobile and carelessly walked in front of it; his act being negligence, as a matter of law.

In opposition to the claim that he was guilty of contributory negligence, the plaintiff cites the following cases: *Graybiel v. Auger*, 64 Cal. App. 679, 222 P. 635; *Deitchler v. Ball*, 99 Wash. 483, 170 P. 123; *Coffman v. Singh*, 49 Cal. App. 342, 193 P. 259; *Blackwell v. Renwick*, 21 Cal. App. 131; *Hatzakorjian v.*

Rucker-Fuller Desk Co., supra. In *Moss v. Boynton Company*, supra, the court said:

"Contributory negligence 'is a question of law only when the evidence is of such a character that it will support no other legitimate inference than that in the one case the plaintiff was guilty of contributory negligence. * * * When the evidence is such that the court is impelled to say that it is not in conflict on the facts, and that from those facts reasonable men can draw but one inference, and that an inference pointing unerringly to the negligence of the plaintiff contributing to his own injury, then, and only then, does the law step in and forbid plaintiff a recovery. * * * Even where the facts are undisputed, if reasonable minds might draw different conclusions upon the question of negligence, the question is one of fact for the jury.' *Zibbell v. Southern Pac. Co.*, 160 Cal. 237, 240, 116 P. 513; *Wing v. Western Pac. Co.*, 41 Cal. App. 251, 182 P. 969. And the question of contributory negligence must be determined without regard to any negligence on the part of defendant. *Hutson v. Southern Cal. Ry. Co.*, 150 Cal. 701, 703, 89 P. 1093."

In *Mann v. Scott*, 180 Cal. 550, 182 P. 281, 282, where there was a city ordinance requiring automobiles to stop while a street car was receiving or discharging passengers, and where the plaintiff was injured while attempting to board a car, the court said:

"The question of negligence under the usual rule of ordinary care that devolves upon foot travelers, must be examined in the light of all the attendant circumstances, one of which may be knowledge of the existence of a statute or an ordinance prescribing certain fixed regulations for observance by automobile drivers. And it may be that if the jurors in this case rejected, as improbable, respondent's testimony that she looked and saw no approaching automobile, they, nevertheless, concluded—as well they might—that if she did not see the automobile before leaving the sidewalk, she reasoned that its driver would comply with the city ordinance, referred to in the court's instructions, requiring an automobile traveling behind a street car to stop 10 feet in the rear of the car if it stops to let off or take on passengers, until the passengers have safely alighted from or boarded the car. Whether, if she saw the automobile, respondent would have been warranted in going toward the street car without further watching the automobile approach, relying upon a compliance by the appellants with the requirements of the ordinance, was a question upon which men's minds might well differ, and hence it was properly a case for the jury. * * *"

In *Carbaugh v. White Bus Line*, 51 Cal. App. 1, 195 P. 1066, 1067, the plaintiff at an intersection saw the defendant's stage approaching, but proceeded to cross into the in-

tersection. In discussing the question of contributory negligence, the court said:

"The first contention of the appellant herein is that the plaintiff D. C. Carbaugh, as the driver of said automobile, was guilty of contributory negligence as a matter of law in entering upon and attempting to cross said boulevard after observing the defendant's stage approaching its point of intersection with the Mission drive. This contention is absolutely without merit. The plaintiff D. C. Carbaugh, as he approached the intersection of these two streets, was driving upon the right side of the Mission drive at a rate of speed permitted by law, and had, under the provisions of the Motor Vehicle Act, the right of way across Pomona Boulevard in advance of the defendant's stage approaching thereon. Whether or not after observing the approach of said stage and its position upon said boulevard, and the rate of speed at which it was traveling, the said plaintiff was justified in proceeding upon his rightful way across said boulevard in advance of said stage was clearly a question of fact for the jury. *Zibbell v. Southern Pacific Co.*, 160 Cal. 237, 116 P. 513; *Scott v. San Bernardino Valley, etc., Co.*, 152 Cal. 604, 93 P. 677; *Commonwealth Bonding, etc., Co. v. Pac. Elec. Ry. Co.*, 42 Cal. App. 573, 184 P. 29; *Robinson v. Clemons*, 46 Cal. App. 661, 190 P. 203; *Baker v. Western Auto Stage Co.*, 48 Cal. App. 283, 192 P. 73."

[6] The question as to whether a given state of facts constitutes contributory negligence, as a matter of law, or whether it is a matter that should go to the jury, as a question of fact, is often a close one. The solution depends entirely upon the existing circumstances in each particular case. Unusual circumstances may determine in a given case whether or not reasonable minds might legitimately draw different conclusions on the question of negligence. There seems to be a general rule running through the cases where a pedestrian, or one standing on a highway, is injured by an automobile, which usually determines whether the question of contributory negligence is one of law, or of fact. Where the injured party fails to look at all, or looks straight ahead without glancing to either side, or is in a position where he cannot see, or, in other words, where he takes no precaution at all for his own safety, it is usually a question for the court. Where he looks but does not see an approaching automobile, or, seeing one, erroneously misjudges its speed or distance, or for some other reason assumes he could avoid injury to himself, the question is usually one for the jury.

[7] While a somewhat close question is presented by the facts in the instant case, it can hardly be said that the plaintiff here did not take *some* precaution, or that he did not have *some* reason for assuming he could avoid in-

jury. He stood as close as possible to the Ford on which he was working; he warned the lady he was trying to assist to step back so that the way would be more nearly clear; and he noted that there was plenty of room for the defendant to pass on the other three-fourths of the highway. He also testified that when he last saw the truck he thought it was slightly to the left side of the road. He may have thought it was already turning over to the other side of the road, and thus misjudged its position. He may have assumed he could avoid injury, since he thought the lights on the truck were sufficient to reveal the Ford and himself, and that the driver would turn out in time. Whether he could, or should, have moved the machine off the highway, in the time available, may be a debatable question. It was an emergency, in which he was attempting to assist a lady in trouble in the middle of the night. While it would now appear that the highest degree of caution might have saved him from injury, what he, as a reasonable man, was justified in doing on the spur of the moment is a matter upon which reasonable minds might well differ. Under all of the circumstances, we are of the opinion that the question raised, as to contributory negligence on the part of the plaintiff, was one for the jury.

Since the questions of negligence on the part of the defendant and contributory negligence on the part of the plaintiff were properly submitted to the jury, the matter of instructions is important. A number of assignments of error, in connection with the giving or refusing of instructions, are set forth. We deem it necessary to comment only on a few of them. The court gave the following instruction:

"I charge you that under the Motor Vehicle Act of this state which was in full force and effect at the time of this accident, the driver of an automobile in relation to the rights of others traveling upon the highway was required to drive his vehicle in a careful and prudent manner and at a rate of speed not greater than is reasonable and proper and under no circumstances to exceed thirty-five miles per hour, and the law requires of him the necessity of making certain that foot passengers were aware of the rearward approach of the vehicle; and that the vehicle itself is at such a distance from the pedestrian as to avoid running over him in his sudden panic from surprise at knowledge of its unexpected approach, and finally, that the vehicle is under such control as that it may be stopped promptly."

[8, 9] It is, of course, the law that the driver of an automobile must anticipate the presence of other persons upon the highway. *Hatzakorjian v. Rucker-Fuller Desk Co.*, supra. In the case just cited, the court held that the driver of the automobile should have

known of the presence of the pedestrian, and that blinding headlights were no excuse, as the pedestrian was on the right side of the road, where he had a right to be. While this is the law, it applies more particularly to cases where the driver of the automobile either knew or should have known of the presence of the other party. In effect, the jury was here instructed that the law required of the truck driver in this case that he make certain that the plaintiff was aware of his approach. We think that reasonable diligence, rather than certainty, was required. In view of the fact that the circumstances here were peculiar, that the defendant was running at a low rate of speed on the right side of the road, that he saw an obstruction, being plaintiff's parked and lighted car, that he was turning out in an effort to pass the obstruction he saw, and in view of the doubt as to whether or not the position and effect of the lights on plaintiff's car were such as to have caused the Ford to be so blended with the plaintiff's car as to have reasonably prevented the defendant from seeing the Ford, or the plaintiff, an instruction that the law placed upon the defendant the absolute necessity of making certain that foot passengers were aware of his approach was hardly justified. It left out of consideration the question as to whether the driver should have known of the presence of the plaintiff, or whether or not the plaintiff himself knew of the approach of the vehicle, and was oblivious thereto. We think that under the conditions here present the instruction in question should have been qualified in the manner indicated.

The court also instructed the jury:

"I instruct you that every person has a right to presume that every other person will perform his duty and obey the law, and in the absence of reasonable ground to think otherwise, it is not negligence to assume that he is not exposed to danger which comes to him only from violation of law or duty by such other person."

[10-13] While this is also a general rule, it should have also been qualified under the circumstances of this particular case. The rule does not apply to "every person," but applies to one who is himself not negligent. 19 Cal. Jur. 596, and cases there cited. Reliance upon this presumption will not excuse one who is himself negligent, for such a rule would abrogate the doctrine of contributory negligence. *McPherson v. Walling*, 58 Cal. App. 563, 209 P. 209. A person may not blindly rely upon the unaided care of another, but must use reasonable care to observe the conduct of such other person, so far as this may affect his own safety. *Simonsen v. L. J. Christopher*, 186 Cal. 786, 200 P. 615; *Harris v. Johnson*, 174 Cal. 55, 161 P. 1155, L. R. A. 1917C, 477, Ann. Cas. 1918E, 560. Whether or not reasonable care

is used under the circumstances, in relying upon this presumption, is a question for the jury. *Mann v. Scott*, supra; *Scott v. San Bernardino Valley Company*, 152 Cal. 604, 93 P. 677. The effect of this instruction was to tell the jury that in this case the plaintiff had a right to rely upon the rule stated, irrespective of whether or not he himself was negligent, and that he had a right to assume that he was not exposed to danger, even though he might know he was in a perilous position. The negligence of the defendant and the contributory negligence of the plaintiff were questions which should have been left to the jury, and this instruction should not have been given, without qualification. It is not a necessary inference from the facts in this case that the danger to be anticipated could come only from a violation of law, but such danger might come from a variety of other causes. Respondent justifies this instruction by the argument that the plaintiff had a right to be where he was, and that he had a right to assume that the lights of the truck would be sufficient for the driver of the truck, if he was obeying the law, to observe the Ford in time to clear it. The vice of the instruction is that it practically assumes, what respondent assumes in this argument, that the plaintiff had a right to be where he was without taking additional precaution. Whether or not he had this right, and also the right to assume that the driver of the truck would see him, were questions for the jury, and may not be assumed as true.

The court also instructed the jury as follows:

"I instruct you that under the Motor Vehicle Act which was in full force at the time of this accident it is provided that, 'any vehicle overtaking another vehicle proceeding in the same direction shall pass at least two feet to the left thereof, and shall not again be driven to the right side of the highway until reasonably clear of such overtaken vehicle.'"

[14] This instruction is not strictly applicable to the facts of this case, as there was no evidence in connection with this accident of any vehicle overtaking another vehicle which was "proceeding in the same direction." In effect, it instructed the jury that the law imposed the duty upon the driver to clear the parked Ford by at least 2 feet, irrespective of the circumstances, and irrespective of whether he knew of the presence of the Ford upon the highway, or, as a reasonable man, under the circumstances, should have known thereof. The question of negligence on the part of the driver depended upon whether or not he used reasonable care under the circumstances disclosed by the evidence, and not upon whether or not he complied with this section of the California Vehicle Act.

The court also instructed the jury as follows:

"I instruct you that under the Motor Vehicle Act which was in force at the time of this accident, the defendants were required to carry at the front of their truck at least two lighted lamps of sufficient candle power to reveal any object, vehicle or substantial object on the road straight ahead for a distance of seventy-five feet therefore, in this case, if you find from the evidence that the defendants failed to have headlights on their truck of sufficient candle power to reveal the plaintiff at a distance of seventy-five feet, then I charge you that a violation of this law would be negligence as a matter of law, and if you find from the evidence that the defendants' negligence proximately contributed to the happening of the accident, no matter how slight, then your verdict will be in favor of the plaintiff and against the defendants, if you further find that at that time the plaintiff was in the exercise of ordinary care with regard to his own safety and was without contributory negligence on his part."

[15, 16] The jury were thus instructed that the law required the defendants to have lights of sufficient candle power to reveal any object on the road straight ahead for a distance of 75 feet, and also they were instructed that, if the defendants failed to have headlights sufficient to *actually reveal* the plaintiff at a distance of 75 feet, this constituted negligence, as a matter of law. There was no law to this effect in California at that time. The instruction is apparently based upon the California Vehicle Act of 1919 (St. 1919, p. 191). This accident occurred on the night of June 1, 1925. At that time the California Vehicle Act of 1923 was in force. This act contains no such requirement. See General Laws 1923, Act 5128. The evidence shows the truck involved in this action was equipped with electric headlights. This instruction, in effect, told the jury the defendant was guilty of negligence, as a matter of law, if his lights did not, in fact, reveal the plaintiff to him. The evidence showed that the plaintiff was not actually revealed to the defendant prior to the collision, and the instruction was misleading and prejudicially erroneous. *Wiley v. Cole*, 67 Cal. App. 762, 228 P. 550. The jury were here instructed that the law required that the defendant have headlights that *must* have revealed the plaintiff at a distance of 75 feet, irrespective of where the plaintiff was, and irrespective of what might have interfered with his having been so revealed. In our opinion, this instruction not only was a misstatement of the existing law, but it concerned a matter so closely related to the questions of fact involved that it may have had a not inconsiderable effect upon the jury in reaching their verdict. The act of 1923 established a different test than distance for lights upon mo-

tor vehicles. Under that act, lights are required to be, not only sufficient for the purposes of the driver of the vehicle, but also such that they will not unduly interfere with the vision of approaching drivers. The only requirement of this act, in regard to the amount of light, is that it shall be an "ample driving light." General Laws 1923, Act 5128, § 101. What constituted an ample driving light, under the circumstances, was for the jury to decide, and it was erroneous for the court to instruct them that this particular distance was the test. A number of other circumstances are presented by the evidence which should have been considered by the jury, in passing upon whether or not there was any negligence on the part of the defendant.

Respondent argues that, even if this instruction was erroneous, it was harmless. We cannot agree with this point of view. Irrespective of whether or not the driver of the truck could see more than 75 feet ahead of him, it was in evidence that he did not see the plaintiff, and the jury were practically instructed that this was negligence, as a matter of law. Not only this, but the question of whether or not the plaintiff was guilty of contributory negligence depended upon a number of circumstances, among which are the acts and conduct of the defendant himself. If the defendant had improper lights, and thus deceived the plaintiff, who had acted upon the belief that he had proper lights, this would materially affect the question of contributory negligence. The jury might draw the inference that the reason the defendant did not see the plaintiff was because he did not have lights that conformed to this instruction, and they might also draw the inference that, if he had had lights which complied with this instruction, this alone would have justified the plaintiff in remaining where he did, upon the highway.

[17] It is true that there were other instructions submitting the question of contributory negligence to the jury, but this instruction practically told the jury that the defendant was negligent if his lights did not actually reveal the plaintiff to him, and this implies that the plaintiff was justified in relying absolutely upon being seen by the defendant. We think the general instructions on contributory negligence did not cure the error in the last quoted instruction, and that the giving of the same was prejudicial to the defendants. The question of negligence and contributory negligence were, under the peculiar circumstances of this case, very close questions, and should have been left entirely to the jury. It is impossible to say that the instruction here referred to had no part in weighing the balance in favor of the plaintiff and against the defendants.

This action was brought against R. M. Davis and H. E. Smith, doing business under the fictitious name and style of Coachella Valley Transportation Company, and also American National Bank of Pomona, a corporation. The jury brought in its verdict in the same form, against R. M. Davis and H. E. Smith, doing business under said fictitious name, and also against American National Bank of Pomona, a corporation. The answer of the American National Bank of Pomona alleged, among other things, that R. M. Davis and H. E. Smith were conducting and operating said business as trustees for the benefit of said bank. It appears that a franchise to act as common carriers had originally been issued by the Railroad Commission to H. L. Boutell and H. S. Fuqua, permitting them to operate as the Coachella Valley Transportation Company. These parties, having become indebted to the said bank, attempted to turn over the business to the bank, and Davis and Smith were appointed by the bank under an agreement with the owners of the line, to conduct the business and protect the interest of the bank. On January 22, 1923, the two owners of the line, and the said Davis and Smith, applied to the Railroad Commission for permission to sell and transfer said business to said Davis and Smith, as trustees, for said bank. Boutell and Fuqua had theretofore given an assignment to the bank. It was stipulated between the parties hereto that, at the time of the accident in question, the truck was being driven by one George Scanlon, who was at that time the agent and employee of the Coachella Valley Transportation Company, and that he was acting within the scope of his authority as such agent and employee. It appears that the assignment made to the bank was taken subject to the approval of the Railroad Commission. The subsequent order of the Railroad Commission contained the following:

"Applicants Davis and Smith sought the transfer of the certificate rights to them as trustees for the American National Bank for the purpose of finding a competent purchaser for the line. Each stipulated, however, that they would accept the transfer to themselves jointly and not as trustees and assume personal responsibility. Mr. Davis is vice president of the American National Bank and Mr. Smith is a hardware merchant. Mr. Smith will continue active management."

"Order. H. L. Boutell and H. S. Fuqua, doing business under the fictitious name Coachella Valley Transportation Company, having made application to the railroad commission for approval of the sale and transfer of all their certificate rights to R. M. Davis and H. E. Smith, as trustees, a public hearing having been held, the matter having been duly submitted and now being ready for decision:

"It is hereby ordered that the application herein be granted for the sale and transfer of said certificate rights to R. M. Davis and H. E. Smith, jointly as individuals, and not as trustees for any person whatever, upon the following conditions:

"5. No vehicle may be operated by the applicants R. M. Davis and H. E. Smith unless such vehicle is owned by them, or is leased by them for a specific amount on a trip or term basis, the leasing of the equipment not to include the services of a driver, or operator of leased cars. All employment of drivers or operators of leased cars shall be made on the basis of a contract by which the driver or operator shall bear the relation of an employee to the transportation company."

As respondent says in his brief, it was necessary to let the case go to the jury on the question of ownership of and who was operating the truck line. Respondent justifies the judgment against the bank by the evidence which shows that the business was assigned to the bank; that the individual defendants accepted the operation thereof only for the bank; that any deficit in the expense of operation was paid by the bank; that Mr. Davis testified that he and Smith operated the line in behalf of the bank, Smith as manager, and Davis as adviser; that Davis testified that, after the order was issued by the Railroad Commission, he and Smith agreed with the bank that they were to operate it for the bank, and that they should have no personal responsibility. Smith testified that he was manager; that the bank paid him; that he was operating the line for the bank; and that he worked for the owners, on a salary. Respondent argues that the bank was therefore liable while they held the assignment, and that the evidence shows that Davis and Smith were operating the line for the bank and for no one else. On the other hand, they justify the verdict against Davis and Smith on the ground that the records of the Railroad Commission showed that these two had assumed personal responsibility. Respondent therefore argues that it was for the jury to determine who, in effect, were the owners and operators of the truck line. We think this contention is correct, but it does not clearly appear that both the bank and the individuals can be held liable under the evidence. They attempt to justify the judgment against the two individuals by the statement of the Railroad Commission that they have accepted liability, but if the order of the Railroad Commission was conclusive as to liability, then the individuals would be responsible, and the bank would not. If the two individuals were, in fact, merely employees, then they were coemployees of the driver of the truck, and, not being directly involved in any negligence of the driver, if

such negligence there was, they would not be liable.

While the jury has apparently found that Davis and Smith were the ones doing business under the fictitious name mentioned in the stipulation, they have also found against the bank, and it is not clear whether it was their intention to find that Davis and Smith alone were operating the truck line, or whether they considered the bank as also a party to this operation. Under our view of the case, it will have to be reversed, and we mention this phase of the case in order that it may be guarded against on another trial.

[18] One other point remains to be considered. Appellant urges that the damages are excessive. The jury awarded a verdict of \$30,000. The evidence shows plaintiff's leg was amputated slightly below the knee four days after his injury. His total expense, as shown by the evidence, was \$605. Plaintiff was an employee of a gasoline filling station, and received \$140 a month. While we are aware of the rule that damages for personal injuries cannot be held excessive, as a matter of law, simply because the amount may be larger than ordinarily allowed in such cases, the amount named in the verdict of the jury is large enough to emphasize the fact that the errors herein mentioned were prejudicial to the defendant. Respondent calls attention to section 4½ of article 6 of the Constitution, to the effect that a judgment should not be reversed, unless an examination of the entire case discloses the fact that the errors complained of have resulted in a miscarriage of justice. In our opinion, the amount of this verdict furnishes an additional reason for the action we feel compelled to take herein.

For the reasons given, the judgment is reversed.

We concur: SLOANE, P. J.; MARKS, J.

103 Cal. App. 663

PEOPLE v. WOOFTER et al. (Cr. 1108.)

District Court of Appeal, Third District, California. Feb. 3, 1930.

Criminal law ⇨1182—Conviction would be affirmed where accused filed no brief nor made appearance at time case was called for hearing by appellate court (Pen. Code, § 1253).

Where accused filed no brief on appeal from conviction of escape from prison camp and made no appearance at time case was called for a hearing, conviction would be affirmed pursuant to provisions of Pen. Code, § 1253.

Appeal from Superior Court, Butte County; J. O. Moncur, Judge.

Francis Woofter and others were convicted of escape from prison camp, and they appeal. Affirmed.

Clinton W. Johnson, of Oroville, for appellants.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

PER CURIAM. The defendants were convicted in the superior court of Butte county of a felony, to wit, escape from a prison camp.

The transcript on appeal was filed in this court December 19, 1929. No brief has been filed in behalf of appellants. The cause was regularly placed on the calendar for oral argument on February 3, 1930. No appearance was made for appellants at the time the case was called for hearing.

Pursuant to the provisions of section 1253 of the Penal Code, the judgments are affirmed.

103 Cal. App: 523

NELSON et al. v. DARLING. (Civ. 5874.)

District Court of Appeal, Second District, Division 2, California. Jan. 29, 1930.

Appeal and error ⇨32—Appeal from judgment of municipal court in city wherein cause of action arose lies only to superior court, whose judgment is final.

Where cause of action in suit commenced in municipal court arises in city in which such court is situated, an appeal lies only to the superior court, whose judgment is final.

Appeal from Superior Court, Los Angeles County; Hartley Shaw, Judge.

Action by George A. Nelson and another, copartners doing business under the name of Nelson Bros., against Lucy A. Darling. From a judgment of the Superior Court affirming a judgment of the Municipal Court for plaintiffs, defendant appeals. On respondent's motion to dismiss the appeal. Appeal dismissed.

E. H. Woodard, of Los Angeles, for appellant.

Max Schleimer, of Los Angeles, for respondent.

BURNELL, Justice pro tem. This cause is before us on the respondent's motion to dismiss the appeal taken from a judgment of the superior court affirming a judgment of the municipal court of the city of Los Angeles. The action was for the recovery of real estate broker's commissions, and it is evident from an inspection of the clerk's transcript that the cause of action arose within the city of Los Angeles, where the plaintiff brokers had their office and where the agreement for

exchange of properties and payment of commissions was entered into.

Where the cause of action in a suit commenced in the municipal court arises, as disclosed by the record therein, in the city in which such court is situated, an appeal lies only to the superior court, and the judgment of that tribunal is final. *Johnston v. Wolf* (Cal. App.) 280 P. 980; *Nelson v. Thomas* (Cal. App.) 283 P. 982.

The appeal is dismissed.

We concur: CRAIG, Acting P. J.; IRA F. THOMPSON, J.

103 Cal. App. 624

PEOPLE v. KEYES et al. (Cr. 1806.)★

District Court of Appeal, Second District, Division 2, California. Jan. 31, 1930.

Rehearing Denied Feb. 13, 1930. Hearing Denied by Supreme Court Feb. 27, 1930.

1. Indictment and information ⇨125(5½)—Indictment charging single conspiracy to commit crimes of giving bribe and receiving bribe was not duplicitous (Pen. Code, §§ 67, 68).

Indictment charging a single conspiracy to commit the crime of giving and offering a bribe, in violation of Pen. Code § 67, and the crime of asking and receiving, and agreeing to receive, a bribe, in violation of section 68, and alleging that each of ten overt acts pleaded in indictment were committed in pursuance of conspiracy, was not duplicitous as charging two separate conspiracies.

2. Conspiracy ⇨23—Crimes of giving and offering bribe and of asking and receiving bribe were sufficient on which to base charge of conspiracy (Pen. Code, §§ 67, 68).

Crimes of giving and offering a bribe, in violation of Pen. Code, § 67, and of asking, receiving, and agreeing to receive, a bribe, in violation of section 68, were sufficient on which to base a charge of conspiracy, in that a conviction for conspiracy therein would bar a subsequent prosecution for substantive offense of bribery.

3. Criminal law ⇨427(1)—Indictment and information ⇨171—Conspiracy to commit any crime may be proven under charge directly of its commission, and thereafter acts of conspirators are admissible.

A conspiracy to commit any crime may be proven under charge directly of its commission for purpose of swelling volume of testimony otherwise admissible in support of charge, and, after such proof, testimony of any conspirator as to acts in furtherance of conspiracy will be admissible against defendant, himself a party to illicit concord.

4. Conspiracy ⇨45—Letter containing resignation of chief deputy on ground cases were being insincerely prosecuted was admissible in prosecution against district attorney for conspiracy in giving and receiving bribe (Pen. Code, §§ 67, 68).

In prosecution against district attorney and another for criminal conspiracy to commit crime of giving and offering bribe, in violation of Pen. Code, § 67, and crime of asking, receiving, and agreeing to receive, bribe, in violation of section 68, the admission in evidence of a letter to district attorney from chief deputy offering resignation on ground he did not care to be party to insincere prosecution was not erroneous, in view of fact that letter amounted to charge that certain cases were not being sincerely prosecuted without a denial thereof by district attorney.

5. Criminal law ⇨1036(3)—Objection to records of county assessor's office to establish financial worth as being hearsay was waived without request for instruction limiting effect (Pen. Code, §§ 67, 68).

Where defendants, in prosecution for conspiracy to commit crime of giving and offering bribe, in violation of Pen. Code, § 67, and crime of asking, receiving, and agreeing to receive, a bribe, in violation of section 68, failed to request instruction limiting effect of records of county assessor's office introduced to establish financial worth of person alleged to have transferred money, the objection to such evidence as being hearsay was waived.

6. Criminal law ⇨530—Refusal to compel production of alleged statement taken in shorthand, and afterwards transcribed, without showing that it was signed, held not erroneous (Pen. Code, §§ 67, 68).

In prosecution for conspiracy to commit crime of giving and offering bribe, in violation of Pen. Code, § 67, and crime of asking, receiving, and agreeing to receive, a bribe, in violation of section 68, the refusal to compel production of alleged statement of one of defendants concerning facts of case which was taken down in shorthand, and afterwards transcribed, without showing that he signed statement or had ever seen it, held not erroneous.

7. Criminal law ⇨1120(6)—Objection to question on ground it had already been asked and answered was properly sustained without showing in respect thereto.

Ruling of trial court sustaining objection to question on ground that it had already been asked and answered held not erroneous, in absence of showing that such question had not been asked and answered theretofore.

8. Witnesses ⇨201(2)—Question as to witness authorizing attorney to agree with district attorney relative to plea of guilty was properly excluded as privileged communication.

Question, in prosecution for conspiracy, relative to whether witness had authorized attorney to agree with district attorney as to plea of guilty, and that he would testify for prosecution, was properly excluded as calling for privileged communication between client and attorney.

9. Criminal law ⚡1120(6)—Question whether witness, when making statement, expected to be tried, was properly excluded without showing statement referred to.

Action of court in sustaining objection to question relative to whether witness really expected to be tried on charge at time of making statement held not to constitute error, in absence of showing as to nature of statement referred to; the question without such showing being unintelligible.

10. Criminal law ⚡1122(6)—Objection to questions will not be held erroneously sustained without showing in respect thereto.

Appellate court will not hold action of trial court, in sustaining objection to questions, erroneous, in absence of showing in respect thereto by argument or citation of authority.

11. Criminal law ⚡730(3)—Prosecutors were not guilty of misconduct by cross-examination establishing that defendant had been accused of other crimes, in view of instruction limiting effect (Pen. Code, §§ 67, 68).

In prosecution for conspiracy to commit crime of giving and offering a bribe, in violation of Pen. Code, § 67, and crime of asking, receiving, and agreeing to receive, a bribe, in violation of section 68, prosecutors were not guilty of misconduct by eliciting from witness on cross-examination the fact that defendant district attorney had been made respondent under accusation for removal from office, and had been indicted for offense different from that under investigation, in view of instruction limiting effect of such testimony.

12. Witnesses ⚡326—Prosecution was properly permitted to introduce testimony tending to show bias on part of impeaching witness in favor of defendants.

Where witness for defendant, in prosecution for conspiracy, had testified to a conversation between himself and witness for prosecution, tending to show bitter feeling on part of state witness against defendant, the prosecution was properly permitted in rebuttal to call witnesses who related statements by defense witness tending to show a bias on his part in favor of some of defendants.

13. Criminal law ⚡427(5)—Telegram held admissible as communication from conspirator, in view of sufficiency of evidence showing conspiracy (Pen. Code, §§ 67, 68).

In prosecution for conspiracy to commit crime of giving and offering bribe in violation of Pen. Code, § 67, and crime of asking, receiving, and agreeing to receive, bribe in violation of section 68, telegram was properly received in evidence as communication from one conspirator to another in and about subject-matter of conspiracy, in view of sufficiency of evidence to show connection of parties with conspiracy.

Appeal from Superior Court, Los Angeles County; Edward I. Butler, Judge.

Asa Keyes and another were convicted of the crime of conspiracy, and they appeal. Affirmed.

Hearing denied by Supreme Court 284 P. 1105.

See, also, 279 P. 833.

Milton Cohen and Paul W. Schenck, both of Los Angeles, for appellant Keyes.

Le Compte Davis, of Los Angeles, for appellant Rosenberg.

U. S. Webb, Atty. Gen., and Frank Richards, Deputy Atty. Gen., for the People.

WORKS, P. J. The defendants appeal from a judgment convicting them of the crime of conspiracy and from an order of the trial court denying them a new trial.

The indictment under which appellants were prosecuted charges them with a criminal conspiracy "to commit the crime of giving and offering a bribe in violation of the provisions of section 67 of the Penal Code, a felony, and the crime of asking, receiving, and agreeing to receive a bribe in violation of the provisions of section 68 of the Penal Code, a felony. * * *" The pleading then alleges that during the times mentioned therein appellant Keyes was the district attorney of the county of Los Angeles, that there were pending in the superior court of the county three criminal actions, one against C. S. Lewis, Jacob Berman, alias Jack Bennett, appellant Rosenberg and others, the second against E. L. Rouse, appellant Rosenberg, and others, and the third against Jacob Berman and others, and that appellant was charged with the duty of prosecuting the three actions.

The nature of the conspiracy—and it will be observed that but one conspiracy is mentioned in the language above quoted—is thus, with the omission of unnecessary verbiage, more specifically set forth in the indictment:

"That continuously throughout the period of time from about the first day of September, 1927, to the first day of September, 1928, * * * the said above named defendants * * * have conspired, combined, confederated and agreed together, and with each other, to commit the crime of giving and offering a bribe in violation of the provisions of section 67 of the Penal Code, a felony, and the crime of asking, receiving and agreeing to receive a bribe in violation of the provisions of section 68 of the Penal Code, a felony, that is to say, that the said defendants then and there and continuously throughout said period of time * * * have conspired, combined, confederated and agreed together that he, the said Asa Keyes, * * * would ask, agree to receive and receive various and divers things of value and advantages and promises and undertakings to give things of value and advantages, and that the said defendants * * * [several defendants other than appellants are named in the indictment] would willfully, unlawfully and feloniously

ously give and offer to give to him, the said Asa Keyes, various and divers things of value and advantages and promises and undertakings to give things of value and advantages, with a corrupt intent and upon the agreement and understanding that the action of him, the said Asa Keyes, as such district attorney * * * would be * * * influenced thereby, in that he, the said Asa Keyes * * * would control and direct the prosecution of each of said actions to the end that in so far as said actions related to any of said above named defendants E. H. Rosenberg * * * [and others] that said actions would be disposed of in such manner as to result in the discharge of such defendant [sic] without the conviction of such defendant [sic]."

It will be noted that, in the matter constituting the paragraph immediately preceding this paragraph, but one conspiracy is mentioned.

The indictment charges ten several overt acts performed in furtherance of the conspiracy. The facts concerning each of these acts are set forth in separate paragraphs, ten, of course, in number. The first of these paragraphs is preceded by the heading, "Overt Act No. I." Each of the remaining nine is preceded by a similar heading, but with the number appropriate to it. It is charged in each of the ten paragraphs that the overt act referred to in it was committed, "in pursuance of said conspiracy and to effect the object of the same." Here, then, are ten separate references to the single conspiracy pleaded in the earlier portions of the indictment.

[1] Appellants contend that the pleading is duplicitous, that, indeed, it charges a conspiracy formed for the purpose of "giving and offering a bribe," and a second conspiracy for the purpose of "asking, receiving and agreeing to receive a bribe." The pleading will bear no such construction. Its prefatory portion charges *a conspiracy* to do both sets of acts. The facts set up to exhibit more fully the nature of the charge exhibit a chain of events creating *a conspiracy*. Each of the ten overt acts pleaded in the indictment is charged to have been committed in pursuance of *a conspiracy*. The pleading is therefore not duplicitous.

Appellants also make the point that the indictment is insufficient, for the reason that both sides in a programmed bribery, that is, both the prospective givers and the prospective takers, cannot in the very essence of things conspire to "give and offer" the bribe, and that, also, both the would-be givers and the would-be takers cannot conspire to "ask, receive and agree to receive" it. As the indictment before us makes no charge of separate conspiracies to do, respectively, these things, but a charge of a single conspiracy to do both sets of them, both points fall to the ground.

[2] We now approach a more interesting question. It is insisted that a charge of conspiracy cannot grow out of the facts exhibited in the indictment. Appellants call attention to the undoubted truth that there are crimes which can be perpetrated only by two persons or two sets of persons acting on opposite "sides," to adopt our own terminology. Among these crimes are adultery, criminal rebating, and bribery. It is said as to each of them, and of others like them, that a concord is necessary to its commission, and that therefore the formation of a conspiracy to commit it is included in and swallowed up by the commission. Upon this postulate it is contended that a charge of conspiracy was impossible in the present instance, and that the charge should have been bribery. This is certainly the law in some jurisdictions, under peculiar circumstances, however, which do not exist in California, the cases upon which appellants rely having been decided by the federal courts. The first of these is *United States v. Dietrich* (C. C.) 126 F. 664, but the reason for the rule, so far as it is of interest here, is perhaps best stated in later decisions. In one of the cases the indictment charged "a conspiracy to commit an offense against the United States by inducing the giving and taking of a rebate." Under the federal statutes, the crime of conspiracy is punishable more severely than the crimes of giving and taking a rebate. With this circumstance in mind, the court said: "If Congress has made a certain action an offense and prescribed its punishment, the courts cannot, by giving it some other name, increase the punishment." *U. S. v. New York Central, etc., R. R. Co.* (C. C.) 146 F. 298, 303. In a later case, charging also a conspiracy to give and accept a rebate, the court said, referring to another class of crimes for purposes of illustration: "It cannot be if * * * the crime of bigamy be punishable in a certain way that the two parties who alone could commit it can be subjected to a charge of conspiracy for committing the same crime, and thereby made to suffer twice for exactly the same offense, or be subjected to a severer punishment on a conviction for the conspiracy than is imposed upon the substantive offense itself." *Thomas v. U. S.* (C. C. A.) 156 F. 897, 904, 17 L. R. A. (N. S.) 720.

The reasons for the rule in question, so far as they are valid, as stated in the language taken from these two federal cases, do not obtain in this state. It is not possible here to punish a man more severely under a charge of conspiracy to commit a particular crime than under a charge that he has committed the crime itself. If two or more persons "conspire to commit any felony, or to commit any act injurious to the public health, or to public morals, or tending to pervert or to obstruct justice, or the due administration of the laws, they shall be punishable in the

same manner and to the same extent as in this code provided for the punishment of the commission of the said felony or act, respectively." Pen. Code, § 182. There is therefore room for the invocation here of the familiar maxim that, where the reason for a rule ceases, the rule itself ceases. We shall have more to say upon this subject below.

We have above referred to the "reasons for the rule in question, so far as they are valid," as stated by the United States courts. In employing this language we had in mind the expression in *Thomas v. United States*, supra, to the effect that one charged with conspiracy might be "made to suffer twice for exactly the same offense." We think this is not a valid reason. We cannot perceive how one charged with crime may be made to suffer twice "for exactly the same offense." The inhibition against double jeopardy would seem to forbid such a possibility. It is to be observed—a circumstance which we have not yet mentioned—that the overt acts charged in the indictment here include acts which amounted to a commission of the very crimes which it is alleged that appellants conspired to commit. The first overt act alleged was the receipt by appellant Keyes, from one of the other defendants, of "a large sum of money, the exact amount of which is to the grand jury unknown, but which was approximately \$10,000.00." Others of the ten paragraphs which set up the overt acts allege the receipt by appellant Keyes of articles of personal property. The eighth of those paragraphs charges that appellant Rosenberg "delivered to the said Asa Keyes a certain wrist watch of the value of about \$600.00, lawful money of the United States." Under such an indictment for conspiracy as we have before us, we have no doubt that appellant Keyes has been once in jeopardy upon a charge of receiving and appellant Rosenberg upon a charge of giving the bribes referred to in the list of overt acts. A charge of the substantive crimes against them, after a conviction of the crime of conspiracy under such circumstances, could hardly be allowed to stand in a court of justice. A conviction of either, hereafter, upon the substantive charge appropriate to him as distinguished from his coappellant, would be a double punishment—it would be, to quote again from *Thomas v. United States*, a second punishment—for "exactly the same offense" as that upon which each has already been convicted, this for the reason of which appellants have attempted to make so much, that bribery, like adultery and duelling, itself involves in its very essence a concert of action upon the part of at least two participants in the offense. We have been pointed to no authority upon this question of jeopardy, and we have made no search for such authority. The point seems plain enough to us without it.

[3] In *United States v. New York Central, etc., R. R. Co.*, supra, the court quotes, without specific comment as to its applicability to the point under consideration, the following language of Chief Justice Cockburn in 12 Cox. Cr. Cas. 93: "I am clearly of the opinion that when the proof intended to be submitted to a jury is proof of the actual commission of crime it is not the proper course to charge the parties with conspiracy to commit it; for that course operates, it is manifest, unfairly and unjustly against the parties accused. The prosecutors are thus enabled to combine in one indictment a variety of offenses, which if treated individually, as they ought to be, would exclude the possibility of giving evidence against one defendant to the prejudice of others." We infer that appellants rely upon this expression in the English case, for they take from the opinion of the United States court a quotation which includes the language of Chief Justice Cockburn, and they emphasize the latter by reproducing it in small capitals in the brief. We think, again, that the view of the English court affords no valid reason for the application of the rule of the Federal courts in this jurisdiction. The form in which the indictment is cast no more involves "the possibility of giving evidence against one defendant to the prejudice of others" than would a charge against appellants of the substantive crimes they are here charged with conspiring to commit. In this state, whatever the rule may be in England—and we have made no effort to ascertain its nature—a conspiracy to commit any crime may be proven, under a charge directly of its commission, for the purpose of swelling the volume of testimony otherwise admissible in support of the charge. After such proof, the testimony of any conspirator as to acts in furtherance of the conspiracy will be admissible against the defendant; he himself being a party to the illicit concord. This rule is so well established that we refer to but one case, a late one, in support of it. There two defendants were convicted of the crime of obtaining money by false pretenses. We said: "Counsel labor under the misapprehension that a conspiracy may not be proved to exist between two defendants for the purpose of establishing the fact that the act of one in furtherance of the conspiracy is in legal contemplation, the act of both and for which both may be convicted. They have the erroneous notion that, when a conspiracy to commit a criminal act is shown to exist, the conspirators may only be convicted of the criminal conspiracy and not of the crime actually committed. Such is not the law. The books abound with cases where conspiracies have been proved and where the jury under appropriate instructions must have found, of necessity, the existence of a conspiracy in order to have returned a verdict of guilty

as to one or more of the defendants. It is sufficient for our purposes to make reference to *People v. Matthew*, 68 Cal. App. 95, 228 P. 417; *People v. Ferdinand*, 194 Cal. 555, 229 P. 341, and *People v. Seitz* (Cal. App.) 279 P. 1070." *People v. Bryant* (Cal. App.) 281 P. 404, 407.

We conclude that the indictment is not subject to the assault which appellants make upon it. We have seen that all reasons for the rule adopted by the United States courts fall to the ground when it is sought to render the rule applicable here. It is therefore wholly proper to say that the rule itself "ceases" here—it can have no application in this state. We can see no substantial reason, upon any other ground, why it was not proper to cast the indictment in the form in which it rests. In effect it charges appellant Keyes with receiving, and appellant Rosenberg with giving, a bribe. In the history of jurisprudence, the time is come when courts are paying less and less attention, under a more enlightened system of legislation than that which has prevailed in former times, to technical rules of pleading which are invoked for the purpose of staying the administration of justice. No matter what the particular form in which the indictment against appellants is framed, it presents in sufficient substance the facts constituting a charge of giving and receiving a bribe. Appellants were tried upon the same evidence which might have been offered against them under the latter charge. Under the law, when they entered upon the trial of the charge as actually formulated, they saw before them a possibility of the same punishment which might have been inflicted upon a charge, with specific directness, of the substantive crime alleged in the list of overt acts to have been committed. They have not been harmed by the manner in which the indictment was drawn. We are bound to take the same liberal view here, in furtherance of justice, as was taken under not altogether dissimilar circumstances in *People v. Jordan*, 92 Cal. App. 543, 268 P. 373. We think, further, that it can make no real difference whether the indictment be regarded substantially and actually as a charge of substantive crime or as a charge of conspiracy. We have referred to it as charging the former merely because a concert of action on the part of two "sides" is necessary to a completed giving and taking of a bribe, and because the pleading shows such concerted action. It can as well and as safely be considered substantially as what on its face it purports to be, a charge of conspiracy. By whatever name it is called, the result is the same, and we are not concerned so much with form as we are with results.

[4] Over objection, the trial court received in evidence a letter to appellant Keyes from the chief deputy in his office. The criminal cases mentioned in the indictment were pend-

ing when the letter was written, and the deputy had been charged with the duty of handling them in the office. He refers to them in the letter as "the Julian cases." The communication reads: "I hereby resign as chief deputy district attorney because I do not care to be a party to the insincere prosecution of the Julian cases." The letter was admitted in evidence while its writer was on the witness stand, and he had just detailed a conversation with appellant Keyes which had to do with the possible use of appellant Rosenberg as a witness for the prosecution in the pending cases. The witness said: "[W]e were discussing the Julian Case, the preparation of it and trial of it, and I think the question of whether Mr. Rosenberg should be used as a witness came up, and Mr. Keyes stated that he believed that he needed him as a witness. That was the extent of that conversation regarding Mr. Rosenberg. I disagreed with him on it and that was the end of the discussion at that time." The witness also testified that, after the letter had been received by appellant Keyes, he and Keyes had a conversation during which the following transpired: "[Mr. Keyes] said that he would not take that resignation or any other resignation; that I could stay there and handle the case and stay chief deputy as long as I wanted. He said that he had made his suggestion relating to Mr. Rosenberg because he believed that his evidence was necessary. I told him that I felt that he was being made a goat out of * * * by some of his friends and particularly Mr. Dudley Robinson who represented Mr. Rosenberg, and that I did not want to be joined in with him. I reminded him that Mr. Robinson was getting a fee to represent Mr. Rosenberg and I felt that he was imposing on Mr. Keyes' long friendship. He said that it was not that and that I could continue in charge of the case."

It is contended that the court erred in receiving the letter in evidence, but we think the ruling admitting it was correct. The letter amounted to a charge that the "Julian cases" were not being sincerely prosecuted, and the charge was in effect leveled at appellant Keyes, as he was the head of the office which rested under the duty of sincerely and effectively conducting the prosecution. The letter was important as laying a basis for a showing of the reaction which appellant Keyes exhibited to the charge, and it is to be taken in connection with the assertion of the chief deputy that his superior was being made "a goat of" by the counsel of appellant Rosenberg. The district attorney did not deny that the prosecution of the cases was being insincerely conducted. He merely said that he would not accept the resignation of the chief deputy, and that he had made the suggestion as to appellant Rosenberg "because he believed that his evi-

dence was necessary." The situation is affected by the fact, also, that appellant Keyes later told the chief deputy that there would be no dismissals in the Julian cases, but that, while the cases were on trial, he said to the same witness that he would "make a motion for the dismissal of [appellant] Ed Rosenberg for the purpose of using him as a witness." The motion for a dismissal as to Rosenberg was actually made by him, and it was by the court denied. We think the letter of the chief deputy was proper evidence under the rule stated in *People v. Mallon*, 103 Cal. 513, 37 P. 512, and in later cases which have followed that decision. The effect of what appellant Keyes said after the receipt of the letter was for the jury.

[5] One of the defendants named in the indictment was one Ben Getzoff, and the paragraphs alleging the ten overt acts show, with the exception of the wrist watch delivered to appellant Keyes by appellant Rosenberg, that the money and articles of personal property which were received by Keyes were handed to him by Getzoff. Appellant Keyes offered evidence to prove that he believed Getzoff was a man of great wealth, who, to quote the language of the brief filed by Keyes, was "well able to lavish favors upon his chosen friends." The prosecution offered upon this same issue a showing made by certain records of the county assessor's office. These books were to the effect that in 1925 Getzoff was assessed upon personal property of the value of \$750, and paid a total tax of \$11.70, that his name did not appear on the assessment rolls for 1926 and 1927, and that in 1928 he was assessed upon personal property of the value of \$800 and paid a tax of \$13.45. It is insisted that this evidence was hearsay, and also apparently that it was inadmissible even if it were not hearsay. If the rulings admitting the evidence were error—and we do not decide that they were—we think the error was cured, perhaps we might even say that it was invited, by appellants themselves. The following occurred during a discussion of the question whether the evidence should be received: "[Counsel for one of appellants:] And this book is not the evidence of his [Getzoff's] wealth. It is only evidence of the things that it bears on its face. It would be evidence that he was assessed for that much and that he paid so much without any further testimony, but it would not be evidence of the valuation of the man's property under any circumstances, because it was kept under the provisions of the law. [A Deputy District Attorney:] Why cannot we limit it to that then? Or why cannot we limit it to that and have the jury so instructed? [Same counsel for appellant:] It would only be introduced for the purpose that he paid those taxes but it would not have any relevancy to show how much he was

worth and would not rebut anything that was said in this case at all. * * * Now let me ask what would be thought if your honor is asked to give that instruction, that this book is only worth that much and that he paid that much taxes, and they must presume therefrom that he didn't have any other property, must not presume that, and if that instruction was given then I think it would have to be given under those circumstances. What value would this evidence be then? How can the jury then go into a speculation, into a speculative field as to whether he had anything else? The Court: Well, it would merely show that Ben Getzoff had in Los Angeles property that was assessed to him originally. [Deputy District Attorney:] That is all. [Counsel for appellant:] It constitutes no proof that he had no more. The Court: No, it doesn't constitute proof that he had no more. It constitutes proof of that one thing. [Counsel for appellant:] That would be admitted by us that he had that property and that he was assessed for it, and if the court is going to give an instruction to the effect that it is proof of that and nothing else, I do not think it would do so much harm under the court's instruction, under the proper instruction. [Deputy District Attorney:] All right. The Court: All right; call in the jury. [Counsel for appellant:] We do not, however, waive our objection. The Court: All right." The evidence would have been utterly harmless if the instruction mentioned had been given, as all present at the trial seem to have conceded, but it was not given. We think it was not incumbent upon the trial judge to give the instruction without a specific request for it, and it is clear to us that it should have been asked by appellants if, at the end of the trial, they still thought it necessary to their protection. The evidence was directed at appellant Keyes, and, if it had any appreciable effect, it was he who was injured by it. Under such circumstances, it is clear to us that he should have reminded the court to give the instruction at the conclusion of the long and arduous trial which occurred. We think the objection to the evidence was waived at least, even though the counsel stated that they did not waive it.

[6] Jacob Berman, who was one of the defendants named in the indictment, had made a statement concerning the facts of the case, and what he said was taken in shorthand and afterward transcribed. The statement was made in the presence of one who later became, or who then already was, a special prosecutor—and some question is raised as to this point—to conduct the instant case, and also in the presence of others, including two members of the grand jury. Berman was a witness for the prosecution, and, after his direct examination, during which the statement in question was not used, appel-

lants demanded an inspection of the paper, the existence of which they ascertained on cross-examination. The prosecution refused to deliver it up, and the trial judge refused to require its delivery. Appellants insist that this latter refusal was error. Appellants brought out the fact on the cross-examination of Berman that he had never signed the statement, and they do not in their brief refer to any place in the record which shows that he had ever seen it. A decision of the Supreme Court clearly disposes of the point now presented. We quote from the opinion, which was rendered in a murder case:

"The bell boy, O'Connor, testified that he was an eyewitness to a part, at least, of the homicide, and related the circumstances. On cross-examination it was disclosed that immediately after the homicide he was taken to the police headquarters, and there made a statement to Capt. Seymour, which was taken down at the time. The defense then demanded that the district attorney produce the statement referred to by the witness, whereupon the district attorney admitted that he had such a statement in typewriting, but refused to produce it. Application was then made to the court for an order requiring its production, but the court refused to make the order. The statement could not have been used in evidence, except for the purpose of impeaching the witness by showing thereby that he had made statements out of court inconsistent with the testimony given by him on the trial. Code Civ. Proc., section 2052. The only statements that can be used for that purpose, if in writing, are statements made by the witness himself, either directly in his handwriting or over his signature, or indirectly by his adoption of, or admission of, the correctness of a written report of his statements made by some other person. He cannot be held responsible for a statement taken down by another purporting to be a report of his oral declarations, unless he has been made acquainted with the contents of such statement, and directly or indirectly admitted that it was correct. Inquiry as to the admissibility of such statements and as to the necessity of ordering their production is addressed to the court. Unless it is shown that there is good reason to believe that the document, when produced, would be admissible in evidence for some purpose in the case, the court need not compel its production. *Ex parte Clarke*, 126 Cal. 235, 58 P. 546, 46 L. R. A. 835, 77 Am. St. Rep. 176. There was testimony with relation to this statement from which the court could rightly conclude that the oral statements of the witness to Capt. Seymour were taken down in shorthand, by a stenographer, and afterwards written out in longhand, and that the document in the possession of the district attorney, and which he refused to produce, was the longhand typewritten copy of the shorthand notes. There was nothing to

show that the witness had ever read the statement or seen it, or that he was aware of its contents. This being the case, the statement could not be used for purposes of impeachment, as a statement made by the witness, and it was not error to refuse to compel its production." *People v. Glaze*, 139 Cal. 154, 72 P. 965, 966.

It is evident that it was not error here for the trial judge to refuse to compel the production of the alleged statement of Berman. It is contended by respondent that the statement was privileged under the provisions of subdivision 5 of section 1881 of the Code of Civil Procedure, and that for that reason a production of it could not be required. We find it unnecessary to decide this point, but, in view of the fact that the question may become of interest elsewhere, we refer to *Sloane v. Hammond*, 81 Cal. App. 590, 254 P. 648, as having a possible bearing upon it.

The witness Berman answered many questions inquiring for the circumstances leading to his presence on the stand as a witness for the prosecution. The appellants addressed five other questions to him, and an objection to each of them was sustained. It is insisted that the trial judge erred in each of these rulings.

[7] This was the first of the five questions: "And you felt that if you did make a statement to the proper authorities, that that would redound to your own benefit and be for your own good, did you not?" One of the objections to this question was that it had already been asked and answered, and the objection was sustained on that ground. Appellants do not show us that it had not been asked and answered. There was, therefore, no error in the ruling.

[8] This was the second question: "Now, in the Julian case, did you authorize your attorney, Mr. Donnelly of New York, to agree with the district attorney that if he would permit you to plead guilty to the first count of that indictment which charged conspiracy to obtain money by false pretenses, and dismiss the other counts, that you would testify for the prosecution, provided they would not object to a term of imprisonment in the penitentiary being made as short as it could be made or as the authorities could be induced to make it?" This question was in effect answered by Berman at a later place in the record. The question also called for a privileged communication between client and attorney. *Jones, Evidence*, § 750. There was here no error.

The third and fourth questions also called for privileged communications, and were therefore objectionable.

[9] This was the fifth question: "At the time you made the statement did you really expect to be tried on that charge?" The state-

ment here referred to, as we learn from respondent's brief, was one made by Berman in the presence of his counsel and a deputy district attorney. The nature of the statement is not shown by appellants in their brief, nor do they even show to whom it was made. So far as we may gather from appellants' brief, then, the question asked is unintelligible. Quite naturally, there is nothing in respondent's brief to show that it was proper. If the question was a proper one, appellants have succeeded admirably in concealing the fact from us. We are therefore safe in saying that there was no error here.

The following matter comprises one of the divisions of the brief of appellant Keyes:

"During the cross-examination of Mr. Berman and for the purpose of showing the effort of Mr. Keyes to apprehend him, the following questions were asked:

"Q. And you left rather suddenly, did you not, on May 2nd? Q. Did you during that period (while he was away from May to September, 1927) ascertain that the district attorney and the authorities of Los Angeles county were looking for you in connection with the Julian matters? Q. What parts of the world did you visit during that period? Q. Well, the fact is, Mr. Bennett, is it not, that while you were in Europe you were dodging the law? Q. You were doing everything you could while in Europe, and during the time you were in this country during that period, were you not, to avoid arrest? Q. You ascertained at the same time (while in Europe) did you not, that the district attorney of Los Angeles county had detectives all over Europe who were following you and trying to capture you? Q. During that period (after he returned to New York from Europe) you were doing everything in your power to avoid arrest and detection on indictment number 30741, were you not? Q. Were you in hiding at that time?" The prosecution's objections to all of these questions were sustained by the court."

[10] This portion of the brief is headed, "Errors in connection with rulings during the cross-examination of Mr. Berman to questions which sought to show his flight," but with heading and text together we are unable to determine what questions of law counsel seek to present. There is neither argument nor citation of authority. In addition to these omissions, some of the questions included in the text of the brief are unintelligible, standing as they do. There is a failure to show us that there was error in sustaining the objection to any of these questions. We therefore say there was none.

[11] A claim is made by appellants that the prosecutors were guilty of misconduct. A deputy district attorney was called to the witness stand for the purpose of testifying to a certain conversation between himself and ap-

pellant Keyes. The witness was asked on cross-examination: "That accusation was the accusation provided for the purpose of removing officials charged with certain criminal matters?" The question was answered in the affirmative, and it was followed by another: "The indictment referred to for the purpose of identification was the indictment charging Mr. Keyes with the crime of bribery, a substantive offense?" This question was also answered affirmatively. It is contended that the asking of the two questions was misconduct, on the ground, as it is asserted, that the jury was informed by them that appellant Keyes had been made the respondent under an accusation for his removal from office, and had been indicted for an offense different from that under which he was being tried. Immediately preceding the two questions, the witness had been asked, for the purpose of fixing the time of the conversation: "State when that time is fixed?" To this question he had answered: "That was a day after the accusation was filed against Mr. Keyes and also the indictment which was subsequently dismissed and a new indictment found by the grand jury." Not only this, but no assignment of misconduct was interposed as to the asking of the two questions until after an objection to each was made, and neither objection was forthcoming until after the question to which it was applied was answered. In response to the assignment of misconduct, the trial judge observed: "It seems to me the question was asked for the purpose of fixing the time. That is the only purpose which the jury must consider it for. It is not that it tends to a circumstance, but it is that he may refresh his memory as to the time some other event happened. The jury must disregard the question for any other purpose than that limited purpose. You must not draw any inference of any kind from the question." Under all these circumstances, the claim of misconduct cannot avail appellants. It is quite important to note that the matter to which they take exception was placed before the jury by an answer of the witness made before the two questions were asked.

[12] One Pike was called as a witness for the prosecution, and gave testimony against the defendants. One McFadden was afterward put on the stand by the defendants, and testified to a conversation between himself and Pike which tended to show an extreme and bitter feeling on the part of the latter against the defendant to whom his testimony had principally related. In rebuttal, the prosecution called two witnesses, who, after the proper foundation had been laid by questions addressed to McFadden, related statements by the latter which tended to show a bias on his part in favor of some of the defendants and particularly in favor of appellant Keyes. It is contended that this impeachment of McFadden was improper, and,

in presenting the point, appellants cite many cases in support of the well-known rule that a witness may not be impeached as to matters collateral to the issues being tried in a litigation. Strictly speaking, however, the question of the bias, interest, or motive of a witness is not a collateral matter. First, we quote from a decision of the Supreme Court: "When, under cross-examination as a witness, the defendant, in response to a question of the district attorney, declared that he had not previously been convicted of a certain felony. Subsequently, against the objection of defendant, the district attorney was permitted to introduce the record of the conviction. It is a well settled rule that a witness cannot be cross-examined as to any fact which is collateral and irrelevant to the issue, merely for the purpose of contradicting him by other evidence, if he should deny it, thereby to discredit his testimony. And if a question is put to a witness on cross-examination which is collateral or irrelevant to the issue, his answer cannot be contradicted by the party who asked him the question; but it is conclusive against him. But when the question asked on cross-examination calls for a response in respect to a matter which the party asking the question would have a right to prove as an independent fact, the rule does not apply. In the latitude permitted by the law in cross-examinations, many questions may be asked which could not be allowed on direct examination, because relating to matter purely collateral. The Code of Civil Procedure (section 2051) allows the cross-examiner to ask a witness if he has been convicted of a felony, and does not confine the evidence of that fact—as was the rule before the Code—to the record of conviction. But by the same section the right to prove the fact, by the record of conviction, is continued. The law authorized the district attorney to prove by the record the conviction as a distinct fact. It was not one of those matters entirely irrelevant, which may be inquired into only by virtue of the wide latitude permissible on cross-examination, and was, therefore, not simply collateral within the meaning of the rule, which prohibits any other evidence than the statement of the witness on cross-examination." *People v. Chin Mook Sow*, 51 Cal. 597, 600.

We call particular attention to the following sentence, contained in this quotation: "But when the question asked on cross-examination calls for a response in respect to a matter which the party asking the question would have a right to prove as an independent fact, the rule does not apply." It is always proper to show the bias or intent of a witness as an independent fact. "But the evidence containing the conversations between the witness LeForte and Mrs. McRea was not for the purpose of contradicting him

as to the evidence he had given as to the facts of the case, but was for the purpose of showing his interest and bias in favor of the defendant on trial. That evidence tending to show the interest of a witness in the case may be given cannot be doubted, and evidence that a witness has endeavored to induce the prosecuting or any other witness to absent himself from the trial or to drop the prosecution of the case is clearly of such character. The bias and interest of the witness in the case is a matter going to the weight to be given his testimony." *People v. Mack*, 14 Cal. App. 12, 110 P. 967, 968. We can see no reason why this rule should not be applied to an impeaching witness as well as to any other witness in a lawsuit. We think there was no error in admitting the questioned testimony.

Appellants insist that the district attorney was guilty of misconduct during the final argument of the cause before the jury. Some of the language employed by him was intemperate, there is no question, but we doubt whether it was sufficiently strong to be characterized as misconduct. If, however, it was misconduct, we think it was cured by the admonition which the trial judge addressed to the jury concerning it.

It is contended that the evidence was insufficient, in several particulars, to support the verdict. Respondent directs our attention to portions of the record which are ample to uphold it as to every one of these particulars. We can see no useful purpose to be subserved in a repetition of the supporting evidence here.

[13] Appellant Rosenberg makes a point which depends for its solution upon the question whether the evidence was sufficient to show that Getzoff and Berman were members of the conspiracy charged in the indictment, both having been named as defendants therein. The trial court received in evidence a telegram from Berman to Getzoff, and it is contended that error was committed in its admission. The telegram was as follows, the "Ed" referred to in it being appellant Rosenberg: "Received wire from Ed saying that if I don't send you money you won't do anything. I don't want Ed sending threatening wires as any promises I make I will keep and do not want him interfering in my business relations with you stop I think he should keep some of the promises he made on it. You and I can take care of our own business stop he wired me he didn't owe you a cent." We think there was ample evidence to show the connection of Berman and Getzoff with the conspiracy. The wire was therefore properly received as a communication from one conspirator to another in and about the subject-matter of the conspiracy.

Appellants make one or two other points

which we think are not worthy of a specific consideration.

Judgment and order affirmed.

We concur: CRAIG, J.; IRA F. THOMPSON, J.

103 Cal. App. 624

PEOPLE v. KEYES. (Cr. 3333.)

Supreme Court of California. Feb. 27, 1930.

1. Conspiracy $\S$ 23—Unlawful agreement between two parties, one to give, and the other to receive, bribe, does not constitute criminal "conspiracy"; "bribery."

Unlawful agreement between two parties, the one to give, and the other to receive, a bribe, does not constitute a criminal conspiracy, since bribery requires for its commission the unlawful concert of one or more persons acting with one or more other persons having a different motive or purpose.

[Ed. Note.—For other definitions, see Words and Phrases, First, Second, and Third Series, Bribery; Conspiracy.]

2. Criminal law $\S$ 1167(1)—That defendant was wrongfully charged with criminal conspiracy to receive bribe was immaterial, in view of allegations charging substantive offense of bribery (Pen. Code, $\S$ 68).

Fact that defendant was wrongfully charged with criminal conspiracy to receive a bribe was immaterial, in view of existence in indictment of ample allegations showing unlawful and felonious agreements to accept a bribe, which was sufficient to charge offense of bribery under Pen. Code, $\S$ 68, particularly since punishment for substantive offense and for conspiracy to commit it is the same, and defendant therefore suffered no substantial injury by reason of conviction for conspiracy.

Langdon, J., dissenting.

In Bank.

On petition for hearing after decision by the District Court of Appeals (284 P. 1096). Petition denied.

Milton Cohen and Paul W. Schenck, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Frank Richards, Deputy Atty. Gen., for the People.

PER CURIAM. [1, 2] In denying the petition for a hearing in this court after decision by the District Court of Appeal, Second Appellate District, Division Two, in the above-entitled cause, we deem it proper to say that we withhold our approval of so much of the opinion rendered as holds that in California, contrary to rulings elsewhere, an unlawful agreement between two parties, the one to give, and the other to receive, a bribe, may constitute a criminal conspiracy. It is true

that a set of defendants may conspire to give, or a set of defendants may conspire to receive or accept, a bribe, but bribery requires for its consummation the unlawful concert of one or more persons acting with one or more other persons having a different motive or purpose. That being true, there is in such a case no room for the operation of a charge of conspiracy. In the indictment before us, Rosenberg and his codefendants, other than Keyes, are properly charged with a conspiracy to offer and give a bribe to said defendant, but as to defendant Keyes himself a criminal conspiracy cannot be properly charged. However, this fact is immaterial, in view of the existence in said indictment of ample allegations showing an unlawful and felonious agreement on his part to accept a bribe from the other defendants, which is all that is required to charge the offense of bribery. Pen. Code, $\S$ 68.

In fact, to employ the language necessary to charge a conspiracy to violate said section is to charge the substantive offense thereunder. Then, too, as pointed out in the opinion, the punishment for the substantive offense and for conspiracy to commit it is, under the Code, the same. The defendant has therefore suffered no substantial injury.

The petition is denied.

LANGDON, J., dissents.

208 Cal. 770

AHERN v. LIVERMORE UNION HIGH SCHOOL DIST. OF ALAMEDA COUNTY. (S. F. 12925.)★

Supreme Court of California. Jan. 30, 1930.

Rehearing Denied March 1, 1930.

1. Appeal and error $\S$ 1002—In action for loss of fingers by power saw, evidence of negligence being sharply conflicting, jury's decision would not be disturbed.

In action for personal injuries, where evidence on issue of defendant's alleged negligence was in sharp conflict, appellate court would not disturb jury's determination.

2. Schools and school districts $\S$ 121—In manual training student's action against high-school district for fingers severed by power saw, evidence held to support finding that plaintiff, aged 14, was not contributorily negligent.

In action by manual training student against high school district for loss of two fingers severed by power saw, appellate court could not say, after judgment for plaintiff, that implied finding that he was not guilty of contributory

negligence was unsupported by evidence, in view of fact that plaintiff was only 14 years old and testified with other students that no instructions were given relative to necessity of using a guard to the saw.

3. Statutes $\S$ 125(7)—Amendment to statute relating to liability of school trustees was not open to objection that it violated Constitution, in that subject was not included in title (St. 1923, p. 298; Const. art. 4, $\S$ 24).

St. 1923, p. 298, entitled, "An act to amend section 1623 of the Political Code, relating to the liability of school trustees," was not open to objection on ground that subject of amendment was not embraced in its title, and hence did not violate article 4, $\S$ 24, of the Constitution.

4. Statutes $\S$ 206—Statute should be construed, if possible, in such manner as to give meaning to every part thereof.

Such a construction should be adopted wherever possible as to give meaning and effect, not only to a statute or Code section as a whole, but also to each and every part thereof.

5. Statutes $\S$ 225—Court could not presume that statute was to be restricted by later one merely because bills were before Legislature at same time.

Where proposed statutes were before the Legislature at about the same time and were later enacted into law, neither of which referred to the other, assumption that statute first enacted was to be limited by terms of later enactment would be unreasonable.

6. Schools and school districts $\S$ 89—Statute held to create cause of action against school district by pupil injured through negligence of district (Pol. Code, $\S$ 1623, as amended by St. 1923, p. 298).

Pol. Code, $\S$ 1623, as amended by St. 1923, p. 298, provided that school authorities should be liable in name of the district "for any judgment against the district on account of injury to any pupil arising because of the negligence of the district or its officers or employees, and they must pay any judgment for debts, liabilities or damages out of the school funds." Held, this was not only statutory authorization to school board to pay judgment, but it also gave students right to institute action against district to recover for injuries sustained as a result of the district's negligence.

7. Statutes $\S$ 225—Statute dealing with liability to public and another with liability to school children, not embracing same subject, could not be construed together (Pol. Code, $\S$ 1623, as amended by St. 1923, p. 298; Deering's Gen. Laws 1923, Act 5619).

Contention that Pol. Code, $\S$ 1623, as amended by St. 1923, p. 298, and Deering's Gen. Laws 1923, Act 5619 (St. 1923, p. 675), both related to liability of school district for negligence and therefore could be construed together, could not be sustained, in view of fact that the latter dealt with the liability of counties, municipalities, and school districts to the public, and the former dealt with liability of a school district to school children.

8. Statutes $\S$ 162, 225 $\frac{1}{2}$ —In general, special statute will control general one, and will not be repealed by it.

As a rule, a special statute governs a general one regardless of date of enactment, and a general statute will not ordinarily repeal a special act, although containing a repealing clause and apparently dealing with same subject-matter.

Preston, Shenk, and Richards, JJ., dissenting.

In Bank.

Appeal from Superior Court, Alameda County; Homer R. Spence, Judge.

Action by Martin Ahern, a minor, by his guardian ad litem, Theresa J. Ahern, against the Livermore Union High School District of Alameda County. From a judgment for plaintiff, defendant appeals. Affirmed.

Superseding opinion in 279 P. 1032.

Rehearing denied; RICHARDS, SHENK and PRESTON, JJ., dissenting.

Earl Warren, Dist. Atty., Ralph E. Hoyt, Chief Asst. Dist. Atty., and Agnes R. Polsdorfer, Deputy Dist. Atty., all of Oakland, for appellant.

Warren H. Pillsbury, of San Francisco, for respondent.

CURTIS, J. The brief of the appellant herein correctly states the nature of this action and the general facts out of which it arose as follows: "This is an action brought by Martin Ahern through his guardian ad litem, Theresa J. Ahern, against the Livermore Union High School District of Alameda County for damages for personal injuries alleged to have been caused by the negligence of the defendant, its officers and employees. The plaintiff was a student in the manual training department of said district and on the 7th day of December, 1925, while using a Greenlee Brothers power saw to cut a groove in a piece of scrap lumber, the plaintiff suffered the loss of the middle and index fingers of his right hand when they came in contact with the saw blade. The action was tried before the court sitting with a jury, which, at the conclusion of the trial returned a verdict in favor of plaintiff and against the defendant in the sum of \$3,500. Motions for a nonsuit and for a new trial were made on behalf of the defendant and denied. The defendant denied negligence and alleged that the negligence of the plaintiff was the proximate cause of the accident, and also pleaded contributory negligence on the part of the plaintiff." From the judgment herein, the defendant has appealed.

[1, 2] It is apparent from the reading of the record that the evidence as to the negligence of the appellant as well as that tending to show contributory negligence on the part of the respondent is in sharp conflict. While

the school authorities testified that the respondent, together with all pupils who were permitted to use the power saw, were thoroughly instructed regarding its use and the necessity of using the guard when operating the saw, the respondent and other pupils in the school denied that they were ever given any such instruction. This was sufficient to constitute a conflict of the evidence upon this particular issue in the case, and, the jury having resolved such issue in respondent's favor, its determination of the matter will not be disturbed on appeal. As to the plea of contributory negligence, in view of the fact that the respondent was at the time of the accident a minor of the age of 14 years only, and that he, with other witnesses, testified that they had received no instructions as to the necessity of using the guard to the saw when operating the same, we cannot say that the implied finding of the jury that respondent was not guilty of contributory negligence finds no support in the evidence. We are therefore, of the opinion that the verdict of the jury finds justification in the evidence adduced at the trial.

Upon the assumption, therefore, that the school district was negligent in permitting the respondent to operate the power saw under the conditions shown in the evidence, and that the respondent, in operating said saw, was not guilty of any contributory negligence, the appellant still insists that the judgment is erroneous and should be reversed. At the 1923 session of the Legislature there were enacted two statutes relating to the liability of school districts for the negligent acts of their officers. The first of these statutes amended section 1623 of the Political Code (St. 1923, p. 298), and the other of said statutes will be referred to as Act 5619. Deering's Gen. Laws of 1923; St. 1923, p. 675. The trial court held, and we think properly, that the complaint stated a cause of action in favor of the plaintiff under either of these statutes. We think the evidence is also sufficient to justify a verdict in favor of the respondent under either of said acts of the Legislature. Were this all, it would be a simple matter to affirm the judgment of the trial court which was entered in accordance with the verdict of the jury. But the trial court gave certain instructions to the jury to the effect that the plaintiff was entitled to recover if the jury believed that he had brought himself within the terms of section 1623 of the Political Code, as amended in 1923, and that, in order to recover, it was not necessary for him to meet the requirements of Act 5619. It follows that, if section 1623 is applicable to the facts of this case, the judgment must be affirmed, but, if Act 5619 is controlling and the respondent, in order to recover judgment against the school district for the negligence of its officers, must meet the requirements of said act, then the judgment must be reversed.

Section 1623 of the Political Code as amended in 1923 reads as follows:

"Boards of school trustees, high school boards, junior college boards and boards of education are liable as such in the name of the district for salary due any teacher on contract, and for all debts contracted under the provisions of this chapter, and for any judgment against the district on account of injury to any pupil arising because of the negligence of the district or its officers or employees and they must pay any judgment for debts, liabilities or damages out of the school funds to the credit of such district, subject to the limitation on the use of said funds fixed in the constitution of the State of California; provided, that the contracts mentioned in this section shall not be made in excess of the school moneys accruing to the district and usable for the purposes of such contracts during the school year for which the contracts are made, otherwise the district shall not be held liable.

"The district attorney of the county in which a school district is located shall without fee or other charge defend the district in any suit brought for injury to any pupil for any cause. In case suit is brought against the members of the board of school trustees or board of education as individuals for any act or omission in the line of official duty as trustee or board member, it shall be the duty of the district attorney of the county to defend the members of such board of school trustees or board of education without fee or other charge.

"Members of the boards of school trustees and city boards of education shall not be held personally liable for accidents to children going to or returning from school or on the playgrounds or in connection with school work." (St. 1923, p. 298.) The portions of said section included above in brackets were for the first time incorporated therein by the amendment of 1923.

Section 2 of Act 5619, which is the only portion of the act necessary to consider in this action, is as follows: "Counties, municipalities and school districts shall be liable for injuries to persons and property resulting from the dangerous or defective condition of public streets, highways, buildings, grounds, works and property in all cases where the governing or managing board of such county, municipality, school district, or other board, officer or person having authority to remedy such condition, had knowledge or notice of the defective or dangerous condition of any such street, highway, building, grounds, works or property and failed or neglected, for a reasonable time after acquiring such knowledge or receiving such notice, to remedy such condition or failed and neglected for a reasonable time after acquiring such knowledge or receiving such notice to take such action as may be reasonably nec-

essary to protect the public against such dangerous or defective condition."

As we have already stated, each of these two enactments was passed at the 1923 session of the Legislature. Neither of them refers to the other, nor is there to be found in the terms of one anything which expressly purports to make said act subject to or dependent upon the other. From their terms each is an independent and complete enactment of the Legislature relative to the subject-matter embodied therein. The legislative history of these respective statutes shows that the measure providing for the amendment of section 1623 of the Political Code was introduced in the Assembly on January 19, 1923, was passed by the Assembly on April 14th, and the Senate April 24th, and was signed by the Governor May 10, 1923. Act 5619 was introduced in the Senate on January 15, 1923, passed the Senate April 5th and the Assembly May 16th, and was approved by the Governor June 13, 1923. Under the Constitution, both statutes took effect on the same day, which was 90 days after the adjournment of the Legislature.

[3] Appellant first contends that the amendment to section 1623 of the Political Code, enacted in 1923 (St. 1923, p. 298), violates article 4, § 24, of the Constitution of this state, in that the subject of said amendment is not embraced in its title. The title of the act amending said section is as follows: "An act to amend section one thousand six hundred twenty-three of the Political Code, relating to the liability of school trustees." This court has on more than one occasion sustained an act amending a Code section, the title of which is like or similar to the title of the act of 1923 amending section 1623 of the Political Code. *Los Angeles City School District v. Odell*, 200 Cal. 637, 641, 254 P. 570; *Estate of Elliott*, 165 Cal. 339, 132 P. 439; *People v. Oates*, 142 Cal. 12, 14, 75 P. 337. See, also, *People v. French*, 61 Cal. App. 275, 277, 214 P. 1003. The reasons for sustaining an act bearing such a title are fully set forth in the above decisions, and it is not necessary to state them again.

Appellant's principal contention is that section 1623 of the Political Code as amended in 1923 gives no right of action whatever in favor of school pupils who have sustained injury as a result of the negligence of the school district or its officers or employees, but that said section only creates a liability on the part of the district to pay "any judgment against the district on account of injury to any pupil arising because of the negligence of the district or its officers or employees." In other words, appellant contends that this section of the Code authorizes the payment of the judgment from the funds of the school district after the same has been recovered against the district under some authority of law giving a right of action against

the district, and appellant maintains that section 1623 of the Political Code gives no such right of action, but that Act 5619 is the only statutory enactment making a school district liable for the negligence of its officers, and, unless an injured pupil brings himself within the terms of Act 5619—that is, unless he shows that the dangerous condition of the property of the district had been brought to the notice of the board of trustees of the district, and that they had neglected for "a reasonable time after receiving such notice to remedy said dangerous condition"—then the pupil cannot recover damages for the injury sustained by reason of the dangerous condition of said school property.

Appellant has called our attention to what it contends was the reason for the amendment of section 1623 in 1923. Some time prior to the enactment of said section, an action had been instituted in one of the counties of the state in which it was sought to make the trustees of a school district personally liable in damages for an injury sustained by a pupil through the negligence of the district. The trustees of many districts of the state became apprehensive of the danger to which they might be subjected should the plaintiff in that action prevail. Many of them resigned their positions, and some difficulty was experienced in securing competent persons to act as trustees in some of the districts of the state. Hence the amendment, in 1923, of section 1623 of the Political Code.

By its provisions it made three major changes in the then existing law:

(1) Said amendment provides that school trustees "are liable * * * in the name of the district * * * for any judgment against the district on account of injury to any pupil arising because of the negligence of the district or its officers or employees."

(2) It provides that the district attorney shall defend, without charge or fee, the district in any suit brought for injury to any pupil for any cause. It is also made the duty of the district attorney to defend, without fee or charge, any action "brought against the members of the board of school trustees or board of education as individuals for any act or omission in the line of official duty as trustee or board member."

(3) It expressly exempts the school trustees and members of city boards of education for any personal liability "for accidents to children going to or returning from school or on the playgrounds or in connection with school work."

Bearing in mind that the purpose of the amendment of 1923 to section 1623 of the Political Code was to relieve school trustees and members of boards of education from personal liability for accident to school chil-

dren, it will be seen that the amendment most effectually accomplished that purpose. The amendment not only expressly relieved them from such liability, but it provided that the district attorney should, without charge to them, defend any such action that might for any cause pertaining, of course, to their duties as trustees of the school district, be instituted against them personally. We can readily understand that the fear existing within the ranks of school trustees and members of boards of education by reason of the attempt to hold them personally liable for injury to pupils was immediately dispelled by reason of this amendment, and that after the enactment these officials resumed their duties with the assurance that they would not be held personally accountable for injuries sustained by pupils in connection with school work. But while we are satisfied as to the effect of the amendment in regard to the liability of school officials, it might be pertinent at this time to ask what had become of the rights of the pupil. The latter's asserted right of action for injury against the officers had been taken from him by the amendment. Had anything been given him by the Legislature, in place of that of which he had been deprived by the terms of the amendment? While, of course, it would not be necessary for the Legislature to provide any protection to pupils sustaining damages as a result of the negligence of school authorities, yet we would hardly expect the lawmaking body of the state, while legislating upon the subject, to leave the pupils of our schools wholly unprotected, and we do not think it has.

[4] As we have already stated, the amendment provides that the trustees in the name of the district are made liable for any judgment against the district on account of injury to any pupil arising because of the negligence of the district or its officers or employees. This, it is conceded, means that the district itself is made liable for any such judgment. It is conceded that school boards are not authorized to pay school funds except in cases expressly provided for by statute. Appellant contends, therefore, that the provision of the amendment last referred to is simply an authorization to the school board to pay such a judgment, and that it creates no liability against the district for damages sustained by a pupil. This contention is, we think, completely answered by a further provision of this section of the Code, which immediately follows that just referred to, and which provides that "they (school boards) must pay any judgment for debts, liabilities or damages out of the school funds to the credit of such district." This last-quoted provision of the section constitutes complete statutory authority to school boards to pay any judgment for damages, which would, of course, include a judgment in favor of a pupil for the negli-

gence of the district, or its officers, or employees. This being the case, if we are to give the amendment making school districts liable for any judgment for damages in favor of a pupil the construction contended for by appellant, then this provision is meaningless and was entirely unnecessary. It could be expunged from the section of the Code without altering or impairing its meaning or purpose in any manner. "It is fundamental that, if possible, a statute or code section should be construed so as to give meaning and effect, not only to the statute or code section as a whole, but to each and every part thereof." 23 Cal. Juris. 758; *Crowe v. Boyle*, 184 Cal. 117, 193 P. 111.

[5] It is conceded by appellant that at the time of the amendment to section 1623 of the Political Code in 1923 there was no other section of the Code or other statute which made school boards liable for injuries to the pupils resulting from the negligence of the district or its officers or employees. To adopt appellant's contention, we would have a provision of the Code making school districts liable for a judgment in favor of a pupil, but giving the pupil no right of action against the district whereby he might reduce his claim for damages into a judgment. This would be an absurd state of affairs, and we cannot believe that the Legislature ever intended that such a condition should result from the enactment of said amendment. But appellant maintains, although there was no statute giving a pupil such a right of action, that by the provision of Act 5619, subsequently enacted and approved, the pupil was given, under the general terms of this later statute, the right to institute an action against the district for the purpose of recovering a judgment for damages sustained by reason of negligence. Appellant asserts, although this later statute was not enacted when the bill providing for the amendment of section 1623 of the Political Code was approved by the Governor, that we must assume that the members of the Legislature, when they voted for said amendment to section 1623, and the Governor, at the time he approved said amendment, had knowledge of the pendency before the Legislature of the bill providing for the enactment of Act 5619, and that it must be presumed that, at the time of their respective actions in reference to said amendment, they had notice of said bill and of the progress it was making through each house of the Legislature. Therefore appellant contends that the Legislature enacted, and the Governor approved, the amendment, with notice of the terms and provisions of Act 5619, which gave pupils the right, under the terms and conditions of the later statute, to reduce their claims for damages against the district to judgment. Conceding that the members of the Legislature and the Governor, at the time of the enactment of said amendment, knew of the bill then pending before the

Legislature providing for the enactment of Act 5619, neither the members of the Legislature, at the time they voted for the enactment of said amendment, nor the Governor, at the time he approved the same, knew or could have known what would be the ultimate fate of said bill. We know of no law that would justify us in holding that the Legislature or the Governor, at the time they acted upon the amendment to section 1623, did or could assume that Act 5619 would be subsequently enacted and approved. Neither statute refers to nor is limited by the terms of the other. It would therefore be most unreasonable to hold that the statute first enacted was to be limited by the terms of the later enactment simply because the bills providing for each statute were before the Legislature at or about the same time. Unless there is something in the terms of the statutes or in the subject-matter of the two acts indicating that one is subject to the other, each must stand as a complete expression of the legislative intent upon the particular subject embraced therein. We are therefore unable to agree with the contention of the appellant that, when the Legislature enacted this amendment to section 1623, making school districts liable for judgments against the district on account of injury to a pupil caused by the negligence of the district or its officers or employees, it had in mind the terms of said Act 5619 not then enacted, or that the right of action, out of which the judgment in favor of the pupil and for which the district is made liable by the terms of the amendment, was to be subsequently created in favor of the pupil by the enactment of said Act 5619.

[6] Section 1623 of the Political Code, as amended in 1923, having made school districts liable for judgments in favor of pupils arising from the negligence of the districts or their officers or employees, we must, in the absence of any other legislation upon the subject, hold that by the terms of this section as amended, the right is given the pupil injured through such negligence to institute an action against the district for the purpose of recovering such a judgment. Otherwise this provision of the Code section, as already observed, would be meaningless. Besides, this section purports to cover the whole subject of the liability for damages to pupils arising from negligence. The section, as amended, expressly exempts the trustees and members of boards of education from such liability, and, in making the district liable for judgments in favor of the pupils for injury arising from such negligence, the plain intent of the statute was to fix this liability, from which the officers had been freed by the statute, upon the district itself. The wording of the amendment may not be as precise and exact as we might wish. Had the wording thereof been that the district was liable for damages sustained by a pupil because of the

negligence of the district or its officers or employees, there would be no question of the meaning of the amendment. We can see but slight, if any, difference between making a person liable for damages sustained by reason of his negligence and making him liable for a judgment for damages sustained by reason of his negligence. In this connection we might refer to said section 1623 of the Political Code prior to its amendment in 1923. Since 1874 up to its amendment in 1923, it provided that "boards of trustees are liable as such in the name of the district for any judgment against the district * * * due any teacher on contract." Under this section as it then stood, teachers for years successfully proceeded against districts to recover salaries due them on their contracts with the district. One such action was that of *Hancock v. Board of Education*, 140 Cal. 554, 74 P. 44. In sustaining a judgment in favor of a teacher for his salary, this court, on page 561 of the opinion, 74 P. 46, stated that "the Code provides that the trustees of every school district may sue and be sued (Pol. Code, § 1575), and that the trustees are liable in their official capacity for judgments for salaries against the district. (Pol. Code, § 1623.)" While the precise question involved in the present action was not stressed in the *Hancock* Case, the right of the plaintiff therein, a teacher, to maintain his action was evidently based upon section 1623 of the Political Code prior to its amendment in 1923, and in our opinion the judgment therein could have been sustained only by holding that a right of action against the district was given to a teacher by said section for the recovery of his salary. By the amendment of 1923 (St. 1923, p. 298), this provision of the statute was changed so that it now reads, "Boards of school trustees * * * are liable * * * for salary due any teacher on contract." Just what was the object to be accomplished by amending the section in this respect we are not advised, but we are confident that it confers no greater or different liability upon school districts for the salary of teachers in its amended form than was imposed upon them by the terms of the section previous to this amendment. It is therefore our conclusion that section 1623 of the Political Code as amended in 1923 creates a liability on the part of the school districts for damages sustained by a pupil by reason of the negligence of the school district, its officers, or employees.

[7, 8] Finally, appellant contends that the two acts (that is, section 1623, as amended, and Act 5619) relate to the same subject-matter, namely, the liability of a school district for negligence, and, as both went into effect on the same day, they should be read together as one act and construed accordingly. If section 1623 of the Political Code and Act 5619 dealt entirely with the same subject-matter, there would be considerable force in

this contention of appellant. But, by reference to their provisions, it will be seen that such is not the fact. Act 5619 deals with the liability of counties, municipalities, and school districts to the general public for defective or dangerous conditions in the streets, grounds, or property of the counties, municipalities, or school districts, while that portion of the amendment to section 1623 of the Political Code enacted in 1923 with which we are now concerned, deals with the liability of the school district to school children for the negligence of "the district or its officers or employees," resulting in injury to said children. It is evident from the terms of these two legislative enactments that Act 5619 is a general act, defining the liability of the public bodies named therein to the general public and specifying the conditions under which said liability may attach, while the amendment of 1923 to section 1623 of the Political Code is a special act and purports to deal only with the liability of school districts to the children of the district for the negligence of the district or its officers or employees. In such a case the provisions of the special act must prevail over the terms of the general statute. "It is a general rule that a special statute controls a general one, without regard to their respective dates, and that an act general in character will not ordinarily repeal a special act, even though it appears to cover the ground and contains a general repealing clause." 23 Cal. Juris. pp. 706 and 707; *Riley v. Forbes*, 193 Cal. 740, 227 P. 768; *McNeil v. Kingsbury*, 190 Cal. 406, 213 P. 50. These citations also answer the claim of appellant that Act 5619, having been enacted subsequent to the passage of the amendment to section 1623 of the Political Code, controls the latter. Being a general statute, it must give way to the terms of the special statute, irrespective of the date of its passage.

As the provisions of section 1623 of the Political Code are determinative of the rights of the respondent in this action, the instructions of the court that respondent was entitled to recover if he brought himself within the terms of said section of the Code were proper.

The judgment is affirmed.

We concur: WASTE, C. J.; LANGDON, J.; SEAWELL, J.

PRESTON, J. I dissent. I cannot bring my mind to the conclusion that section 1623 of the Political Code, as amended, confers any such right against a school district in favor of a person injured through the negligence of an officer or employee thereof. It seems too clear for controversy that a substantive right of action in such case is controlled by Act 5619 of the General Law.

The two enactments covering this subject are counterparts of each other and went into effect on the same day. They should be read together. Act 5619 covers rights of action against counties, municipalities, and school districts in negligence cases. Prior to the enactment of this law, the sovereign government could not be sued for the negligence of its officers and employees, and it is only by grace of the Legislature that such an action can be at any time maintained. The provisions of section 1623 are simply intended to make lawful the disbursement of school funds in payment of judgments obtained pursuant to the authority granted by Act 5619. Any other construction destroys the meaning as to the last-mentioned act altogether so far as school districts are concerned.

It is an innovation to have an action of this kind allowed at all, and I do not think the Legislature for a moment intended to give a broader right of recovery than provided by Act 5619.

We concur: SHENK, J.; RICHARDS, J.

209 Cal. 4

**BARONI (CONTINENTAL CASUALTY CO.,
Intervener) v. ROSENBERG et al.
(S. F. 13779.)★**

Supreme Court of California. Feb. 3, 1930.

Rehearing Denied March 3, 1930.

1. Appeal and error ⇐232(1)—Insufficiency of evidence cannot be urged in support of order granting new trial unless specified as ground therefor (Code Civ. Proc. § 657).

Under Code Civ. Proc. § 657, insufficiency of evidence cannot be urged in support of order granting motion for new trial, when not specified as one of grounds therefor.

2. Trial ⇐133(6)—Granting new trial for misconduct of defendant's counsel, in reference to statements regarding compensation insurance, held not abuse of discretion, notwithstanding cautionary instruction (Code Civ. Proc. § 657).

In action for personal injuries sustained when struck by defendant's truck, granting new trial under Code Civ. Proc. § 657 for misconduct of defendant's counsel before jury, consisting of statement when cross-examining plaintiff as witness under section 2055, to effect that plaintiff will be entitled to draw compensation under Workmen's Compensation Act as long as he lives, held not abuse of discretion, notwithstanding instruction to disregard everything said in regard to compensation insurance, where statement was absolutely erroneous, and correct method of rating disability contradicting such statement was not admissible.

In Bank.

Appeal from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

Action by Oriente Baroni against B. Rosenberg and another, wherein the Continental Casualty Company joined as intervening plaintiff and lien claimant. Verdict for defendant named, and, from an order granting a new trial, he appeals. Affirmed. Super-seding opinion 282 P. 508.

Louis V. Crowley and Cooley, Crowley & Gallagher, all of San Francisco, for appellant.

Daniel A. Ryan, of San Francisco (George F. Snyder, of San Francisco, of counsel), for respondent.

PRESTON, J. The order granting a new trial, here appealed from by defendant B. Rosenberg, is affirmed. The sole question is whether the trial court abused its discretion in making said order.

[1] Plaintiff predicated his motion for new trial upon practically all of the statutory grounds (section 657, Code Civ. Proc.), but urged, as the main specifications of error, alleged prejudicial misconduct on the part of counsel for said defendant, hereinafter detailed, and that the verdict was against the weight of the evidence. The insufficiency of the evidence cannot be urged in support of the order, however, as it is not therein specified as one of the grounds therefor. Section 657, Code Civ. Proc.

Plaintiff instituted the action for the purpose of recovering damages against defendants by reason of the fact that on November 1, 1926, he was struck by a five-ton dump truck owned by defendant B. Rosenberg and operated by one of his employees in connection with grading work on Rutland avenue, San Francisco. Plaintiff was at said time acting as grading foreman for Keystone Construction Company, and, in a half-kneeling position at the sidewalk edge on said avenue, was engaged in stretching string to mark the prospective line of curb for excavation purposes. The truck, in passing, hit his leg and so swung him around that one of his feet was caught under a wheel, crushed, injured, and rendered permanently useless. Continental Casualty Company, the carrier of workmen's compensation insurance for plaintiff's employer, which had expended in plaintiff's behalf some \$1,000.20 for hospital expense and claimed \$3,520.27 as compensation payments for 169 weeks, joined in the action as plaintiff intervener and lien claimant. The cause was tried before a jury and verdict rendered for said defendant. The alleged misconduct charged by plaintiff arose from a colloquy which took place between coun-

sel in the presence of the jury, under substantially the following circumstances:

[2] Counsel for defendant called plaintiff as a witness under section 2055 of the Code of Civil Procedure and asked him if he was receiving at that time workmen's compensation each week. Plaintiff's attorney objected unless the jury be instructed that such compensation would have to be paid back out of any verdict obtained. After remarks between counsel, the record shows the following:

"Q. (By Mr. Gallagher, counsel for defendant): It is a fact that you are weekly receiving indemnity from the Continental Casualty Company? A. Yes. I get \$20.83 a week.

"The Court: As long as it has been mentioned, that is, from the fact that his employer paid workmen's compensation.

"Mr. Gallagher: Yes, your Honor.

"The Court: And that was between this plaintiff and his employer.

"Mr. Ryan: And will have to be repaid to the person who paid the insurance.

"Mr. Gallagher: Yes, and it will continue to be paid, too.

"Mr. Ryan: No, it will not. It stops at a certain time.

"Mr. Gallagher: *He will get it as long as he lives.*

"Mr. Ryan: No, he will not. I object to that and assign it as misconduct.

"The Court: I ask the jury to disregard all of that. * * * I ask the jury to disregard everything that has been said except what has been said by the court on the subject of the law governing this matter.

The statement of counsel, above quoted and in italics, was in fact not true. As was brought out by affidavit upon motion for new trial, plaintiff received under the Workmen's Compensation Act (General Laws, Deering 1923, part 1, Act 4749, p. 1710, as amended) a permanent disability rating of only 42¼ per cent., or the equivalent of 169 weeks of disability payments. In order to entitle him to compensation under said act for the remainder of his life, he would have to have been *totally*, and not partially permanently, disabled—that is, he would have to have received a total permanent injury rating of at least 70 per cent. Section 9, subd. 2(5) of said act. Here of plaintiff's whole body, his one foot only was permanently injured, thus entitling him to said rating of but 42¼ per cent. permanent disability. The facts as to the method of rating disabilities under the act and as to the rating received by plaintiff were not brought out prior to the proceedings upon motion for new trial. They were not in the record. Indeed, there was no way of incorporating them therein.

Under section 26 of said act, such testimony is inadmissible.

Moreover, the entire discussion as to compensation was extraneous to the issues. Although the court admonished the jury to disregard it, the harm, if any, was already done, and it had no power to wipe away the false concept of the situation, imprinted upon their minds. The remark was properly assigned as misconduct, and, despite the admonition, was, in our opinion, prejudicial. The fact of the matter is that the absolutely erroneous statement that plaintiff would get compensation as long as he lived was flatly made by defendant's counsel, before the jury, and correct information as to the method of rating disabilities under the act, which might have disabused their minds, was not and could not be given them. To our mind there was ample justification for the exercise by the trial court of its discretion in granting a new trial; hence our affirmance of its action. As authority for the conclusion announced, see *Keena v. United Railroads*, 197 Cal. 148, 239 P. 1061, and *Gee v. Fong Poy*, 88 Cal. App. 627, 639 to 647, 264 P. 564, and cases therein cited.

We concur: CURTIS, J.; LANGDON, J.; SHENK, J.; RICHARDS, J.; SEAWELL, J.



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209 Cal. 10

WALLACE v. GABLE et al. (Sac. 4227.)

Supreme Court of California. Feb. 11, 1930.

1. Master and servant **§80(2)**—Cause of action on contract for household services accrued when employer was adjudged incompetent.

Cause of action on contract for services in cooking and general housework, nursing and care of decedent, at agreed price of \$1 a day payable upon termination of employment, accrued when employer was adjudged incompetent.

2. Limitation of actions **§83(2)**—Where employer died before expiration of time limited for commencing plaintiff's action for services, action commenced within one year after letters testamentary were issued was not barred (Code Civ. Proc. § 353).

Where employer died before expiration of time limited for commencing plaintiff's action for services in doing cooking, housework, nursing and care of employer, action commenced within one year after letters testamentary were issued was not barred under Code Civ. Proc. § 353.

3. Limitation of actions **§83(2)**—Presentation of claim against estate at any time before action is barred is within time, if filed within time provided in notice to creditors (Code Civ. Proc. § 353).

Under Code Civ. Proc. § 353, expressly extending time for bringing action against deceased person's representative, presentation of claim at any time before action is barred is within time, provided it be filed within time provided in notice to creditors.

In Bank.

Appeal from Superior Court, Butte County; H. D. Gregory, Judge.

Action by Nellie Wallace against John N. Gable and another, executors of the last will and testament of George Gable, deceased, upon a rejected claim against the estate. From a judgment for plaintiff, defendants appeal. Affirmed.

Carleton Gray, of Oroville, for appellants.
Bond & Deirup, of Chico, for respondent.

LANGDON, J. This is an appeal by the defendants from a judgment against them, as executors of the last will of George Gable, deceased. The plaintiff's action was founded upon her rejected claim, presented against the estate for her services for cooking and general housework, nursing and care of decedent, continuously from July 1, 1894, to the date of his death, August 14, 1926, at the agreed price of one dollar a day, payable upon termination of the employment. The amount prayed for was \$11,725, less \$1,200 paid upon account, leaving \$10,525, for which amount the jury returned a verdict for plaintiff. However, as it had been brought out at the trial that on September 22, 1924, the deceased had been declared an incompetent and a guardian had been appointed who had made a new contract with plaintiff, it became apparent that the original contract terminated at the time the guardian was appointed. The trial court denied a new trial upon condition that the amount of the judgment be reduced to \$9,831 to conform to the situation presented by the proof, and the judgment was entered for such latter amount.

There is no merit in the contention that the record does not support the finding of the jury as to the existence of the contract for the plaintiff's services and that they were to be paid for at the time of the death of the employer or when the plaintiff should leave his service. The proof of this agreement was, naturally, somewhat difficult because of the death of one party to the contract and the consequent disqualification of the other as a witness. Only indirect evidence was available, but of this there is ample in the record to justify the conclusion of the jury.

[1] It is earnestly contended that this claim, if proven, is barred by the statute of limitations. It is conceded that the cause of action accrued on September 22, 1924, when the employer was adjudged incompetent. The claim of plaintiff was presented to the executors on May 25, 1927, or over two years and eight months after it had accrued. Seventeen days later this action was commenced. It is insisted by appellants that the claim was barred by section 339, subdivision 1, Code of Civil Procedure, and could not have been allowed by the executors because of the provisions of section 1499, Code of Civil Procedure.

[2] The respondent, on the other hand, contends that the general statute of limitations is extended by section 353, Code of Civil Procedure, which provides, in part: "If a person against whom an action may be brought die before the expiration of the time limited for the commencement thereof, and the cause of action survive, an action may

be commenced against his representatives, after the expiration of that time and within one year after the issuing of letters testamentary or of administration." The plaintiff complied with the provisions of this section. The employer died in August, 1926, before the expiration of the time limited for commencing plaintiff's action, and the action was commenced within one year after letters testamentary were issued, which was on September 13, 1926.

Appellant meets this situation by the position that section 353, Code of Civil Procedure, relates exclusively to the commencement of actions, and does not relate to or extend the time for presenting or filing claims against an estate, and that the claim was barred under the general statute before the claim was presented and that presentation of a valid claim is a condition precedent to bringing an action.

Reliance is placed upon the case of *Morrow v. Barker*, 119 Cal. 65, 51 P. 12. That case holds that no suit may be brought on a claim unless the claim be presented within the time limited by the notice to creditors. In that case, the claim was presented after the time limited in the notice. In the instant case, the claim was presented within the time mentioned in the notice to creditors and the claim and the action were both filed within one year after the appointment of the executors.

[3] We think the purpose and meaning of section 353, Code of Civil Procedure, is to extend the time within which to present claim and bring an action in the event of rejection. Since section 353, Code of Civil Procedure, expressly extends the time for bringing an action, a presentation of a claim at any time before action is barred is within time, provided it be filed within the time provided in the notice to creditors. Such was the view of this court, apparently, in the case of *Barclay v. Blackinton*, 127 Cal. 189, 59 P. 834, 835. In that case, the claim was presented to the administrator within one year after the death of the intestate, but suit was not brought thereon within the year allowed by section 353, Code of Civil Procedure. That year expired on March 2, 1897, and the action was not brought in time. However, the court said: "After the 2d day of March, 1897, the claim was barred by the statute of limitations, and thereafter neither the administrator nor the court had the power to allow it"—thus assuming that section 353, Code of Civil Procedure, extended the time for filing claim as well as the time for bringing an action.

There are no other matters which require discussion, and the judgment appealed from is affirmed.

We concur: CURTIS, J.; PRESTON, J.; RICHARDS, J.; SEAWELL, J.; SHENK, J.

209 Cal. 36

KERR, County Registrar of Voters, v. RUSSELL, County Purchasing Agent.

L. A. 12153.

Supreme Court of California.
Feb. 20, 1930.

Alternative writ denied.

Jennings & Belcher, of Los Angeles, for petitioner.

Everett W. Mattoon, County Counsel, and R. C. McAllaster, Deputy County Counsel, both of Los Angeles, for respondent.

PER CURIAM.

[1-4] The petition for a rehearing is denied. The alternative writ of mandate was heretofore denied without opinion. In order to set at rest the question sought to be presented herein, it should now be stated that the petition is without merit. It has always been the policy of our law to preserve uniformity throughout the state as to the time for the election of elective county officers. Section 2¾ of article 2 of the Constitution preserves that uniformity, and provides for the election at the primary elections of nonpartisan county officers who receive votes on a majority of all the ballots cast for such officers. This is a general provision, is applicable throughout the state, and is self-executing.

Section 7½ of article 11 of the Constitution prescribes how and in what manner county freeholders charters may be adopted. It is therein provided: "All elective officers of counties * * * shall be nominated and elected in the manner provided by general laws for the nomination and election of such officers." This is a provision relating especially to county freeholders charters. The last sentence in section 2¾ of article 2 of the Constitution is general, and purports to apply to all freeholders charters, but it must be held to apply only to freeholders charters wherein it is competent under other provisions of the Constitution to provide for a different mode, such as in municipal freeholders charters.

The special provision of section 7½ of article 11 above quoted must therefore be controlling over the last sentence of section 2¾ of article 2, which is general in its nature. Also any provisions of the Los Angeles county charter which are inconsistent with the controlling portion of section 2¾ of article 2 of the Constitution must be governed by the latter. Consequently said section 2¾ has operated since its adoption in November, 1926, so as to provide for the election of nonpartisan county officers of Los Angeles county at the primary election, and the names of such officers so elected were not in 1928 and are not required to be placed on the ballot at the succeeding general election.

1. Counties ⇨62—Preservation of uniformity of time for election of elective county officers throughout state is policy of law.

It is the policy of the law to preserve uniformity as to time for election of elective county officers throughout the state.

2. Constitutional law ⇨31—Constitutional provision for election of nonpartisan county officers receiving majority of votes at primary elections is general, self-executing provision, applicable throughout state (Const. art. 2, § 2¾).

Const. art. 2, § 2¾, providing for election of nonpartisan county officers receiving majority of votes cast for such officers at primary elections, is a general provision, applicable throughout the state, and self-executing.

3. Counties ⇨62—General constitutional provision as to election of nonpartisan officers is controlled by special provision for nomination and election of county officers as provided by general laws (Const. art. 2, § 2¾, and art. 11, § 7½).

Last sentence of Const. art. 2, § 2¾, providing that freeholders' charter provision for different method of electing nonpartisan officers than that prescribed in such section shall govern, must be held to apply only to freeholders' charters, wherein it is competent under other constitutional provisions to provide for different mode, as in municipal freeholders' charters, though general and purporting to apply to all such charters, and hence is controlled by special provision of article 11, § 7½, for nomination and election of all elective county officers in manner provided by general laws.

4. Counties ⇨62—County charter provisions, inconsistent with constitutional provision for election of nonpartisan county officers receiving majority of votes at primary elections, are governed thereby (Const. art. 2, § 2¾; Los Angeles County Charter).

Provisions of Los Angeles County Charter inconsistent with provision of Const. art. 2, § 2¾, for election of nonpartisan county officers receiving majority of votes at primary elections, are governed by such provision, so that names of officers so elected need not be placed on ballot at succeeding general election.

In Bank.

Petition by W. M. Kerr, as Registrar of Voters of the County of Los Angeles, for a writ of mandate to H. E. Russell, as Purchasing Agent of such county.

209 Cal. 39

PROCTOR et al. v. JUSTICE'S COURT OF CITY OF BERKELEY et al.

S. F. 13666.

Supreme Court of California.

Feb. 20, 1930.

1. Criminal law §90(1)—All justices of peace are part of state constitutional judicial system having jurisdiction, conferred by Constitution and general laws; "county officer"; "city officer" (Const. 1849, art. 6, § 14; Const. 1879, art. 6, § 11, and § 11a as adopted Nov. 6, 1928).

Justices of the peace are neither "city" nor "county" officers, but are part of constitutional judicial system of state having concurrent jurisdiction with superior courts in certain matters expressly given by Constitution and also having such jurisdiction in civil and criminal cases as is given by general laws of state to all justices of peace without distinction between township and city justices, since Const. 1849, art. 6, § 14, and Const. 1879, art. 6, § 11, and § 11a as adopted Nov. 6, 1928, provide that Legislature shall determine number of justices of peace and fix by law their powers, duties, and responsibilities.

[Ed. Note.—For other definitions, see Words and Phrases, First, Second, and Third Series, City Officer; County Officer.]

2. Criminal law §90(4)—Justice's court of city of Berkeley within township of 30,000 population containing town of Emeryville, where intoxicating liquor was unlawfully sold, had jurisdiction over offense (Pen. Code, § 1425, as amended by St. 1929, p. 861; Code Civ. Proc. § 103; Wright Act; Pol. Code, § 4480).

Under Pen. Code, § 1425, as amended by St. 1929, p. 861, and Code Civ. Proc. § 103, justice's court of city of Berkeley of second and one-half class, and together with town of Emeryville, being within township having population exceeding 30,000, had jurisdiction over offense of maintaining place in Emeryville where intoxicating liquor was unlawfully sold and kept in violation of Wright Act (St. 1921, p. 79), since Pol. Code, § 4480, provides that provisions of the Codes must be construed with certain exceptions as though part of same statute.

In Bank.

Application by George Proctor and others for a writ of prohibition to be directed to the Justice's Court of the City of Berkeley and Oliver Youngs, Jr., as Justice thereof, to prevent the respondent court from proceeding with an action.

Alternative writ of prohibition discharged, and application for peremptory writ denied.

Stanley R. Sterne, of Oakland, for petitioners.

Earl Warren, Dist. Atty., and J. F. Coakley, Asst. Dist. Atty., both of Oakland, for respondents.

W. Cloyd Snyder, of Pasadena, amicus curiæ.

WASTE, C. J. Petitioners seek to prohibit the justice's court of the city of Berkeley from proceeding with the trial of an action wherein the petitioners are charged with having maintained a common nuisance in the town of Emeryville, county of Alameda, in violation of the state liquor law. The specific issue in the proceeding is whether or not the justice's court of the city of Berkeley has jurisdiction over the offense of maintaining a place in the town of Emeryville where intoxicating liquor was unlawfully sold and kept, in violation of the provisions of the Wright Act (St. 1921, p. 79), the alleged violation occurring since the most recent amendment of section 1425 of the Penal Code (St. 1929, p. 861).

Prior to its amendment, section 1425, in part, and so far as is material here, read as follows: "The justices' courts have jurisdiction of the following public offenses committed with the respective counties in which such courts are established. * * *" (Italics added.) Then follows an enumeration of certain misdemeanor offenses. As amended, the section reads:

"1425. The justices' courts have jurisdiction as follows: 1. In cities, cities and counties, towns and judicial townships, having a population of thirty thousand or more, said courts shall have jurisdiction in all criminal cases amounting to misdemeanor only, except those of which the juvenile court is given original jurisdiction.

"2. In those having a population of less than thirty thousand said courts shall have jurisdiction in all criminal cases amounting to misdemeanors only, punishable by fine not exceeding one thousand dollars, or imprisonment not exceeding six months, or by both such fine and imprisonment."

It is petitioners' contention that the omission from the section, as amended, of the words "committed with the respective counties," etc., was deliberate and intentional, and intended by the Legislature to restrict the criminal jurisdiction of justices' courts to such misdemeanors only as may be committed within the territorial limits of the respective cities, cities and counties, and judicial townships in which such justices' courts are situated. The respondent contends that section 1425 has reference solely to the kind of offenses over which the justices' courts are given jurisdiction, as differentiated from territorial jurisdiction, and that notwithstanding the amendment of the section the jurisdiction of the justices' courts in criminal cases remains the same as it was before the amendment. So far as the present proceeding is concerned, we think that is so.

[1] The Constitution of this state has, from the beginning provided that the Legislature shall determine the number of justices of the

peace, and fix by law their powers, duties, and responsibilities. Const. 1849, art. 6, § 14; Const. 1879, art. 6, § 11 (section 11a as adopted Nov. 6, 1928). Justices of the peace are therefore neither city nor county officers, but are part of the constitutional judicial system of the state (*People v. Cobb*, 133 Cal. 74, 65 P. 325), having concurrent jurisdiction with superior courts in certain matters expressly given by the Constitution, and also having such jurisdiction in civil and criminal cases as is given by the general laws of the state to all justices of the peace. In this regard, there is no distinction whatever between township and city justices. *Graham v. Mayor of Fresno*, 151 Cal. 465, 471, 91 P. 147; *People v. Sands*, 102 Cal. 12, 17, 36 P. 404. A study of the acts of the Legislature relating to justices' courts, beginning with the first enactment (St. 1850, c. 73, p. 179), supports the contention of the respondent that section 112 of the Code of Civil Procedure relates to the kind of civil causes, and section 1425 of the Penal Code, *supra*, relates to the kind of criminal causes of which the justices' courts may take cognizance, and that these sections do not purport to fix the territorial jurisdiction of these courts. The only jurisdiction of justices of the peace conferred by the first statute on the subject (1850, *supra*) was jurisdiction in civil cases, and was "limited to the township wherein they may have been elected." The following year (St. 1851, pp. 22 et seq.) these courts were given jurisdiction, "except within the limits of the cities of San Francisco, Sacramento, and Stockton," of certain petty "public offenses, committed within their respective cities or townships." By section 107, article 5, of an "Act concerning the Courts of Justice of this State, and Judicial Officers" (Stats. 1853, pp. 287, 298), justices' courts, except in the city of San Francisco, were given jurisdiction over an increased number of civil and criminal causes. Following the adoption of an amendment of the Constitution in 1862, the Legislature, in 1863, revised the act concerning the courts of justice of this state (Stats. 1863, p. 333 et seq.). Chapter 7 of that act, as revised, relates to justices' courts and particularly to their jurisdiction. Section 48 provides that these courts "shall have jurisdiction" within their respective townships, or cities, of the following actions and proceedings: (Enumerating the kinds of civil actions and proceedings). Section 50 provides that: "The jurisdiction of justices' courts within an incorporated city, shall extend to the limits of such city or township in which the city is situated. Mesne and final process of justices' courts may be issued to any part of the county in which they are held." Section 51 provides: These courts shall have jurisdiction of the following public offenses committed within the respective counties in which such courts are established: (Enumerating certain misdemeanors). The

law on the subject of the jurisdiction of justices' courts remained substantially in this condition until the Codes were adopted. Section 116 of the Code of Civil Procedure of 1872 provided that the civil jurisdiction of justices' courts within an incorporated city "extends to the limits of such city, or township in which the city is situated." Section 117 substantially adopted the provisions of section 51, *supra* (Stats. 1863, p. 340). The subject of the criminal jurisdiction of these courts is not referred to in the first Penal Code adopted in 1872. In 1880, section 103 was added to the Code of Civil Procedure. It provided generally for justices of the peace and for the creation of justices' courts, making the township the basis for the establishment of such courts. This section has been amended many times since its adoption in 1880, the various amendments merely providing for and relating to justices in cities of different classes. The amendment of the section in 1891 has a very material bearing on this proceeding. It was then amended to provide that the "justices of the Peace of cities * * * shall have the same jurisdiction, *civil and criminal* (*italics added*), as justices of the Peace of townships and township justice's courts" (Stats. 1891, p. 456). In addition, they have jurisdiction of causes arising under city ordinances, both civil and criminal, and in other municipal and local police matters. Section 106 of the Code of Civil Procedure, based on the original Code section 116, *supra*, which, in turn, was based on the statute of 1863, *supra* (page 340), was also enacted in 1880. It provides that the civil jurisdiction of justices' courts extends to the limits of the township in which they are held.

We are of the view that it may be said with assurance that the Legislature has always regarded township justices' courts and city justices' courts in the same class in providing generally for their jurisdiction. In the early days, the three large cities of the state, including San Francisco, were excepted from the general jurisdictional features of justices' courts throughout the state. By the Consolidation Act of San Francisco, and the Act of March, 1866, special provision was made for justices' courts and justices in cities and counties of more than one hundred thousand population, with jurisdiction extending to the limits of the city and county. See, also, Code Civ. Proc. §§ 85-98.

There is a well-recognized rule of statutory construction that the Codes blend into each other, and are to be regarded as constituting but a single statute. *Pol. Code*, § 4480; *People v. Dobbins*, 73 Cal. 257, 14 P. 860; *Butte County v. Merrill*, 141 Cal. 396, 74 P. 1036. Section 1425 of the Penal Code, relating to the public offenses over which the justices' courts shall have jurisdiction, was once section 115 of the Code of Civil Procedure. No doubt regarding the subject-matter as coming more

appropriately within the purview and purpose of the Penal Code, the Legislature, in 1905 (St. 1905, p. 705), re-enacted the section as part of that Code, and in 1907 repealed section 115 of the Code of Civil Procedure (St. 1907, p. 682). See *In re Yee Kim Mah*, 31 Cal. App. 196, 200, 159 P. 1060. During all the time this was being done, however, section 103 of the Code of Civil Procedure, *supra*, remained unchanged in so far as this consideration is concerned, and provided, as it has since 1891, that the justices of the peace and justices' courts of cities shall have the same jurisdiction, *civil and criminal*, as justices of the peace of townships and township justices' courts.

[2] With this historical background of the legislation relating to the subject to support the contention of the respondent justice of the peace and justice's court, we are of the view that, in the absence of some positive prohibitory legislation depriving the justice's court of the city of Berkeley of jurisdiction of the public offense with which petitioners are charged, we need not indulge in speculation as to whether the omission of certain words from section 1425 of the Penal Code, *supra*, was intentional or not. Senate Bill No. 64, amending section 112 of the Code of Civil Procedure relating to the civil causes over which the justices' courts shall have jurisdiction, and Senate Bill No. 734, amending section 1425 of the Penal Code relating to the public offenses within the jurisdictional cognizance of justices' courts, were each part of the legislative program for increasing the jurisdiction of justices' courts throughout the state, particularly in the more populous townships and cities, to more nearly approach the jurisdiction of the more recently created municipal courts. The language of each of the sections, as amended, is the same in providing that, "The justices' courts shall have jurisdiction as follows": Of certain civil causes (Code Civ. Proc. § 112 [St. 1929, p. 834]); and "The justices' courts have jurisdiction as follows": Of certain criminal causes (Pen. Code, § 1425 [St. 1929, p. 861]). Section 103 of the Code of Civil Procedure, *supra*, was not touched by the Legislature. By reason of the provisions of that section, the jurisdiction of a justice's court sitting in a city of the second and one-half class is made the same as, and co-extensive with, that of a township justice's court. Berkeley is a city of the second and one-half class, and both it and the town of Emeryville are within the confines of Oakland township. It cannot be denied that the justice's court of Oakland township and the justice of the peace thereof—that township having a population in excess of thirty thousand—would have jurisdiction over the criminal offense of which these petitioners were accused.

It follows that the respondent court and justice thereof may legally proceed in the matter here complained of. The alternative writ of prohibition heretofore granted is therefore discharged, and the application for a peremptory writ is denied.

We concur: RICHARDS, J.; SHENK, J.; CURTIS, J.; SEAWELL, J.; LANGDON, J.; PRESTON, J.

209 Cal. 26

NORTHERN CALIFORNIA CONFERENCE
ASS'N OF SEVENTH DAY ADVENTISTS
v. SMITH et al.*
Sac. 4201.

Supreme Court of California.
Feb. 19, 1930.

Rehearing Denied March 20, 1930.

1. Deeds ⇨61—Valid delivery of deed to third person, to be delivered to grantee upon grantor's death, immediately reduces grantor's estate to life estate.

Valid delivery of deed to third person, with direction to deliver it to grantee upon grantor's death, immediately cuts down grantor's estate to life estate.

2. Deeds ⇨67—Grantor after delivery of deed is powerless to divest grantee of estate in remainder created by deposit with third person.

Deed after delivery cannot be recalled by grantor, and grantor is thereafter without power to divest grantee of estate in remainder created by deposit with third person.

3. Deeds ⇨58(4)—Delivery is lacking, where grantor intends to retain control of deed or rights in property until death after delivery to third person.

If grantor intends to retain control of deed or rights in property, including right to control and dispose of it, until his death with intention that depository shall deliver deed to grantee upon grantor's death only in event that grantor shall not have recalled it or made other disposition of property, delivery is lacking.

4. Wills ⇨88(4)—Deed delivered to third person for delivery to grantee after grantor's death is testamentary in character if grantor retains control.

Where grantor retains control of deed delivered to third person to be delivered to grantee upon his death, deed can only be considered as attempted testamentary disposition, which must fail if formalities for execution of will have not been complied with.

5. Evidence ⇨269(3)—Grantor's acts after parting with title may be proven to show intention at time deed was delivered to third person.

While evidence of declarations, acts, and conduct of grantor made after he has parted with title in disparagement of it is inadmissible,

subsequent acts of grantor may be proven for purpose of showing intent at time deed was placed in hands of third person.

6. Deeds ⚡56(2)—Intent that deed should be immediately effective to diminish grantor's estate is essential of valid delivery to third person for delivery after grantor's death.

Intent that deed should be immediately effective to diminish grantor's estate is an essential of valid delivery to third person for delivery to grantee after grantor's death.

7. Deeds ⚡208(5)—Evidence in action to quiet title held to support finding that deed deposited with third person, for delivery after grantor's death, was never legally delivered.

In action to quiet title, where plaintiff claimed title under deed delivered to third person to be delivered to plaintiff after grantor's death, evidence showing that grantor retained control over deed after delivery to third person held to support finding that deed under which plaintiff claimed was never legally delivered to it or to any one on its behalf.

In Bank.

Appeal from Superior Court, Yolo County; W. A. Anderson, Judge.

Action to quiet title by the Northern California Conference Association of the Seventh Day Adventists against Theodore Smith and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Devlin & Devlin, of Sacramento, and Armfield & Eddy, of Woodland, for appellants.

Huston, Huston & Huston and Thomas B. Leeper, all of Sacramento, for respondents.

PER CURIAM.

Plaintiff, Northern California Conference Association of Seventh Day Adventists, appeals from a judgment decreeing that defendant Theodore Smith is the owner and entitled to the possession of certain real property situate in the county of Yolo, and that it has no right, title, or interest therein, and that it take nothing. Plaintiff is a religious corporation organized to advance the doctrines of the Seventh Day Adventist faith.

Said plaintiff and defendant Theodore Smith claimed title by separate deeds from Sarah C. Hays. The conveyance to plaintiff of an undivided one-half interest in said property was executed by Mrs. Hays, then over seventy years of age, on June 8, 1923. She left said conveyance with the attorney who prepared it with instructions to deliver it to the grantee upon her death. Mrs. Hays died in December, 1924, and said attorney delivered the deed to representatives of plaintiff soon thereafter. Plaintiff raises the point in its reply brief that there is no evidence that the deed to plaintiff was not given for a valuable consideration, but was a gift. We think it clearly and indubitably appears from

the nature and circumstances of the case that there was no consideration for the conveyance. It seems unlikely that the corporation even knew of the deed to it until after Mrs. Hays' death.

Defendant Smith claimed title to the entire estate in the premises under a deed deposited by Mrs. Hays with the Bank of Italy as an escrow holder on November 2, 1922, seven months before the execution of the deed to plaintiff, and the delivery of said deed to him after the death of Mrs. Hays upon his payment, on October 1, 1925, of \$12,000 in cash and the execution of a note for \$16,500 secured by a deed of trust on the property, in accordance with the terms of the escrow agreement. He learned of the deed to plaintiff after the death of Mrs. Hays, but before he elected to perform the terms of the escrow agreement.

Defendant Viola M. Rablin, administratrix of the estate of Sarah C. Hays, deceased, denied in her answer that plaintiff corporation had any interest in said premises and denied that her claim was without right, or that she had no right or title in said lands, but she did not set forth the nature or extent of the interest claimed, nor pray that it be adjudged that she, as administratrix or individually, was the owner of said lands, but only that plaintiff take nothing and for such other relief as might seem equitable.

Upon this appeal plaintiff states that although upon the record it would be entitled to a judgment as against all of the defendants, including defendant Smith, adjudging it to be the owner of an undivided one-half interest in said property, it is willing to recognize the rights of Smith provided judgment is ordered in its favor against the defendant Rablin, both individually and as administratrix, decreeing that she holds in trust one-half of the moneys received from Smith in payment of the purchase price of said property and also a half interest in the note and deed of trust given to secure the balance of the price.

Plaintiff claims the right to a sum of money and to an interest in the said note for \$16,500, secured by deed of trust, in lieu of the land. It may be questioned whether the pleadings are appropriate for such recovery. The allegations of the complaint are in the usual form of suits to quiet title, averring ownership of specific real property by plaintiff and a claim of interest by defendants, which is without right. By the prayer of the complaint plaintiff seeks a determination of title and does not apply for a decree establishing a trust in a sum of money and a note secured by deed of trust. Conceding for purposes of discussion that the form of the pleadings is not a bar to the relief here sought, any substantive right which plaintiff may have is dependent upon the deed to it

having been executed by a competent grantor and validly delivered. The case was tried before a jury, which found, in response to special interrogatories, that the deed to plaintiff was the product of the delusions of a diseased mind, and that when Mrs. Hays left the deed with the attorney who prepared it she did not intend to part with control over it, from which it would follow that there was no delivery. While there are grounds for contending that the evidence will not support the jury's verdict that the deed was the product of delusions, we will not here decide that question, for the reason that we prefer to place our decision of affirmance on the ground that the deed was never delivered. It will be necessary, however, to briefly review the evidence bearing on the question of mental capacity for the aid it furnishes in determining the question of delivery.

At the time of the execution of the deed to plaintiff, June 8, 1923, Mrs. Hays resided in the city of Sacramento at the home of her widowed daughter, the defendant Viola M. Rablin, and contributed to the expense of maintaining the household. The property described in said deed consisted of 160 acres of farm land near the city of Woodland, with the home place where Mrs. Hays and her husband had resided for many years. Eighty acres of said land had been devised to her by said husband, who had died many years previously, and the other eighty acres had been received from the estate of a deceased daughter, who had received it under her father's will. It would appear that Mrs. Hays possessed no other property except personal property of inconsequential value. By the will of said husband an eighty-acre tract was devised to each of their seven children.

For many years Mrs. Hays had been a member of the Seventh Day Adventist Church and a staunch supporter of the doctrines and precepts of that faith. During the period of her residence with her daughter the activities of said church unquestionably furnished the dominating interest in her life. She was regular in attendance upon church meetings and zealous in the missionary work of the body. No other members of the family were affiliated with, or interested in, said church.

The evidence as to her relations with her children, especially with the defendant daughter, with whom she had resided since 1920, is relied upon as indicating mental incapacity to a degree sufficient to vitiate the deed to plaintiff. The testimony of Mrs. Rablin, corroborated by neighbors and friends, would indicate that the mother had developed many of the attributes of character not infrequently associated with advancing years. She continually complained to her daughter and to neighbors that said daughter and her sons did not show her any consideration or

kindness, and that her daughter had a very unpleasant disposition. When the daughter took the mother to task for complaining to neighbors, the mother denied having made any complaints or unkind statements. Upon several occasions she claimed that her daughter or other members of the household had stolen articles of small value belonging to her. When the articles were found where Mrs. Hays had left them, she accused her daughter of having replaced them. Even after the finding of the misplaced or lost articles the mother stated to persons outside the family that they had been stolen.

Upon one occasion, which was after the execution of the deed to plaintiff, the mother, without informing the daughter, left the daughter's house and rented a flat near by. The next day she returned and requested her daughter to permit her to come back. Upon her return she voluntarily told the daughter that all that she owned should pass to her when she died. She was frequently heard pacing back and forth in her room and mumbling to herself in a rather loud tone of voice.

The daughter's testimony would indicate that she exerted her best efforts to provide her mother with a comfortable and harmonious home, and that the mother's unhappiness was due to her own unfortunate disposition. The daughter further testified that she assisted her mother in all business transactions, both in regard to the ranch property here involved and in other matters.

The deed to plaintiff was prepared by one G. P. Hurst, Esq., a Woodland attorney, who had known Mrs. Hays for twenty-five years. He prepared a will for her in May, 1923. A few weeks after its execution she again called at his office and stated that she had concluded to dispose of her property by deeds, as somebody had told her wills were easily broken. There is no clear evidence as to the contents of said will, which was destroyed by Mrs. Hays after the deed to plaintiff was executed, but there are references in the testimony of Mr. Hurst and one other witness from which it may be inferred that said property or an interest therein was devised to plaintiff.

Mrs. Hays told said attorney that her children had been sufficiently provided for, that one or two of them had not made good use of the property they had, and that they had not shown due courtesy and kindness to her. She also recounted the supposed theft of her property by members of the family. She told him nothing of the deed deposited in escrow which defendant Smith was entitled to receive upon the payment of the price fixed in the escrow agreement. Said attorney states that he endeavored to impress on Mrs. Hays that it was difficult to break a will if it was properly drawn and the maker was legally competent; that he explained to her that

the delivery of a deed to be good must be absolute; that a will would not divest her title, but under a deed title would pass to the grantee and she could not reclaim the deed, or thereafter convey the property. Mrs. Hays persisted in executing a deed. It was placed in an envelope and left with Mr. Hurst, the following instruction being written on the envelope: "Give the within deed to the grantees on my death. Date, June 8/23. Mrs. S. C. Hays." Shortly after the death of Mrs. Hays in December, 1924, Mr. Hurst delivered the deed to the representatives of plaintiff corporation.

[1-4] The advice given by her attorney was sound. The effect of a valid delivery made to a third person, with a direction to deliver the deed to the grantee upon the death of the grantor, is to immediately cut down the estate of the grantor to a life estate. A deed by its delivery is beyond the power of the grantor to recall, and the grantor is thereafter without power to divest the grantee of the estate in remainder created by its deposit with a third person. If the grantor intends to retain control of the deed or of his rights of property, including the rights of disposition and control, until his death, with the intention that the depository shall deliver the deed to the grantee upon the death of the grantor only in the event that the grantor shall not have recalled it, or made other disposition of the property, delivery is lacking. *Bury v. Young*, 98 Cal. 446, 33 P. 338, 35 Am. St. Rep. 186; *Kenney v. Parks*, 125 Cal. 146, 57 P. 772; *Stone v. Daily*, 181 Cal. 571, 185 P. 665; *Donahue v. Sweeney*, 171 Cal. 388, 153 P. 708. In such a case the deed can only be considered as an attempted testamentary disposition which must fail because the formalities for the execution of a will have not been complied with.

[5] The conduct of Mrs. Hays subsequent to the execution of the deed to plaintiff reveals a lack of intent that the deed should become operative upon being left with attorney Hurst to cut down her estate to a life interest, and hence a failure of delivery. While evidence of the declarations, acts, and conduct of a grantor made after he has parted with title and in disparagement of it is inadmissible, subsequent acts of the grantor may be proven for the purpose of showing the intent of the grantor at the time the deed was placed in the hands of a third person. *Williams v. Kidd*, 170 Cal. 631, 151 P. 1, Ann. Cas. 1916E, 703; *Donahue v. Sweeney*, 171 Cal. 388, 153 P. 708.

[6] Mrs. Hays leased the premises to defendant on November 2, 1922, for a term commencing on that date and terminating on October 1, 1923. Smith immediately entered into possession, farming the land, and continued in possession at all times thereafter. On November 2, Mrs. Hays also deposited the

deed to Smith with the Bank of Italy as an escrow holder, with instructions to deliver to Smith upon his payment of the price previously agreed upon between Smith and herself on or before October 1, 1923. On July 18, 1923, the lease and time for the exercise of the option to purchase were extended in writing to October 1, 1924, and on September 30, 1924, the time was extended to October 1, 1925. On that date Smith paid the sum of \$12,000 in cash and executed a note and deed of trust for \$16,500 payable to the administratrix of the estate of Mrs. S. C. Hays, whereupon the deed dated November 2, 1922, was delivered to him.

Smith testified that at the time of the extension granted July 18, 1923, which date was about a month after the execution of the deed to plaintiff, he took Mrs. Hays out to the ranch and talked the matter over with her, and she then asked him to stay with the matter. Upon other occasions, including the date of the extension given on September 30, 1924, she again requested him to continue and stated that she wished him to buy or that she would give him further extensions. She did not inform him of her deed to plaintiff. The defendant Mrs. Rablin corroborated the testimony of Smith as to Mrs. Hays' requests that he purchase the property.

J. R. Hays, a son of Mrs. Hays, testified that his mother told him two or three months before she died, and frequently before that time, that she wished to sell the property and asked him to direct prospective purchasers to her. She never informed said son or the defendant Mrs. Rablin of the deed to plaintiff corporation, but she told two friends, who were members of her church, that she had deeded her property to the church.

The effect of the deed to plaintiff, if a valid delivery was made to Attorney Hurst, was to immediately cut down the estate of Mrs. Hays to a life estate. By the escrow agreement previously entered into, Smith had bargained for the right to acquire an estate in fee upon his election to pay the stipulated price, and Mrs. Hays, following the execution of the deed to plaintiff, requested him to complete the purchase and offered to and did extend the time for the exercise of the option, thereby holding herself out as owner of the fee. She made no mention to Smith of the deed to plaintiff. The only satisfactory explanation of her conduct is that she did not intend that her rights in said property during her lifetime, including the right of disposition, should be abridged or changed and an estate vested in plaintiff by the execution of the deed left with her attorney, Mr. Hurst. By the answer, "No," made to the special interrogatory as to whether Mrs. Hays intended to part with control over said deed when she gave it to Mr. Hurst, the jury placed a construction upon the facts and circumstances which finds support in the evidence. An intent that the deed

should be immediately effective to diminish the estate of the grantor was an essential of a valid delivery.

[7] In explanation of the action of Mrs. Hays in urging Smith to complete his purchase after the execution of the deed which, it is contended, cut down her estate to a life interest, appellant states that a person may contract to sell, and give an option on, property belonging to another, or may contract to dispose of a greater interest than he himself owns, with the expectation of thereafter acquiring the estate offered in order to make a conveyance. But evidence which would sustain a finding of such an intent on the part of Mrs. Hays is entirely lacking. Neither can it be inferred, under any reasonable construction of the evidence, that Mrs. Hays intended to vest an estate in appellant by the deposit of the deed with Mr. Hurst, but urged Smith to complete his purchase with a belief that the estate granted to appellant might be divested by Smith's exercise of his rights under the prior escrow agreement. We cannot attribute to Mrs. Hays technical legal knowledge as to the conflicting rights of appellant and Smith in such a situation, nor believe that she would seek to deprive her grantee of an estate conveyed to it by urging another to exercise his rights under a prior contract.

While Mr. Hurst's testimony would indicate that he gave Mrs. Hays a clear explanation and endeavored to make her comprehend the ambulatory character of a will as compared with a deed, her subsequent conduct with relation to the property furnishes strong evidence that she failed to understand the full meaning of his remarks. Said attorney throughout his testimony stated that he persisted in restating his explanation to Mrs. Hays upon the several occasions when she called, for the reason that she gave no indications of comprehending him. While he may have believed that the effect of his repeated statements of the law was to finally make the point clear, the subsequent behaviour of Mrs. Hays, considering her age and clouded mentality, indicates the contrary.

The notion that a deed may serve as a substitute for a will without diminishing the grantor's estate during his lifetime is very prevalent. Mrs. Hays' statement to Attorney Hurst that she wished a deed in place of the will previously executed because somebody had told her wills were easily broken, and her failure to tell Hurst of her contract with Smith, as well as the testimony of the two friends of Mrs. Hays, members of the Adventist Church, who testified to telling her that deeds were better than wills, indicates a likelihood of a belief on the part of Mrs. Hays that a deed would serve as a substitute for a will, and, like a will, would not affect her estate during her lifetime. While an ex-

planation such as was given by Mr. Hurst should leave no doubt in the mind of the average person, Mrs. Hays was a woman over seventy years of age, who, if not afflicted with mental incapacity, as respondents contend, at least had displayed attributes of character and mind indicative of weakened powers of understanding.

In view of all the facts and circumstances, we cannot accede to appellant's contention that Mrs. Hays' persistence in executing a deed following the explanation of the effect of delivery by Mr. Hurst furnishes conclusive evidence of an intent that the deed should be immediately operative. We are of the opinion that the deed was never legally delivered to plaintiff or to any one on its behalf. Hence plaintiff must fail in its claim to one-half of the moneys paid by Smith on the purchase price of the land and to a half interest in the note, secured by deed of trust, given by him for the balance of said price.

Judgment affirmed.

209 Cal. 45

OSOSKE v. KALINOWSKY et ux.

S. F. 12773.

Supreme Court of California.

Feb. 20, 1930.

1. Husband and wife $\S$ 262(1)—Property acquired during coverture in husband's name is presumably community property.

If, during coverture, title is taken in name of husband, disputable presumption arises that property is community property.

2. Husband and wife $\S$ 264—In action for specific performance of contract to sell realty, made by husband but not by wife, evidence showed property was community property.

In action against husband and wife for specific performance of contract for sale of real property executed by husband, evidence that husband brought action, to which wife was not party, to quiet title to part of property, and that record title was in husband's name for over sixteen years and continued in him for more than six months after execution of contract in suit, tended to show that property was community property under management of husband.

3. Appeal and error $\S$ 1011(1)—Finding on conflicting evidence that property was community property could not be disturbed on appeal.

In action against husband and wife for specific performance of contract to sell real property executed by husband, Supreme Court could not disturb finding of trial judge that property was community property where evidence was in conflict.

4. Appeal and error ⇨1008(1)—“Subject to owners’ approval” did not necessarily mean that husband was not dealing with own property in contracting to sell.

In action against husband and wife for specific performance of contract to sell real property executed by husband containing clause, “subject to the owners’ approval,” contention that words quoted substantiated claim that husband was not dealing with his own property could not be sustained, since plaintiff’s explanation that he merely copied blank form used by real estate brokers was plausible, and was apparently accepted by trial court.

5. Husband and wife ⇨247—Amendment to statute relating to control of community property did not change status of property previously conveyed to husband (St. 1917, p. 829).

Status of real property conveyed to husband in 1907 was fixed by law then existing, and hence was not affected by subsequent amendment of Civ. Code, § 172 (St. 1917, p. 829), dealing with management of community property.

6. Records ⇨18(10)—Decree for husband quieting title to part of land conveyed to him did not conclusively prove all of land was community property (McEnerney Act).

Judgment for plaintiff, in action against husband and wife for specific performance of contract to sell real property executed by husband, could derive no support from decree in earlier proceedings, under the McEnerney Act (St. 1906, Ex. Sess. p. 78), whereby title to portion of property was quieted in husband, since plaintiff’s theory that decree was conclusive of husband’s ownership of community property was inapplicable, where judgment affected more property than was included within decree.

In Bank.

Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Action by David Ososke against Otto Kalinowsky and wife. From a judgment for plaintiff, defendants appeal.

Affirmed.

Superseding opinion in 283 P. 813.

Marion Veckl, of San Francisco, for appellants.

I. Karmel, of San Francisco, for respondent.

Henry E. Monroe, of San Francisco, amicus curiæ.

CURTIS, J.

Action for the specific performance of a contract for the sale of real property, executed by the defendant Otto Kalinowsky in favor of the plaintiff, which contract bears date the 3d day of May, 1924. The defendant Bertha Kalinowsky did not sign the agreement. The defendants are husband and wife. It is not denied that the plaintiff per-

formed all of the conditions of said agreement on his part to be performed, and that he, within the time contemplated by said agreement, tendered the sum of \$500, the purchase price called for by said contract, and demanded of defendant Otto Kalinowsky a deed to said real property in compliance with said contract. The defendant refused to execute or deliver to plaintiff any deed to said real property, and the defense interposed by said defendant and also by his wife, Bertha Kalinowsky, who has been made a party to this action, was that said real property, at all times since the same was purchased, and at the date of said agreement of sale, was the separate property of the said Bertha Kalinowsky. Upon the issue thus made by the pleadings as to the ownership of said real property, the court found, “It is not true that Bertha Kalinowsky, the wife of Otto Kalinowsky, is or at any time was the owner of said property, except as to her community interest therein.” The trial court, in accordance with the findings, rendered judgment in favor of the plaintiff, and the defendants have appealed.

The defendants’ sole contention is that the evidence is insufficient to support the finding of the court that Bertha Kalinowsky was not the owner of said real property. The defendants Otto Kalinowsky and Bertha Kalinowsky were husband and wife on December 14, 1907, the date on which the real property in suit was conveyed from B. Paige & Co., a corporation, to the defendant Otto Kalinowsky. This deed was recorded on December 19, 1907, and said real property stood of record in the name of Otto Kalinowsky from said last-named date until over six months after the execution and delivery by the said Otto Kalinowsky of said agreement of sale. It is also admitted that, after the acquisition of said real property, Otto Kalinowsky instituted an action in the superior court of the city and county of San Francisco under the act popularly known as the “McEnerney Act (St. 1906, Ex. Sess. p. 78), and secured a decree, made and entered on April 7, 1908, declaring and establishing his title to the real property described in the complaint in said action. The real property involved herein is a lot seventy-five feet in length and twenty-five feet in width, and is located on the south side of Augusta street in the city and county of San Francisco. The real property described in said decree in the McEnerney Act comprised the whole of said lot excepting the south twenty-five feet thereof. Bertha Kalinowsky was not a party to the action brought under the McEnerney Act. Neither was her name mentioned in any of the proceedings therein. On May 3, 1924, the defendant Otto Kalinowsky executed and delivered to plaintiff the agreement of sale which is the foundation of this action. As

before noted, Bertha Kalinowsky did not sign said agreement. The evidence shows, however, that the day after this agreement was signed Bertha Kalinowsky called at the home of the plaintiff and asked plaintiff's sister if plaintiff had bought a lot for \$500. Plaintiff's sister testified further regarding this visit and as to what was said by Mrs. Kalinowsky on this occasion. "She said her husband had told her he had sold the lot to my brother and she wanted to know if it was so. So I told her, yes, and my brother came in and spoke to her. After some conversation she said, 'Now don't tell my husband I came here.' * * * I did not ask her why. But afterwards my brother spoke to her for a while and then he said, 'Well, isn't that a good price for the lot, are you satisfied?' 'Oh, yes,' she said, 'Oh, yes.' That was the substance of the conversation. I don't know why Mr. Ososke asked her if she was satisfied. I don't know why she came. She said she wanted to know if it was true that my brother had bought the lot from her husband."

Plaintiff introduced evidence to the effect that the agreement of sale was just and equitable and that the sum of \$500 was a fair price to pay for said lot. This latter evidence was not contradicted by the defendants. They confined their evidence to the status of the property, and each of them testified in support of their claim that the property was the separate property of Bertha Kalinowsky and that the property had been purchased with funds acquired by the defendant Bertha Kalinowsky prior to her marriage to Otto Kalinowsky. Bertha Kalinowsky testified that the money used to purchase said lot was money which she had brought from Germany, together with money which she had earned before her marriage. Her testimony was in a slight degree corroborated by a witness who testified that she had known Mrs. Kalinowsky before her marriage, and that Mrs. Kalinowsky "worked hard and she brought some money from Germany with her."

Defendants contend that, as both of them testified that the real property in question was purchased with the separate funds of Bertha Kalinowsky, and as there was no evidence to directly contradict their testimony in that regard, their testimony upon the status of the property stands uncontradicted. It is true that there is no evidence directly contradicting the statements of Bertha Kalinowsky that she brought some money from Germany and used it with other money earned by her prior to her marriage in the purchase of said real property; that is, no witnesses testified directly that she did not purchase said property with her separate funds. We do not think such evidence was indispensable in order to produce a conflict in the evidence as to whether said property was or

was not her separate property. Any evidence which would tend to establish the fact that said property was the community property of Mr. and Mrs. Kalinowsky would be in conflict with the testimony of the defendants that it was the separate property of Mrs. Kalinowsky.

[1-3] There was evidence, in our opinion, which indirectly contradicted the statement of the defendants. In the first place, the title to the property was taken in the name of Mr. Kalinowsky during coverture, and the presumption is therefore that the property was the community property of the spouses. This presumption is, of course, disputable. *Van Camp v. Van Camp*, 53 Cal. App. 17, 199 P. 885; *Freese v. Hibernia*, 139 Cal. 392, 394, 73 P. 172; *Estate of Warner*, 167 Cal. 686, 688, 140 P. 583. In addition to the presumption that the property was community property, the evidence shows that the defendant Otto Kalinowsky, very soon after acquiring it, instituted an action in his own name under the McEnerney Act to quiet his title to a portion of said real property. His wife was not made a party to said action, and, as we have already noted, her name does not appear in those proceedings. It is hardly probable that those proceedings were taken without her knowledge. After a judgment was obtained in said proceeding quieting Otto Kalinowsky's title to the real property involved therein, he continued to hold the record title to the whole of said real property for over sixteen years, when, by the agreement of sale of May 3, 1924, he purported to contract for the sale of the said real property in his own name, and without the concurrence or consent of his wife. The next day after the execution of said agreement of sale, the wife, Bertha Kalinowsky, having heard from her husband that he had sold a lot to the plaintiff, called upon the plaintiff at his home and asked if he had bought a lot for \$500. On being informed that he had, she merely cautioned the plaintiff and his sister, who was also present at this conversation, not to tell her husband of her visit to plaintiff's house. She was then asked by the plaintiff if the price which was to be paid for the lot was not a fair price and if she was satisfied, to which she replied "Oh, yes." She then left without making any objections to the sale and without making any claim that she was the owner of the lot, or that her husband had no right to sell the same. The evidence of the acts of the defendants from the time the property was conveyed to Otto Kalinowsky up to and after the time he had agreed to sell the same to the plaintiff, as we view it, tended in a greater or less degree to show that the property was the community property of the defendants and under the management and control of the husband. As such it was in substantial conflict with the evidence of the defendants that said property

was purchased with the separate funds of the defendant Bertha Kalinowsky. The trial judge having resolved this conflict in favor of the plaintiff, this court is without the power to disturb his finding upon that question.

[4] Some reliance is placed by the defendants upon the phrase "subject to the owners' approval," incorporated in the contract of May 3, 1924, as substantiating their claim that Otto Kalinowsky was not dealing with his own property when he executed and delivered said contract. However, the explanation given by the plaintiff that he copied a blank form used by real estate brokers in making up the contract is plausible and was evidently accepted by the trial court.

[5] The real property was acquired prior to the amendment in 1917 (St. 1917, p. 829) of section 172 of the Civil Code, which deals with the management and control of community property. The husband therefore had the absolute management and control thereof, and could sell or incur the same without his wife's consent. The status of the property was fixed by the law as it existed at the time of its acquisition (*Spreckels v. Spreckels*, 116 Cal. 339, 48 P. 228, 36 L. R. A. 497, 58 Am. St. Rep. 170), and the amendment did not change the vesting nor give to the wife any greater right in the property than she possessed prior to the amendment (*Roberts v. Wehmeyer*, 191 Cal. 601, 218 P. 22). If, therefore, as found by the trial court, this property was the community property of the defendants, the husband, Otto Kalinowsky, could make a valid contract for its sale, the wife's consent was not necessary to the validity of said contract, and said contract was binding upon both of them. The judgment should therefore be affirmed.

[6] Plaintiff further relies upon the judgment quieting Otto Kalinowsky's title under the McEnerney Act. The case was tried and decided under the assumption that the decree in that proceeding covered the whole of said lot. The findings and judgment were made and rendered under the same assumption. After the case had been appealed and after all of the briefs had been filed, it was discovered that said McEnerney decree did not cover the south twenty-five feet of said lot, and accordingly an order diminishing the record herein showing this fact was then upon the stipulation of the parties made by this court. This order had escaped our attention at the time of the rendition of our former opinion in this action (283 P. 813), and for that reason we treated said McEnerney decree as applying to the whole of said real property and conclusive of Otto Kalinowsky's ownership thereof as community property. Whatever force or effect the McEnerney decree may have in determining title

to said property, it can only apply to that portion thereof embraced within the terms of said decree. The contract of sale is for the whole of said land at a fixed price of \$500. The judgment appealed from decrees the specific performance of said contract and includes land within as well as land without the terms of said McEnerney decree. The decree therefore cannot be relied upon in support of said judgment which affects property not embraced within said decree.

The judgment is affirmed.

We concur: RICHARDS, J.; SHENK, J.; SEAWELL, J.; LANGDON, J.

104 Cal. App. 60
SEARS et al. v. MAJORS et al.★
Civ. 7229.

District Court of Appeal, First District, Division 2, California.

Feb. 14, 1930.

Rehearing Denied March 15, 1930. Hearing Denied by Supreme Court April 14, 1930.

1. Death ⇨38—Action against physicians for patient's death, admittedly barred by statute as to decedent's widow, was also barred as to his minor son (Code Civ. Proc. § 377, and §§ 340, subd. 3, 352, subd. 1).

Action against physicians for death of patient, admittedly barred as to decedent's widow by statute of limitations (Code Civ. Proc. § 340, subd. 3), was also barred as to his minor son, notwithstanding section 352, subd. 1; a single joint cause of action being given heirs by section 377.

2. Common law ⇨16—Statutes are presumed to state common-law rules, unless expressly otherwise declaring.

Statutes are presumed to state the common-law rules, unless they expressly otherwise declare.

Appeal from Superior Court, Alameda County; Homer R. Spence, Judge.

Action by Edward Buchanan Sears, a minor, by his guardian ad litem, Eleanor May Sears, and the latter individually, against Dr. Ergo A. Majors and another. Judgment for defendants, and plaintiffs appeal.

Affirmed.

James F. Brennan and P. J. Murphy, both of San Francisco, for appellants.

Dutton & Gilkey, of Oakland, for respondents.

STURTEVANT, J.

On March 28, 1929, the plaintiffs commenced an action for wrongful death. In the

first count of their complaint the plaintiffs alleged that on November 21, 1924, Edward E. Sears suffered an injury to the middle finger of his right hand; that he consulted the defendant Dr. Adams, and that the latter treated him; that later the injury developed into tetanus; that the malady proceeded to develop, and later caused the death of the decedent; that the defendant, by the use of ordinary care, should have injected a serum known as anti-tetanic serum, but the defendant negligently omitted to do so; that the said Edward E. Sears died on the 3d day of January, 1925; that he left him surviving a wife, one of the plaintiffs, and a son, the other plaintiff, who was at the time of the death of his father of the age of fifteen years; that on the 28th day of March, 1927, the mother was appointed guardian ad litem of her son, and thereupon this action was commenced by the guardian ad litem in behalf of the minor son and by the mother in her own behalf. In the second count, the same facts, except as to names and dates, are alleged regarding the defendant Dr. E. A. Majors. The defendants appeared separately, and each interposed demurrers to the second amended complaint. The demurrers were sustained without leave to amend, and from a judgment entered thereon the plaintiffs have appealed and have brought up the judgment roll.

[1] The pleadings present the question, Was the complaint barred by the statute of limitations? Both parties concede that in their complaint the plaintiffs attempted to allege a cause of action, bringing themselves within the provisions of section 377, Code of Civil Procedure. Both parties agree that at the time the action was commenced the mother was barred by the statute of limitations. Code Civ. Proc. § 340, subd. 3. However, the plaintiffs contend that the minor son was not barred by reason of the provisions of subdivision 1 of section 352 of the Code of Civil Procedure. The plaintiffs concede that section 377 is based, in part, on the English statute commonly known as Lord Campbell's Act, but they claim that said act has gone through so many changes that it can no longer be said the entire act has been inserted in the Code of Civil Procedure. In this behalf they assert that section 377 gives the rights therein mentioned and adopts and follows the Lord Campbell Act in part only. Continuing, they claim that subdivision 3 of section 340 is an entity unto itself and is a statute of limitations, not a part of the cause of action, but a statute applicable to the remedy only. Thereupon they claim that the provisions of subdivision 3 of section 340, Code of Civil Procedure, do not apply to persons falling within the exceptions defined in subdivision 1 of section 352.

Following this line of reasoning, the son, by his guardian, contends that his action was commenced in time, and that, the action having been saved as to the infant, it was also saved as to the mother. *Rabe v. Western Union Tel. Co.*, 198 Cal. 290, 244 P. 1077. In reply, the defendants assert that a single joint cause of action is given to the heirs by section 377, Code of Civil Procedure, and that the language of the statute permits of no other construction. Civ. Code, § 1431; *Salmon v. Rathjens*, 152 Cal. 290, 294, 92 P. 733. Continuing, they claim that, the action being barred as to all excepting the infant, it was also barred as to him. We think the contention is well founded. True, the court has never decided the point with reference to Code of Civil Procedure, § 377, but the decisions are so closely in point as to be determinative. In the case of *Robertson v. Burrell*, 110 Cal. 568, 42 P. 1086, the plaintiffs sought to establish title to certain properties as the surviving heirs of their father, who, they alleged, was at the time of his death a partner of defendants' decedent. When their father died, he left him surviving a widow and minor children. The widow allowed the action to become barred prior to her death. At page 577 of 110 Cal., 42 P. 1086, 1088, the court said: "Where the right of action is joint, knowledge which would bar it as to one would bar it as to all, either in law or equity. *Freem. Coten*, § 375; *Wait Act*, & *Def.* p. 279; *Jordan v. McKenzie*, 30 Miss. 32; *Hardeman v. Sims*, 3 Ala. 747. And, where a right of action is barred to the ancestor, it is barred to his heirs. *Shortridge v. Allen*, 2 Tex. Civ. App. 193, 21 S. W. 419." The discussion in section 375 of *Freeman on Cotenancy* is most exact and instructive. Other text-books state the same rule. 2 *Wood on Limitations* (4th Ed.) p. 1079; 19 *Am. & Eng. Ency.* 182.

[2] It must be conceded that the common-law rule was as stated by Judge Freeman. Our statutes are presumed to state the common-law rule, unless they expressly otherwise declare. 23 Cal. Jur. 785. As our statute does not contain anything to the contrary, the common-law rule should be applied. As in harmony with what we have said, we cite *May v. C. & O. Ry. Co.*, 184 Ky. 493, 212 S. W. 131, 137; *Napier v. Little*, 137 Ga. 242, 73 S. E. 3, 38 L. R. A. (N. S.) 91, Ann. Cas. 1913A, 1013; *Pickens v. Stout*, 67 W. Va. 422, 68 S. E. 354; *Settle v. Simpson*, 204 Ky. 470, 264 S. W. 1092; *Williams v. Sutton*, 43 Cal. 65, 73. The trial court did not err when it made an order sustaining the demurrers.

The judgment is affirmed.

We concur: NOURSE, J.; DOOLING, Justice pro tem.

103 Cal. App. 790

In re WOOD. ★

WOOD v. WOOD.

(Civ. 7107.)

District Court of Appeal, Second District, Division 1, California. Feb. 10, 1930.

Rehearing Denied Feb. 28, 1930. Hearing Denied by Supreme Court April 10, 1930.

1. Divorce ⇨312—Divorced husband appealing from order changing custody of child to wife cannot question irregularity on hearing, where counsel acquiesced.

Husband obtaining divorce, and who was first awarded custody of minor child, cannot, after subsequent order taking custody from him and placing child in custody of wife, raise any question as to alleged irregularity which occurred on hearing of matter before referee appointed by trial court, consisting of examination by referee of minor daughter as witness without first administering legal oath and without presence of either of parties to proceeding, where record on appeal fairly disclosed that counsel for various parties agreed and acquiesced in procedure.

2. Divorce ⇨302—In absence of appeal from order giving father custody of child or finding otherwise, unfitness of mother must be considered established.

Where trial court, in action for divorce by husband, in awarding custody of minor child to husband, made findings that mother was not fit and proper person to have care or custody of child, in absence of other findings of fact with reference to fitness of mother, and no appeal having been taken from order based on finding, unfitness of mother as of date of order placing custody of child with father must be taken as having been conclusively established.

3. Divorce ⇨312—Error, if any, in excluding evidence of mother's conduct before order giving divorced father custody of child held not error, where mother seeking custody showed exemplary conduct (Const. art. 6, § 4½).

Where entire evidence introduced on hearing of motion presented by mother to have custody of minor child changed to her from father obtaining divorce tended to prove that her then mode of living was, and for many months theretofore preceding had been, exemplary in all respects, with no suggestion of any irregularities or departures from established conventionalities, error, if any, in refusal of referee to consider in evidence matters and things that had transpired prior to making of original order or conditions as they existed at time of making of original order, did not result in miscarriage of justice within contemplation of Const. art. 6, § 4½.

4. Divorce ⇨303(3)—Failure to receive in evidence testimony on hearing of former motion regarding inherent mental condition of mother seeking custody of child held not error.

Failure or refusal of referee, on hearing of mother's motion to have custody of minor child changed from father to her, to receive in evidence and to consider transcript of testimony given by two witnesses on hearing of former motion therefor, relating to inherent mental condition of mother, held not error, since referee

was concerned solely with question of whether, at time of hearing under consideration, mother was more fit than father to be intrusted with care and rearing of minor daughter.

5. Divorce ⇨312—In absence of abuse of discretion, order giving father custody of child and order changing custody to mother are conclusive.

In absence of clear abuse of discretion, order of court with jurisdiction placing custody of minor child with divorced father and subsequent order changing custody from father to mother were conclusive, since, in divorce proceedings, court may vary and modify decree as to custody of minor children from time to time as circumstances change.

Appeal from Superior Court, Los Angeles County; Henry M. Willis, Judge.

Action for divorce by Templeton W. Wood, against Matilda Evelyn Wood. Two subsequent several orders changed the custody of a minor child from the husband, to whom it was first awarded, to the custody of the wife, and plaintiff appeals. Orders affirmed.

Morin, Newell & Brown and J. W. Morin, all of Pasadena, for appellant.

Milton M. Cohen and C. O. Bacon, both of Los Angeles, for respondent.

HOUSER, J. In an action for divorce between the parties hereto, an interlocutory decree was entered in favor of the plaintiff. Thereafter, by order of the trial court, the custody of a minor daughter of the parties was awarded to the father. Some 18 months later (by way of motion), the mother sought from the trial court a modification of the former orders, to the end that the custody of the daughter be changed from the father to the mother. It is from each of two several orders by which such change of custody of the daughter was directed that the appeal herein is taken.

[1] Appellant first complains of an alleged irregularity which occurred on the hearing of the matter before a referee appointed by the trial court, which, as stated by appellant, consisted of an examination by the referee of the daughter as a witness without first administering to her the legal oath, and without the presence of either of the parties to the proceeding; also in forbidding either examination or cross-examination of said witness by either of counsel representing the respective parties to the action. As in connection therewith the record on appeal fairly discloses the fact that "counsel for the various parties agreed and acquiesced in the said procedure," it is manifest that appellant is now in no position to raise any question with reference thereto.

Prejudicial error is suggested, in that the referee "refused to consider in evidence mat-

ters and things that had transpired prior to the making of the (original) order, * * * or conditions as they existed at the time of the making of the (original) order," by which the custody of the minor daughter was awarded to the father.

[2] As a basis for the first order, the trial court made certain findings of fact, among which is the statement that the mother was "not a fit and proper person to have the care or custody or control of said minor child * * * —the court having determined that the influence of the defendant (the mother) is disturbing to the child and has a tendency to retard her progress from the effect of certain former unfortunate and prejudicial influences." No other findings of fact having been made with reference to the fitness of the mother to have the care and control of the child, and, no appeal having been taken from the order which was based upon such finding, the unfitness of the mother, as of the date of said order, must be taken as having been conclusively established. The sole purpose of the later inquiry instituted by the mother was to determine whether, since the date of the former order, such an intrinsic change had taken place in the character of the mother and her surroundings, as manifested by her then disposition, proclivities, and general conduct since the rendition of the former order, as would justify the conclusion that, considering the then surroundings of the father and the daughter, the mother was more fit and proper than the father to have the care, custody, control, and rearing of such child.

[3] It is apparent that, so far as the hearing on the motion which resulted in the order here in question is concerned, even by the introduction of evidence identical with that which was adduced on the hearing of the former motion, or, if conceivable, even by stronger evidence relating thereto, a conclusion more unfavorable to the fitness of the mother to have the care and custody of the daughter as of the date of the first order would not have been possible. On the hearing of the motion made by the mother, so far as concerned the condition of her former unfitness to have the custody and control of the daughter, that condition was necessarily unconditionally accepted as, and conceded to be, a definite, incontestable, fact. Since nothing could be added to such conclusion as of the date of the former order, nor anything be subtracted from it, the uselessness of evidence relating to facts upon which to rest a like ultimate conclusion is manifest. The only bearing that evidence as to specific acts preceding the former order could have upon the issue as to the propriety of making a change in the custody and control of the daughter was that the former conduct of the mother might afford some indication as to what possibly

might be expected in the future; but, considering the fact that the entire evidence introduced on the hearing of the motion presented by the mother, if it did not establish, at least it tended to prove, that her then mode of living was, and for many months theretofore preceding had been, exemplary in all respects, with no suggestion of any irregularities or departures from established conventionalities—it is apparent that the error (assuming it to be such) of which complaint is made was not of that importance which in itself would justify a reversal of the order. From a consideration of the "entire cause, including the evidence," this court is not of the opinion "that the error complained of (if any) has resulted in a miscarriage of justice." Section 4½, art. 6, Const.

[4] Further complaint is registered by appellant because of the failure or refusal of the referee to receive in evidence and to consider a transcript of the testimony given by two witnesses on the hearing of the former motion relating to "the inherent mental condition" of the mother. In addition to other patent legal reasons for sustaining the objection interposed by counsel for the mother to the introduction of such testimony, it need only be reiterated that the referee primarily was concerned, not with conditions preceding the date of the former order, but was properly interested solely with the question of whether at the time of the hearing here under consideration was the mother more fit than the father to be intrusted with the care and rearing of their minor daughter.

[5] With much earnestness appellant urges this court to review the evidence, and, founded thereon, in effect to direct the entry of an order by which the custody of the child will remain in the father. But the law is well settled that, where the issue relates to the care and custody of minor children, in the absence of a clear abuse of discretion, the orders made by a court having jurisdiction in the premises are conclusive. The relative functions of the lower court and an appellate tribunal in such matters are aptly and forcefully stated in the case of *Crater v. Crater*, 135 Cal. 633, 634, 67 P. 1049, 1050, as follows:

"* * * It is well established that in divorce proceedings the court has the power to vary and modify its decree as to the custody of the minor children from time to time as circumstances change. The court, in revising and modifying its decree, proceeds upon new facts considered in connection with the facts formerly established, the change of circumstances, the conduct of the parties, and the best interests of the child. The good of the child is regarded as the controlling force in directing its custody, and the courts will always look to this, rather than to the whims and caprices of the parties. The morals of the parents, their financial condi-

tion, their subsequent marriage, the age of the child, and the devotion of either parent to its best interests, are all factors to be weighed and considered by the court. All such applications are addressed to the sound legal discretion of the court below, and its conclusion will not be disturbed here, except it should clearly appear that its discretion has been abused. * * * " To the same effect see: *Swenson v. Swenson* (Cal. App.) 281 P. 674; *Van Der Vliet v. Van Der Vliet*, 200 Cal. 721, 254 P. 945; *Bancroft v. Bancroft*, 178 Cal. 352, 173 P. 582; *Black v. Black*, 149 Cal. 224, 86 P. 505; *Dickerson v. Dickerson*, 108 Cal. 351, 41 P. 475; *Lefebvre v. Lefebvre*, 48 Cal. App. 483, 192 P. 76.

For the reason that each of the other errors suggested by appellant is subsidiary to or dependent upon those alleged errors to which attention herein has been directed, it is deemed unnecessary to give to them further consideration.

The orders are affirmed.

We concur: CONREY, P. J.; ELLIOT CRAIG, Justice pro tem.

103 Cal. App. 510

MORGAN et al. v. MATTHIESON et ux.★
(Civ. 7237.)

District Court of Appeal, First District, Division 1, California. Jan. 29, 1930.

As Modified on Denial of Rehearing Feb. 28, 1930. Hearing Denied by Supreme Court March 27, 1930.

1. Deeds ⇨66—Whether grantor's handing of deed to grantee, after having placed it in trust subject to surrender, constituted delivery, vesting absolute title, held question of fact.

Where deed was delivered to grantee's husband to be held in trust, subject to surrender to grantor on demand at any time during his life, question whether grantor, thereafter receiving deed from trustee and handing it to grantee, made delivery, removing deed from operation of agreement and giving grantee absolute title, held one of fact for trial court, where evidence was conflicting.

2. Appeal and error ⇨994(3), 1012(1)—Trial judge sitting without jury passes upon credibility of witnesses and weight of testimony.

It is the function of the trial judge sitting without a jury to pass upon the credibility of witnesses, to weigh their testimony, and to draw inferences therefrom.

3. Evidence ⇨594—Judge trying facts may consider unimpeached testimony in light of conduct of parties and attendant circumstances.

Trial judge, as trier of facts need not give implicit faith to testimony not directly impeach-

ed, but is justified in testing it by the conduct of the parties, distinctive characteristics of transaction, and attendant circumstances.

4. Deeds ⇨208(1)—Finding that deed, recorded only after grantor's death and originally delivered in trust subject to cancellation, was never delivered to grantee, held justified in cancellation suit.

In action by executors to cancel deed purporting to have been made by deceased to defendant, which was not recorded until after maker's death, and which was originally given to grantee's husband in trust under agreement permitting its withdrawal on demand, finding of trial court that there had been no delivery to grantee and that executors were entitled to cancellation held justified.

5. Deeds ⇨200—Evidence of circumstances surrounding companion deed held admissible to establish intent of deceased grantor, in suit to cancel deed for want of delivery.

In suit by executors to cancel deed from deceased on ground that there had been no delivery, circumstances surrounding execution of companion deed were admissible in arriving at intent and real meaning of transaction, where the two deeds were made as parts of one scheme.

6. Deeds ⇨200—Subsequent letters and declarations of deceased grantor indicating intent not to give property held admissible in suit for cancellation of deed for want of delivery.

In suit by grantor's executors for cancellation of deed on ground that there was no actual delivery to grantee, letters and subsequent declarations of grantor made after the time of the alleged delivery were admissible on question of grantor's intent, where letters recited that grantee under companion deed had secured transaction through threats, and expressed wish that administrators would not give her home place, and declarations related to request to trustee to whom the deeds were given to "get those papers."

7. Deeds ⇨200—In suit to cancel deed for want of delivery, after grantor's death, reasonable freedom must be accorded in judging relevancy of evidence, where testimony was conflicting.

In suit for cancellation of deed of deceased grantor on ground of want of delivery, in which evidence was conflicting and two deeds were made as part of same transaction, reasonable freedom must be accorded in judging relevancy of evidence.

Appeal from Superior Court, Los Angeles County; Malcolm C. Glenn, Judge.

Action by A. S. Morgan and W. L. Pollock, as executors of the last will and testament of J. J. Morgan, deceased, against Henry H. Matthieson and wife. Judgment for plaintiffs, and defendants appeal. Affirmed.

George M. Harker, of Los Angeles, for appellant Willa Matthieson.

G. R. Dexter and Raymond S. Taylor, both of Los Angeles, for respondents.

JOHNSON, Justice pro tem. This is an action by two of the three executors of the will of J. J. Morgan, deceased, to cancel a certain deed purporting to have been made by the decedent to the defendant Willa Matthieson, but not recorded until after the maker's death.

The defendant Henry H. Matthieson, being one of the executors as well as the husband of the defendant Willa Matthieson, did not join his fellow executors in prosecuting the action, and, though named as a defendant in his individual as well as his representative capacity, he filed a disclaimer, leaving the defense of the action to his wife.

The point in controversy is as to delivery of the deed in question; and, judgment having gone in favor of the estate, Mrs. Matthieson took this appeal.

The decedent, J. J. Morgan, a resident of Hollywood, who lived to the age of about 84 years, had known Mrs. Matthieson and her sister, Eleanor McIntyre, for about twenty-five years prior to his death, which occurred on May 31, 1925. The women, who were in the habit of calling Morgan "Uncle Jerry," were distantly related to him by marriage. Morgan, though eccentric and illiterate, was an intelligent, strong-willed, shrewd man of business, and had amassed an estate valued close to a million and a half dollars. He had married twice, had six children and certain grandchildren, but had been divorced from his second wife. After his divorce, he arranged with Mrs. McIntyre to keep house for him. She was about forty-four years his junior; and about six months before his death a written contract, dated November 10, 1924, had been made between Morgan and Mrs. McIntyre, which, after reciting an agreement to marry, obligated Morgan on or before the day of the marriage to convey to Mrs. McIntyre as her separate estate an undivided half interest in his home place, known as No. 1836 Taft avenue, Hollywood. And, by way of an antenuptial settlement, Morgan further agreed, at the end of each of four quinquennial periods following marriage, to pay to Mrs. McIntyre certain fixed sums aggregating \$62,100; the successive payments being made conditional, however, upon the continuance of Morgan's life, and being intended to remove "all and every temptation that might spring up along life's journey." The wedding was postponed several times, but never took place.

The relations between Morgan and the Matthiesons were friendly. Mrs. Matthieson was called somewhat frequently to relieve her sister in the care of Morgan; and Mr. Matthieson's co-operation was sometimes sought by Morgan in business matters.

Morgan seems at various times to have indulged in promises of conveyances to Mrs. Matthieson and her sister; but he delighted more in promises than in performance. He

did, however, give each of them a legacy of \$5,000 in his will.

According to Matthieson's testimony, about a month and a half before Morgan died, he sent for Matthieson. When Matthieson arrived at the house, Morgan declared that he was going to make deeds to some "loved ones," whom he did not then name, but whom he said he had promised at different times to pay for what they had done for him. He wanted, however, to be sure that his interests were protected, as he put it; and after several conferences Matthieson was instructed on April 20, 1925, to have a deed drawn to his wife for the property in suit, another deed to Mrs. McIntyre for the home place, and two other deeds to two of the grandchildren, Hazel Knapp and Earl Pollock. The deeds were prepared, and were signed and acknowledged by Morgan on April 21st.

These four deeds were then delivered into the possession of Matthieson with a letter dated April 20th, drafted by Morgan, and, after correction, typed and signed in duplicate; one copy being kept by Morgan, the other by Matthieson. This letter stated that the deeds were to be held in trust by Matthieson, subject to surrender to Morgan on demand at any time during his life. The letter closed with this further injunction: "In the event of my death, you are to record these deeds at once, provided no circumstances arise which would cause doubt in your mind. At no time and under no other consideration are they to be so recorded." At the foot of the letter Morgan had Matthieson sign an acceptance of the trust, with an agreement not only to perform the duties undertaken, but also to pay Morgan all damages growing out of failure in any particular.

The story of delivery of the deeds, as pieced together from the testimony given in behalf of Mrs. Matthieson by her husband, her sister, and herself, is as follows: Morgan and Matthieson went together to the notary's office on April 21st. There the deeds were acknowledged; and, as they left the office, the deeds were handed by Morgan to Matthieson, who already had his copy of the letter of April 20th. The two men then returned to Morgan's house. Hardly had they arrived when Morgan asked Matthieson for Mrs. McIntyre's deed; and, on receiving it, Morgan turned to Mrs. McIntyre, then present, and handed her the deed, saying that he gave her the property for faithful service, and because of their marriage contract, and that the place was now her home. Nevertheless he asked her not to record the deed, stating that there might be objection from his children, and that for his better contentment he wished her to return the deed to Matthieson to hold for her. This she did; and, after she had left the room, Morgan remarked that that deed was "out from under the agreement."

Then, before Matthieson left the house, Morgan asked him to bring Mrs. Matthieson that evening, saying he wished to deliver her deed to her. The Matthiesons arrived early in the evening, and immediately at Morgan's request Matthieson handed him Mrs. Matthieson's deed. Thereupon Morgan passed the deed to the lady, telling her that he had that afternoon given Mrs. McIntyre a deed to the home place, and added that he had been promising Mrs. Matthieson a present for twenty-five years and was now giving her a lot in Hollywood. Mrs. Matthieson, taking the deed, laid it on the mantel with her purse and gloves. Morgan then said that Mrs. McIntyre had agreed to let Matthieson hold her deed while he himself lived, and asked Mrs. Matthieson as a favor to him to let her husband hold her deed likewise, so that it would not be recorded during Morgan's lifetime. Mrs. Matthieson assented, and, as they left, handed her deed to her husband.

According to the testimony, Morgan told both Mrs. McIntyre and Mrs. Matthieson that he might want to buy the properties back from them, in which case he would pay them certain amounts, which he named.

Nothing more was done with the deeds until the day of Morgan's funeral, at which time Matthieson recorded the deeds made in favor of his wife and her sister, and also the deeds to the two grandchildren; and, after the deeds had been recorded, he gave them to the respective grantees.

While such was the testimony at the trial, given by the witnesses for the defendant, Mrs. McIntyre's testimony was in conflict with that previously given by her in a deposition, wherein she admitted that she knew of the deposit agreement when it was being prepared, and that it had been handed to her at that time to look over. She said also, in reference to the return of her deed to Matthieson, that that was done because Morgan did not want anybody to interfere with the instructions he had given Matthieson, and that all the deeds were to be held under the same instructions. Nothing was said in her deposition about her deed and Mrs. Matthieson's being "out from under the agreement." Likewise Matthieson's testimony was impeached by an affidavit made by him on September 22, 1925, before the suit was begun, and when he was acting as special administrator of the Morgan estate. In that affidavit, after stating how the deeds were made and setting forth a copy of the deposit agreement, he declared that the four deeds were delivered to him by Morgan after being shown to Mrs. McIntyre and Mrs. Matthieson "for the purpose of apprising them of the existence of said deeds, it being the intention and desire of said decedent that said deeds be kept by affiant under the terms and conditions of said memorandum of agreement herein set forth." He declared also that the

deeds remained continuously in his possession until recorded, and that no other or further instructions were ever given him, except that Morgan had said that he might want to recall them for financial reasons, and that, if demand had been made by Morgan upon him, he would have surrendered the deeds to Morgan. This affidavit was made for use in connection with a return filed for the purpose of fixing the federal estate tax, and was made by Matthieson at the request of his coexecutor Pollock, to whom Matthieson had previously made like verbal statements.

Further evidence casting doubt upon the testimony concerning delivery to the two women consisted of two letters written by Morgan in his own hand, and found in his safety deposit box after his death. One was written April 22, 1925, the very day after the alleged deliveries, the other on April 23d, and both were addressed to Morgan's administrator, or all whom it may concern. In those letters, idiocratically spelled, Morgan states, in substance, that on April 21st he deeded the home place to Mrs. McIntyre, but that she had "secured the transaction" through threats of bringing him into court in connection with his agreement to marry her, and that what he had done was to escape notoriety and rather than to have his "good name villified"; and in the letter of April 23d he expressed a wish to have the administrators "help her to the amount of \$1,000 to \$1,500 dollars, but not the Home place." The letters were witnessed by Morgan's secretary, to whom he said that they were important documents and would mean a great deal after his death.

These letters, calculated indeed to "cause doubt" in the mind of the depositary, are significant aids to the interpretation of the peculiar language of the deposit agreement; and, when read with that agreement, necessarily cast discredit on the testimony of the parties interested in the deeds.

While Mrs. Matthieson's testimony was not directly impeached, as was that of her husband and her sister, yet the alleged delivery of the deed to her was so concatenated with that of the deed to Mrs. McIntyre as to put both, as Matthieson is reported by one of plaintiffs' witnesses to have said, in the same basket. The letters help also to point the meaning of certain remarks of Morgan during his last illness. To his daughter, Mrs. Pollock, and her husband, one of the executors, who were sitting at his bedside on an occasion when Matthieson and Mrs. McIntyre left the room together, Morgan said, according to Pollock's testimony, "Watch them, they will steal everything you have got; there is an important paper, find it; it means thirty thousand dollars to the estate."

The trial court found, among other things, that the deed to Mrs. Matthieson had been delivered to her husband by Morgan with in-

structions to hold it for Morgan during his life, but subject to surrender upon his demand, and in no event to record the deed until after Morgan's death; that it was not Morgan's intention to divest himself of title or to vest a present title in Mrs. Matthieson; that there never had been a delivery of the deed to Mrs. Matthieson; and that the property formed part of the Morgan estate. The court accordingly held the executors entitled to have the deed canceled and possession of the property surrendered to the estate.

There is no attempt on the part of Mrs. Matthieson to found investiture of title in herself upon the deposit of the deeds with her husband under the agreement of April 20th. It is conceded that Morgan's retention of control defeated transmission of title. 9 Cal. Jur. 163, 171.

[1, 2] The defendant does insist, however, that there was a personal delivery to her by Morgan, whereby her deed was removed from the operation of the agreement, and she acquired absolute title on the evening of April 21st. That issue involved a disputed question of fact which it was the function of the trial judge to determine from the facts and circumstances in evidence. It was for him to pass upon the credibility of the witnesses, to weigh their testimony, and draw therefrom his inferences. *Hotaling v. Hotaling*, 193 Cal. 368, 382, 224 P. 455, 56 A. L. R. 734; *Duffy v. Duffy*, 71 Cal. App. 251, 258, 235 P. 62.

[3] In all such cases, evidence as to the delivery of a deed, not recorded until after the chief actor's death, must necessarily be closely scrutinized; and the law demands that such a deed shall have in its support evidence clear, unequivocal, and convincing, such as satisfies the court of actual intent to pass immediate title. It is manifest from the written decision of the trial court that the judge did not find the evidence in behalf of the defendant to be of a convincing character, and concluded that the preponderance of the evidence was in favor of plaintiffs. Though Mrs. Matthieson was not directly impeached, yet the judge was not bound to give implicit faith to her testimony. He was justified in testing its verity by the conduct of the parties, the distinctive characteristics of the transaction, and all the attendant circumstances. *Davis v. Judson*, 159 Cal. 121, 128, 113 P. 147; *Blanc v. Connor*, 167 Cal. 719, 722, 723, 141 P. 217; *Caldwell v. Weiner*, 203 Cal. 543, 546, 264 P. 1110.

[4] Our statement of the evidence, as gathered from the record, exhibits abundant justification for the decision rendered, and the finding of the trial court is conclusive on this appeal.

[5] The defendant complains of the admission of evidence concerning Mrs. McIntyre's

deed and the precautions taken in relation to it by Morgan. In the admission of that testimony the court did not err. The deeds were made as parts of one scheme. And, in respect of the alleged personal deliveries, one in the afternoon, the other in the evening, of April 21st, Mrs. Matthieson's deed was so linked to her sister's as to make the circumstances surrounding both occurrences proper evidentiary matter as an aid in arriving at the intent and real meaning of the transaction. *Williams v. Kidd*, 170 Cal. 631, 645, 151 P. 1, Ann. Cas. 1916E, 703; *Cox v. Schnerr*, 172 Cal. 371, 380, 156 P. 509.

[6] The letters and subsequent declarations of Morgan were also admissible, not to disparage the deed, but to give light on the question whether in any of his dealings about the deeds Morgan's intent was to divest himself of title. *Williams v. Kidd*, 170 Cal. 631, 648, 649, 151 P. 1, Ann. Cas. 1916E, 703; *Fisher v. Oliver*, 174 Cal. 781, 788, 164 P. 800.

[7] In cases of this character, the truth cannot always be elicited by focusing the evidence sharply on the precise point in dispute. There are often sidelights of revealing power; and reasonable freedom must be accorded in judging the relevancy of evidence and sifting the facts. We are satisfied that no undue latitude was permitted in this instance.

The judgment is affirmed.

We concur: TYLER, P. J.; CASHIN, J.

103 Cal. App. 779

LAMPLE v. McDOUGALL. (Civ. 4015.)★

District Court of Appeal, Third District, California. Feb. 8, 1930.

Rehearing Denied March 10, 1930. Hearing Denied by Supreme Court April 7, 1930.

1. Deeds $\S$ 194(2)—Presumption is that deed found among papers of grantor after his death was never delivered.

Where deed which has been duly executed and acknowledged is subsequently found among papers of grantor after his death, presumption arises that it was never delivered, and burden of proof rests on party claiming under deed, notwithstanding provisions of Civ. Code, $\S$ 1055, which provides that grant duly executed is presumed to have been delivered at its date.

2. Deeds $\S$ 194(2)—Burden of proving deed found among grantor's papers was delivered rests on claimant.

Where deed which has been duly executed and acknowledged is found among papers of grantor after his death, burden of proving delivery of deed rests on party claiming thereunder.

3. Deeds ⚡208(2)—Evidence held to support finding that deed found among grantor's papers was never delivered.

In action to quiet title to property, deed to which was found among papers of grantor after his death, evidence held to support implied finding that deed was never delivered.

4. Quieting title ⚡29—Where husband devised all property to wife, husband's heirs, during wife's lifetime, could not attack deed found among husband's papers after his death conveying land to wife as regards claim that action to quiet title was barred by laches (Civ. Code, §§ 700, 1386, subd. 8).

Where husband, after bequeathing all his property to his wife, executed deed conveying certain land to his wife, which deed was found among his papers after his death, husband's heirs, during lifetime of wife, could not maintain action questioning validity of deed, as regards claim that cause of action to quiet title was barred by laches, since, if they would take anything, they would take under Civ. Code, § 1386, subd. 8, which provides for succession of property of surviving spouse, and as heirs had mere expectancy which is not deemed interest of any kind under section 700.

5. Evidence ⚡271(17), 317(18)—Statement of defendant's intestate showing that property had been conveyed to her held hearsay and self-serving.

In action to quiet title, statement of defendant's intestate tending to show that property had been conveyed to her held inadmissible as hearsay and self-serving.

6. Executors and administrators ⚡453(2)—Where husband had devised all property to wife, judgment that wife's administrator in suit by husband's administrator to quiet title had no right to land held erroneous.

Where husband devised all property to his wife, and subsequently executed deed conveying certain land to his wife, which deed was found among his papers after his death, in suit by administrator of husband's estate after death of wife to quiet title to land, judgment that administrator of wife's estate had no right, title, and interest to land held erroneous, since, on settlement of husband's estate, residue would go to wife's estate.

Appeal from Superior Court, Sacramento County; Malcolm C. Glenn, Judge.

Action by Agneda E. Lample, as administratrix with the will annexed of the estate of Peter Paulson, deceased, against Donald McDougall, as administrator of the estate of Trena Paulson, deceased. Judgment for plaintiff, and defendant appeals. Affirmed as modified.

Eric Lyders, of San Francisco, and C. H. S. Bidwell, of Sacramento, for appellant.

Irving D. Gibson, of Sacramento, for respondent.

FINCH, P. J. This is an action to quiet title to 20 acres of land. The complaint also

states a cause of action for the recovery of money, but the court granted a nonsuit as to that cause of action, and it need not be further considered. Judgment was entered quieting plaintiff's title to the land, and the defendant has appealed.

The plaintiff sues as the administratrix with will annexed of the estate of Peter Paulson, deceased. The defendant is the administrator of the estate of Trena Paulson, deceased. The decedents were husband and wife. The land in suit was the separate property of the husband. October 9, 1912, he executed the will referred to, devising and bequeathing all his property to his wife. November 24, 1919, Peter Paulson signed and acknowledged a deed purporting to convey the land to his wife "in consideration of love and affection." February 11, 1921, he rented a safe deposit box at a bank, giving instructions that no one was to have access thereto but "just himself." March 23, 1922, he died. The deed was in this safe deposit box at the time of his death. Trena Paulson did not file the will for probate, but caused the deed to be duly recorded April 3, 1922. She held possession of the land and exercised dominion over it until May 14, 1925, when she died intestate. It appears that neither the husband nor the wife left any surviving children, but that fact is immaterial in this case. That is a question to be determined in the administration of their respective estates. The only issue of fact in this case is whether the deed referred to was ever delivered by Peter Paulson to his wife.

[1-3] Appellant relies on section 1055 of the Civil Code, which reads as follows: "A grant duly executed is presumed to have been delivered at its date." There is a conflict in the decisions as to whether the presumption mentioned in that section relates to the fact of delivery or merely to the time of delivery after the fact of delivery has been proved. For the purposes of this opinion, it may be conceded that the presumption relates to the fact of delivery as well as to the time of delivery. "Where a deed which has been duly executed and acknowledged is subsequently found in the possession of the grantor, a presumption arises that it was never delivered, and the burden of proof rests upon the party claiming under the deed. The rule applies where a deed is found among the papers of the grantor after his death." 18 C. J. 417; Tweedale v. Barnett, 172 Cal. 271, 275, 156 P. 483; Donahue v. Sweeny, 171 Cal. 388, 390, 153 P. 708; City Lumber Co. v. Brown, 46 Cal. App. 603, 606, 189 P. 830. The defendant called a witness to prove that Peter Paulson stated, subsequent to the date of the deed, that he had conveyed the land to his wife. The only rational inference, however, from the conflicting statements of the witness, is that the husband, in the language of the wit-

ness, "wanted her to have the property," but did not say he had conveyed it to her. Up to the time of his death, he managed the property as his own, and it does not appear that his wife had any voice in the control thereof. The evidence fully supports the implied finding that the deed was never delivered.

[4] The answer alleges that the plaintiff's cause of action is barred by laches. This contention is based upon the erroneous theory that the heirs of Peter Paulson, at all times since his death, could have maintained an action to have it adjudged that the deed was never delivered. If such heirs succeed to any part of the property, they will take under the provisions of subdivision 8 of section 1386 of the Civil Code. Subject to the contingency mentioned in that subdivision, Trena Paulson took title in fee simple under her husband's will. She could have sold the property or disposed of it by will to the exclusion of her deceased husband's heirs. During her lifetime they had no interest in the property, and, of course, could maintain no action in relation thereto. "A mere possibility, such as the expectancy of an heir apparent, is not to be deemed an interest of any kind." Civ. Code, § 700.

[5] Appellant contends that he should have been permitted to prove statements of Trena Paulson tending to show that the property had been conveyed to her. Such evidence would have been hearsay and self-serving.

[6] The judgment is erroneous in adjudging that the defendant, "as administrator of the estate of Trena Paulson, deceased, has not any estate, right, title, interest or claim whatever in or to said real property hereinabove described, or in or to any part or portion thereof." Upon the settlement of the estate of Peter Paulson, the residue of the estate remaining, after payment of debts and expenses of administration, will go to the estate of Trena Paulson, and will be subject to the payment of her debts and the expenses of administration of her estate. In the proceeding to administer her estate, it will be determined whether or not she left issue and whether or not she made a will disposing of the property in suit, questions which manifestly cannot be determined in this action. The proper judgment to be rendered in such a case as this appears in *Rice v. Carey*, 170 Cal. 748, 750, 151 P. 135.

The judgment is modified by adding to the part thereof quoted herein the words "except such title, estate and interest as vested in Trena Paulson as heir at law or devisee under the last will and testament of Peter Paulson, deceased." As so modified, the judgment is affirmed.

We concur: PLUMMER, J.; R. L. THOMPSON, J.

In re POZZO'S GUARDIANSHIP.

(Civ. 7253.)

District Court of Appeal, First District, Division 2, California. Feb. 11, 1930.

1. Insane persons ⇨26—Order appointing guardian constituted decision that facts conferring jurisdiction were present, and in absence of appeal would be binding if incompetents had notice.

Order appointing guardian constituted decision by court that facts necessary to confer jurisdiction were present, and that determination in absence of appeal would be binding if incompetent persons for whom guardian was appointed had legal notice of the proceedings.

2. Insane persons ⇨26—Erroneous determination of question whether court appointing guardian had jurisdiction, would not show lack of jurisdiction.

Erroneous determination of question whether court appointing guardian of adult incompetent persons had jurisdiction of either subject-matter or of persons, would not show a lack of jurisdiction.

3. Insane persons ⇨13—Incompetents were entitled to statutory notice of time and place of hearing of petition for letters of guardianship of their persons and estates (Code Civ. Proc. § 1763).

Incompetent adult persons for whom guardian was appointed, were entitled to at least five days' notice of time and place of hearing of petition for letters of guardianship of their persons and estates, under Code Civ. Proc. § 1763, as jurisdictional prerequisite of court, and if notice was not given, order appointing guardian would be void, since finding of court cannot bind incompetent persons if in fact they had no notice.

4. Insane persons ⇨25—Upon motion to vacate order appointing guardian, court upon new evidence could decide wards had no notice, jurisdiction of person depending upon fact thereof.

On motion accompanied by petition and affidavit to set aside and vacate order appointing guardian of adult incompetent persons and their estates, court upon new evidence would have had power to decide that wards had received no legal notice in fact, for, at least upon direct attack, jurisdiction of person depends upon fact of notice rather than upon record of notice.

5. Insane persons ⇨25—Affidavit of service of notice on incompetents introduced on motion to vacate order appointing guardian, is presumably affidavit which was before court appointing guardian notwithstanding alteration.

Notwithstanding that affidavit of service of notice upon adult incompetent persons for whom guardian was appointed contained alteration of date when introduced upon motion to vacate order appointing guardian, affidavit was presumably identical affidavit of service of notice which was before court at time guardian was appointed, since there is a presumption in favor of the regularity of judgment.

6. Insane persons ☞27—It may be assumed alteration in affidavit of service upon incompetents in evidence without objection was accounted for to court appointing guardian (Code Civ. Proc. § 1982; Pen. Code §§ 113, 132, 470).

Since there is presumption in favor of regularity of judgment, it may be assumed that alteration in affidavit of service of notice upon adult incompetents, for whom guardian was appointed, was properly and sufficiently accounted for when it was received in evidence by stipulation, and without objection, by court appointing guardian, doing away with necessity of one offering it to satisfactorily account for condition, as provided by Code Civ. Proc. § 1982, since unauthorized alteration of affidavit after being sworn to, or spurious or clandestine alteration, would likewise be unlawful under Pen. Code, §§ 113, 132, 470.

Appeal from Superior Court, Santa Clara County; F. B. Brown, Judge.

Proceedings for the appointment of a guardian of Francis Pozzo and another, contested by Carmen Pozzo, in which Frank Pozzo was appointed guardian of the persons and estates of the adult incompetent persons. A subsequent order set aside and vacated the order appointing the guardian, and the guardian appeals. Reversed, and a new trial of the motion ordered.

Whalen, Harzfeld & O'Brien, of San Francisco, for appellant.

Louis Oneal and C. E. Luckhardt, both of San Jose, for respondent.

PER CURIAM. The following opinion, prepared by Mr. Justice Koford prior to his death, is hereby adopted as the opinion of the court:

After proceedings to that end had in the superior court of the county of Santa Clara, Frank Pozzo was appointed guardian of the persons and estates of Francis Pozzo and Constance Pozzo, adult incompetent persons. The order was made on the 17th of August, 1928. Thereafter on the 18th of September, 1928, Carmen Pozzo, mother of said adult incompetent persons, served and filed a notice of motion, accompanied by a petition and affidavit to set aside and vacate the order appointing guardian of August 17, 1928. Thereafter on the 22d of January, 1929, a new notice of motion was served and filed for the same order specifying that the motion would be made on January 29, 1929. On the day last named, after hearing the motion, the court granted the same, setting aside and vacating the said order appointing guardian. This is an appeal by Frank Pozzo from the said order last named.

[1, 2] The grounds of the motion and the grounds upon which the said order are defended by the respondent are that the court making the order of August 17, 1928, had no

jurisdiction either of subject-matter or of persons for several reasons. With respect to most of these grounds, the original order appointing guardian constituted a decision by the court that the facts necessary to confer jurisdiction were present. Such determination, in the absence of appeal, in this proceeding would be binding if the incompetent persons had legal notice of the proceedings. The erroneous determination of these questions by the court making the original order would not show a lack of jurisdiction.

[3] The main ground upon which the order appealed from is defended, is, that the incompetent persons never had legal notice of the time and place of the hearing of the petition for the appointment of guardian. With respect to this jurisdictional fact, a finding of the court cannot bind the incompetent persons, if, in fact, they had no notice of the hearing. Legal notice to them was jurisdictional. They were entitled to at least five days' notice of the time and place of hearing of the petition for letters of guardianship of their persons and estates. (Code Civ. Proc., § 1763.) This notice is jurisdictional and if not given, the order appointing guardian is void. *Snyder v. Superior Court* (Cal. Sup.) 274 P. 337; *Grinbaum v. Superior Court*, 192 Cal. 528, 221 P. 635; *McGee v. Hayes*, 127 Cal. 336, 59 P. 767, 78 Am. St. Rep. 57; *Estate of Eikerenkotter*, 126 Cal. 54, 58 P. 370; 33 Cor. Jur., pp. 1079, 1080; 34 Cor. Jur., p. 370.

[4-6] The question presented by this appeal is, therefore, whether the court could decide from the evidence before it that the previous order appointing guardian was made without jurisdiction of the persons of the wards for lack of legal notice. The court making the vacating order appealed from, heard no new and independent evidence. At the hearing of the motion all the files of the case were by stipulation considered as in evidence before the court, but no new evidence was received. In granting the motion, the court upon this evidence made written findings of fact and conclusions of law. The findings of fact upon the issue of notice recited that the affidavit of service of notice upon the incompetent persons specifies that the notice was served upon the 15th of August, 1928; that it was sworn to on the 16th of August; that on the face of the affidavit the figures 15 are crossed with a line and replaced by the figures 11, but that it does not appear from said affidavit when, or by whom, the said change in figures was made; that the change was not initialed; that the certificate of inability of the incompetent persons to attend court was signed and acknowledged by the medical superintendent of the State Home for Feeble Minded on the 16th day of August, 1928. Under the heading of conclusions of law, the court found that there was no jurisdiction of the said incompetent persons and

that they had received no notice of the time and place of hearing of appellant's petition as required by law. Upon new evidence the court would have had power to decide that the wards had received no legal notice in fact, for, at least upon a direct attack, jurisdiction of the person depends upon the fact of notice rather than upon the record of notice (14 Cal. Jur., § 89, pp. 1025, 1026). Here, however, the court from a mere inspection of what amounts to the judgment roll of the order appointing guardian decided that no notice was given. Notwithstanding the above-mentioned alteration upon the face of that judgment roll, it was presumably the identical affidavit of service of notice which was before the first court at the time the guardian was appointed. Several reasons may be stated for this. There is a presumption in favor of the regularity of the judgment. 34 Cor. Jur. 352, 353; 15 Cal. Jur., pp. 67, 68, 75, 76. From this it may be assumed that the alteration in the affidavit was properly and sufficiently accounted for when it was received in evidence by the first court. The unauthorized alteration of the affidavit after being sworn to, or the spurious or clandestine alteration of the affidavit in the custody of the county clerk after the first hearing would likewise be unlawful. (Pen. Code, §§ 470, 113, 132.) Finally, while it is true that when a mutilated or altered document is offered in evidence, it devolves upon the one offering it to satisfactorily account for its condition before it may be received in evidence (Code Civ. Proc., § 1982), in this case it was received by stipulation and without objection.

These presumptions negative all the possible grounds we are able to think of which would authorize the second court to decide without new evidence that the notice was not in fact timely served, or that the record of the guardianship proceedings showed upon their face that no legal notice was given.

We must, therefore, hold that the evidence given upon the motion to vacate the order appointing guardian was insufficient to support the court's decision that the order appointing guardian was void. The order appealed from is reversed, and a new trial of the motion is ordered.

BERG v. TRAEGER, Sheriff. (Civ. 5659.) ★

District Court of Appeal, Second District, Division 1, California. Feb. 6, 1930.

Rehearing Denied March 8, 1930. Hearing Granted by Supreme Court April 7, 1930.

1. Appeal and error ⇨23—District Court of Appeal must take cognizance of own jurisdiction, though jurisdiction to pass upon appeal has not been questioned.

Though jurisdiction of District Court of Appeal to pass upon pending appeal was not

questioned in case, nevertheless it must at all times take cognizance of its own jurisdiction.

2. Courts ⇨472(6)—Superior and municipal courts have no concurrent jurisdiction in cause of action at law arising within city having municipal court or outside, but within county (Const. art. 6, § 13, and § 5, as amended November 6, 1928; Deering's Gen. Laws Consol. Supp. 1925-27, Act 5238, § 29, as amended by St. 1929, p. 838, § 2; Code Civ. Proc., § 76, as amended).

Under Const. art. 6, § 13 and Deering's Gen. Laws Consol. Supp. 1925-27, Act 5238, § 29, as amended by St. 1929, p. 838, § 2, providing municipal court has exclusive original jurisdiction of all civil cases arising within city at law for \$2,000 or less, and Const. art. 6, § 5, as amended November 6, 1928 and Code Civ. Proc. § 76, as amended, providing superior court has original jurisdiction in all civil cases, except those in which jurisdiction is given to municipal court, superior court and municipal court do not have concurrent jurisdiction of cause of action at law arising either within city having municipal court or outside city, but within county.

3. Appeal and error ⇨64—District Court of Appeal has no jurisdiction of appeal from superior court's judgment affirming municipal court's judgment in action for \$999 and interest (Const. art. 6, §§ 4, 4b, 13, and § 5, as amended November 6, 1928; Deering's Gen. Laws Consol. Supp. 1925-27, Act 5238, § 29, as amended by St. 1929, p. 838, § 2; Code Civ. Proc. § 76, as amended).

Under Const. art. 6, § 13 and section 5, as amended November 6, 1928, and Deering's Gen. Laws Consol. Supp. 1925-27, Act 5238, § 29, as amended by St. 1929, p. 838, § 2, and Code Civ. Proc. § 76, as amended, providing that municipal courts and superior court have no concurrent jurisdiction of cause of action at law arising within city having municipal court, and Const. art. 6, § 4b, giving District Courts of Appeal jurisdiction of cases in which superior court has original jurisdiction, so that action for \$999 and interest in municipal court appealed to superior court was not within appellate jurisdiction of Supreme Court, under Const. art. 6, § 4, there was no right of appeal to District Court of Appeal from decision of superior court.

4. Constitutional law ⇨111—Change in appellate jurisdiction of District Court of Appeal, effected by statutory amendment concerning municipal courts, related to remedy only (Deering's Gen. Laws Consol. Supp. 1925-27, § 29, as amended by St. 1929, p. 838, § 2).

The change in appellate jurisdiction of District Court of Appeal, effected by amendment of Deering's Gen. Laws Consol. Supp. 1925-27, Act 5238, § 29, as amended by St. 1929, p. 838, § 2, providing that each municipal court has exclusive original jurisdiction of all civil cases and actions arising within city of cases at law in which demand exclusive of interest of value of property in controversy is \$2,000 or less, related to change of remedy only.

5. Appeal and error ⇨1—Right of appeal must be based on Constitution or statutes.

Appeals have no existence at common law, and any right of appeal must be based upon some provision of the Constitution or statutes.

6. Appeal and error  64—District Court of Appeal cannot consider appeal from superior court's judgment affirming municipal court's judgment in action for \$999 and interest, where, during pendency, act withdrew jurisdiction in enlarging jurisdiction of municipal court (Deering's Gen. Laws Consol. Supp. 1925-27, Act 5238, § 29, as amended by St. 1929, p. 838, § 2; Pol. Code, § 327).

District Court of Appeal was without jurisdiction to pass upon appeal from judgment of superior court affirming judgment of the municipal court in action to recover \$999 and interest as damages for conversion of automobile, where, during pendency of appeal, Deering's Gen. Laws Consol. Supp. 1925-27, Act 5238, § 29, as amended by St. 1929, p. 838, § 2, enlarged jurisdiction of municipal court, thereby changing appellate jurisdiction of District Court of Appeal, and since persons acting under any statute are deemed to have acted in contemplation of power of repeal under Pol. Code, § 327, so providing.

Appeal from Superior Court, Los Angeles County; Hartley Shaw, Judge.

Action by Enoch Berg against William I. Traeger, as Sheriff of Los Angeles County. A judgment adverse to defendant in municipal court of the city of Los Angeles was affirmed by the superior court of Los Angeles county, and the defendant appeals therefrom. Appeal dismissed.

Nathan M. Dicker and Abe Richman, both of Los Angeles, for appellant.

A. E. McManus, of Los Angeles, for respondent.

ELLIOT CRAIG, Justice pro tem. This action was commenced and prosecuted to judgment in the municipal court of the city of Los Angeles. Defendant appealed from that judgment to the superior court of Los Angeles county. The superior court affirmed that judgment, and defendant on March 30, 1927, appealed to this court from the judgment of the superior court affirming said judgment of the municipal court. This is an action to recover the sum of \$999 and interest as damages arising out of the alleged conversion of an automobile by the defendant as sheriff of Los Angeles county. The record shows that the cause of action arose within Los Angeles county.

[1] The jurisdiction of this court to pass upon said pending appeal has not been questioned in this case; nevertheless, this court must at all times take cognizance of its own jurisdiction. Discussion is required on only two questions:

First. Is there now a right of appeal to this court in a case of this kind?

Second. If the first question is answered in the negative, then does this court now have

jurisdiction to pass upon an appeal heretofore duly perfected, but not yet decided?

Our discussion is somewhat shortened by reference to the case of Johnston v. Wolf, 280 P. 980, decided by the Supreme Court of this state on September 27, 1929, on hearing after judgment in the District Court of Appeal (274 P. 1028), under date of February 14, 1929. That decision rests upon the jurisdiction of municipal courts, as provided by section 29 of the act authorizing the establishment of municipal courts, etc. (Deering's Gen. Laws, Consol. Supp. 1925-27, p. 1607), as said section stood prior to the legislative amendments of 1929, effective August 14, 1929. The opinion as rendered by the Supreme Court does not disclose any consideration of said 1929 amendments, although said amendments became effective while the motion to dismiss was pending in that court.

Prior to August 14, 1929, said section 29 did provide that municipal courts shall have exclusive original jurisdiction of all cases at law in which the demand, exclusive of interest, amounts to \$1,000 or less, arising in the city where the court exists, and concurrent jurisdiction with the superior and justices' courts of causes of like amount, arising outside of the city, but within the county in which the court is situated. Section 13, art. 6, of the Constitution provides: "Notwithstanding any provision contained in this article, the legislature may fix by law the jurisdiction of municipal courts and inferior courts in cities having municipal courts. * * * " As amended by chapter 477, Statutes of 1929, p. 837, said section 29 now provides that: "Each municipal court shall have exclusive original jurisdiction of all civil cases and actions, arising within the city * * * in which such municipal court is established, of the following classes:

"1. All cases at law in which the demand, exclusive of interest, or the value of the property in controversy, amounts to two thousand dollars or less. 2. * * * 3. * * *," and "Each municipal court shall have original jurisdiction of all cases specified in subdivisions 1, 2 and 3 hereinabove, arising outside the city in which a municipal court is established, and within the county in which such municipal court is established. * * * "

In conformity with the provisions of section 5, art. 6, of the Constitution, as amended November 6, 1928, section 76 of the Code of Civil Procedure was amended by the Legislature, effective August 14, 1929. Said code section now reads: "The superior courts shall have original jurisdiction: 1. In all civil cases and proceedings except cases and proceedings in which jurisdiction is or shall be given by law to municipal or to justices' or other inferior courts, and in all such special cases and pro-

ceedings as are not otherwise provided for. * * *

[2] A study of the Constitution and statutes on jurisdiction of superior and municipal courts, as demonstrated by the material parts thereof fully set forth above, shows that there is now no instance of concurrent jurisdiction in the superior court and the municipal court in an action at law wherein the cause of action arises either within the city in which such municipal court is situated or outside such city but within the county.

The jurisdiction of District Courts of Appeal is provided for and controlled by section 4b, art. 6, of the Constitution, to wit: "The district courts of appeal shall have appellate jurisdiction on appeal from the superior courts (except in cases in which appellate jurisdiction is given to the supreme court) in all cases at law in which the superior courts are given original jurisdiction. * * *

[3] An action of this kind is not within the appellate jurisdiction of the Supreme Court. Section 4, art. 6, Const.

It is therefore apparent from all of the foregoing that there is now no right of appeal to this court in a case such as the one before us.

We next take up the second question. "Any statute may be repealed at any time, except when it is otherwise provided therein. Persons acting under any statute are deemed to have acted in contemplation of this power of repeal." Pol. Code, § 327.

As said by Chief Justice Chase in *Ex parte McCardle*, 74 U. S. (7 Wall.) 506, 514, 19 L. Ed. 264, and approved by the Supreme Court of this state in *People v. Bank of San Luis Obispo*, 159 Cal. 65, 71, 112 P. 866, 37 L. R. A. (N. C.) 934, Ann. Cas. 1912B, 1148: "Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause."

[4] The change in appellate jurisdiction of this court, effected by the amendment of section 29 of the Municipal Court Act, *supra*, related to a change of remedy only. *Moye v. National Surety Co.* (Cal. Sup.) 280 P. 982, citing *People v. Bank of San Luis Obispo*, *supra*; *Pacific Gas Radiator Co. v. Superior Court*, 70 Cal. App. 200, 232 P. 995, 996.

[5] "Appeals have no existence at common law, and any right of appeal must be based upon some provision of the Constitution or of the statute." *Pacific Gas Radiator Co. v. Superior Court*, *supra*; *Gale v. Tuolumne Water Co.*, 169 Cal. 46, 145 P. 532.

[6] In the case of *Pacific Gas Radiator Co. v. Superior Court*, *supra*, at page 202 of 70 Cal. App., 232 P. 995, 996, the court said: "As a general rule every state has full authority to control all remedies which

it may provide, and may abolish a previously existing remedy by appeal, even as to cases which have been appealed. * * * When the jurisdiction of an appellate court depends upon a statute, which is repealed after an appeal has been taken, but is still undetermined, the appeal should be dismissed. *Ex parte McCardle*, 74 U. S. 506, 19 L. Ed. 264. In *People v. Bank of San Luis Obispo*, 159 Cal. 65, 112 P. 866, 37 L. R. A. (N. S.) 934, Ann. Cas. 1912B, 1148, our Supreme Court, after reviewing the authorities at great length, announces the rule to be that when pending an appeal from a judgment the law which is its sole support is repealed, the appellate court cannot proceed further with the litigation. This decision cites many authorities to the effect that, where jurisdiction depends upon a statute, suits brought during the existence of the statute fall at once upon its repeal."

We conclude, therefore, that this court is now without jurisdiction to pass upon this appeal.

The appeal to this court is dismissed.

We concur: CONREY, P. J.; HOUSER, J.

103 Cal. App. 743

H. E. WOODWARD, Doing Business Under the Firm Name and Style of Alamitos Heights Realty Company, Plaintiff and Respondent, v. Leo DREHER, Defendant and Appellant. (Civ. 5741.)

District Court of Appeal, Second District, Division 1, California. Feb. 6, 1930.

Appeal by defendant from a judgment of the Superior Court of Los Angeles County, Hartley Shaw, Judge, affirming a judgment of the Municipal Court in an action to recover real estate broker's commission. Appeal dismissed.

Louis N. Whealton and Raymond J. Kirkpatrick, both of Long Beach, for appellant.

Doyle, Clark & Thomas and W. Ward Johnson, all of Long Beach, for respondent.

ELLIOT CRAIG, Justice pro tem. This action was commenced and prosecuted to judgment in the municipal court of the City of Long Beach. Defendant appealed to the superior court of Los Angeles county from that judgment. The superior court affirmed the judgment, and defendant on June 28, 1927, appealed to this court from the judgment of the superior court affirming said judgment of the municipal court.

This is an action to recover the sum of \$475, and the cause of action is based upon

a written agreement to pay a commission to a realtor for procuring a purchaser for certain real property. The cause of action arose, as disclosed by the record, within Los Angeles county and within the city of Long Beach.

This appeal must be dismissed upon the ground that this court is now without jurisdiction to proceed further in the case. The law applicable hereto is fully set forth in the decision in *Berg v. Traeger*, 285 P. 332, this day filed by this court.

The appeal to this court is dismissed.

We concur: CONREY, P. J.; HOUSER, J.

D. Q. SERVICE CORPORATION v. SECURITIES LOAN & DISCOUNT CO. ★
(Civ. 5657.)

District Court of Appeal, Second District, Division 1, California. Feb. 6, 1930.

Rehearing Denied March 8, 1930. Hearing Granted by Supreme Court April 7, 1930.

1. Appeal and error ⇨23—District Court of Appeal must take cognizance of own jurisdiction, though jurisdiction to pass upon appeal is unquestioned.

Though present jurisdiction of District Court of Appeal to pass upon pending appeal is not questioned, nevertheless court must take cognizance of its own jurisdiction.

2. Appeal and error ⇨64—District Court of Appeal has no jurisdiction of appeal from judgment of superior court in action for \$430.10 for conversion of truck tires, which is within original jurisdiction of municipal court (Const. art. 6, §§ 5, 11, 13; *Deering's Gen. Laws Consol. Supp.* 1925-27, Act 5238, § 29, as amended by St. 1929, p. 838, § 2; *Code Civ. Proc.* § 76).

Since under Const. art. 6, §§ 11, 13, and *Deering's Gen. Laws Consol. Supp.* 1925-27, Act 5238, § 29, as amended by St. 1929, p. 838, § 2, action for recovery of \$430.10, as damages for alleged conversion of truck tires, was within original jurisdiction of municipal court and not within original jurisdiction of superior court of Los Angeles county, where municipal courts exist under Const. art. 6, § 5, *Code Civ. Proc.* § 76, there is no right of appeal from judgment of superior court to give District Court of Appeal jurisdiction.

3. Constitutional law ⇨111—Statutory right to review on appeal may be taken away by repeal, even as to causes previously appealed.

A statutory right to have cases reviewed on appeal may be taken away by repeal of statute, even as to causes which had been previously appealed to higher courts.

Appeal from Superior Court, Los Angeles County; Michael J. Roche, Judge.

Action by the D. Q. Service Corporation against the Securities Loan & Discount Company. Judgment for defendant, and plaintiff appeals. Appeal dismissed.

Pacht, Pelton & Warne and William W. Leavitt, all of Los Angeles, for appellant.

Henry G. Bodkin, of Los Angeles, for respondent.

ELLIOT CRAIG, Justice pro tem. This action was commenced in the superior court of Los Angeles county for the recovery of the sum of \$430.10 as damages for an alleged conversion of two truck tires. Judgment was in favor of defendant. On November 26, 1926, plaintiff appealed to this court from that judgment. The record shows that the cause of action arose, if at all, within Los Angeles county.

[1] The present jurisdiction of this court to pass upon said pending appeal has not been questioned in this case; nevertheless, this court must take cognizance of its own jurisdiction.

[2] An action of this kind is now within the original jurisdiction of the municipal court. Sections 11 and 13, art. 6, Const. of Cal.; *Deering's Gen. Laws, Consol. Supp.* 1925-27, p. 1607, and chapter 477, St. 1929, p. 837.

An action of this kind is not now within the original jurisdiction of the superior court of Los Angeles county (being a county wherein municipal courts exist). Citations, *supra*, re municipal courts; section 5, art. 6, Const.; *Code Civ. Proc.* § 76; *Berg v. Traeger*, 285 P. 332, decision filed in this court this day. It follows that there is now no right of appeal from the superior court judgment. *Berg v. Traeger, supra*.

A study of the Constitution and statutes discloses that no saving clause has been provided under either Constitution or statutes for a continuance of jurisdiction over a pending appeal in this kind of an action.

[3] The power of this court to pass upon an appeal heretofore duly perfected but not yet decided is fully discussed in *Berg v. Traeger, supra*. "A statutory right to have cases reviewed on appeal may be taken away, by a repeal of the statute, even as to causes which had been previously appealed." *Cooley's Constitutional Limitations* (8th Ed.) p. 794.

By reason of the foregoing and upon the authority of *Berg v. Traeger, supra*, we conclude that this court is now without jurisdiction in this case.

The appeal to this court is dismissed.

We concur: CONREY, P. J.; HOUSER, J.

103 Cal. App. 741

James B. STOUT, Plaintiff and Respondent, v. Lyman FARWELL, Defendant and Appellant. (Civ. 5724.)★

District Court of Appeal, Second District, Division 1, California. Feb. 6, 1930.

Rehearing Denied March 8, 1930.

Appeal by defendant from a judgment of the Superior Court of Los Angeles County, Hartley Shaw, Judge, affirming a judgment of the Municipal Court in an action for goods sold and delivered. Appeal dismissed.

D. A. Knapp, of Los Angeles, for appellant. Victor R. Hansen, of Los Angeles, for respondent.

ELLIOT CRAIG, Justice pro tem. This action was commenced by plaintiff in the municipal court of the city of Los Angeles. The complaint contained two causes of action. The first count was for the recovery of the sum of \$620 upon an alleged indebtedness for certain goods, wares, merchandise, and labor, and the second count was for the recovery of the same sum of \$620 upon an alleged account stated.

Plaintiff had judgment in his favor and defendant appealed to the superior court of Los Angeles county. The appeal before us is by defendant on June 23, 1927, from the judgment of the superior court affirming the judgment of the municipal court.

The record discloses that the causes of action arose, if at all, within the county of Los Angeles.

This appeal must be dismissed upon the ground that this court is now without jurisdiction to proceed further in the case. The law applicable hereto is fully set forth in the decision in *Berg v. Traeger*, 285 P. 332, this day filed by this court.

The appeal to this court is dismissed.

We concur: CONREY, P. J.; HOUSER, J.

103 Cal. App. 501

FIRST NAT. BANK OF FINDLAY v. TERRY. (Civ. 6677.)†

District Court of Appeal, First District, Division 1, California. Jan. 29, 1930.

Rehearing Denied Feb. 28, 1930. Hearing Denied by Supreme Court March 27, 1930.

1. Judgment ⇨822(1)—“Full faith and credit” clause requires only that foreign judgment be given faith and credit it had in state of origin (Const. U. S. art. 4, § 1).

“Full faith and credit” clause of Const. U. S. art. 4, § 1, requires only that foreign judgment

be given such faith and credit as it had by law or usage of state of its origin.

[Ed. Note.—For other definitions, see Words and Phrases, First, Second, and Third Series, Full Faith and Credit.]

2. Judgment ⇨815—Where foreign judgment was invalid under law of state of its origin because entered by clerk in recess during term time, it was unenforceable.

Where foreign judgment sued on was invalid under law of state of its origin because entered by clerk of court in recess during term time, it was unenforceable in state.

3. Judgment ⇨815—Language of foreign judgment sued on was controlling on whether clerk entered judgment in recess or in vacation.

Language of foreign judgment sued on was controlling on whether judgment was entered by clerk of court in recess or in vacation.

4. Judgment ⇨818(1)—Foreign judgment can be attacked on ground of lack of jurisdiction over defendant's person.

Judgment of sister state is always open to attack on ground of lack of jurisdiction of court rendering judgment over person of defendant.

5. Judgment ⇨943—In action on foreign judgment entered by confession, defendant's testimony regarding his making no payments on note tolling statute of limitations held admissible.

In action on judgment of sister state entered by confession, defendant's testimony that he made no payments on note tolling statute of limitations, and that note was given by him for credit and accommodation of his father, and that defendant did not authorize any payments to be made on note or indorsements of payments on note, held admissible upon issue of jurisdiction of court.

6. Appeal and error ⇨891—Where points upon which appellant sought to introduce evidence were raised in trial court and no application was made for continuance, appellant could not introduce additional evidence in appellate court (Code Civ. Proc. § 956a; Supreme Court and District Courts of Appeal Rule 38).

Where all points upon which appellant sought to introduce evidence in appellate court were raised in trial court before decision on merits and no application was made for continuance to obtain additional evidence sought to be introduced before appellate court, appellant was not entitled to order permitting production of additional evidence in appellate court under Code Civ. Proc. § 956a, and Supreme Court and District Courts of Appeal Rule 38.

7. Appeal and error ⇨891—Power vested in reviewing courts to take additional evidence does not allow cause to be tried de novo as matter of right (Code Civ. Proc. § 956a; Supreme Court and District Courts of Appeal Rule 38).

Powers vested in reviewing courts on appeal under Code Civ. Proc. § 956a, and Supreme Court and District Courts of Appeal Rule 38, authorizing taking of additional evidence when, in discretion of court and in interest of justice, record presented should be supplemented, do

★Rehearing denied.

†Rehearing denied. Hearing denied by Supreme Court.

not allow cause to be tried de novo on application of party as matter of right.

Appeal from Superior Court, Alameda County; J. D. Murphey, Judge.

Action by the First National Bank of Findlay against Homer S. Terry upon a foreign judgment. From a judgment for defendant, plaintiff appeals. Affirmed.

Dunn, White & Aiken and Hamilton Wright, all of Oakland, for appellant.

Fitzgerald, Abbott & Beardsley, of Oakland, for respondent.

PER CURIAM. This is an action on a foreign judgment, the validity and enforceability of which was challenged in the trial court by the defendant on the several grounds hereinafter mentioned, all of which were pleaded as special defenses in the answer and by the trial court sustained. Accordingly, judgment was entered for defendant, and plaintiff has taken this appeal therefrom.

[1, 2] In determining the question of the enforceability of a judgment theretofore entered in a court of record of a sister state, it is a fundamental principle of law universally recognized, that the "full faith and credit" clause of the federal Constitution (article 4, § 1) requires only that the judgment be given such faith and credit as it had by the law or usage of the state of its origin. *Board of Public Works v. Columbia College*, 17 Wall. 521, 21 L. Ed. 687. The judgment here sued upon was entered by confession in the records of the circuit court of Piatt county, Ill.; and it appears without contradiction from the judgment itself as well as from the other court records introduced in evidence at the trial by appellant, that the judgment was entered by the clerk of said court *in recess during the October term of said court* in the year 1923; and admittedly under the law of that state, judgments by confession can be legally entered by the clerk only "in vacation." During "term time" they must be entered in open court. *Wilson v. Josephson*, 244 Ill. App. 366; *Schmieg v. Burkhardt*, 215 Ill. App. 240; *Anderson v. Field*, 6 Ill. App. 307; chapter 110, § 188, *Smith's Illinois Rev. Stats. 1921*. It follows, therefore, that the judgment in question was invalid under the law of the state of its origin, and consequently it is unenforceable here.

[3] In support of the judgment appellant argues that under the decisions of that state the term "in recess" is sometimes held to mean "in vacation." But, as pointed out in the case of *Wilson v. Josephson*, supra, which reviews many of the earlier Illinois cases upon the subject, the term "in recess" is construed to mean "in vacation" only when it appears that the recess interval extends over a period of more than one judicial day, and

not where the adjournment is taken merely from day to day. In the present case the wording of the court documents, including the judgment, is that the judgment was entered in recess "during October term," and since there is nothing in the record indicating that the recess mentioned extended over a period of more than one judicial day, the language of the judgment is controlling.

In further support of the judgment, appellant seeks to invoke the aid of the legal presumption of regularity and verity with which all judgments of courts of record are clothed; and in this connection appellant cites a number of cases from Illinois, and from other jurisdictions interpreting the Illinois cases, to the effect that by virtue of statutory enactment in that state, a judgment entered by confession by the clerk "in vacation" has the same force and effect and is entitled to the benefit of the same presumptions as a judgment entered by the court. On the other hand, respondent calls attention to other Illinois decisions which evidently hold to the opposite view, upon the theory that in entering judgment by confession the clerk exercises no judicial power, but acts merely in a ministerial capacity. The latter view is apparently the one taken in this state. See opinion refusing hearing by Supreme Court in *Shirran v. Dallas*, 21 Cal. App. 405-423, 132 P. 454, 462; also, *Old Settlers' Investment Company v. White*, 158 Cal. 236, 110 P. 922. But, whatever may be the correct Illinois rule as to the status of such judgments, it does not aid in establishing the validity of the judgment under consideration here, because admittedly the statute referred to, in terms, is restricted to judgments entered by the clerk "in vacation," which, as the evidence shows and the court found, is not this case. Moreover, appellant frankly states in its brief that the point is presented upon the assumption that the judgment was entered "in vacation."

Another ground of attack upon the judgment in the trial court was that the court in which it was entered did not acquire jurisdiction over the person of respondent. This contention is based upon the following facts: The judgment was founded on a promissory note for the sum of \$1,689.95, dated Findlay, Ill., January 25, 1908, and was signed by respondent, made payable on demand to "The Findlay Store Co.," and subsequently indorsed to appellant. Annexed to it and forming a part thereof was a warrant of attorney, reading as follows:

"And to secure the payment of said amount I hereby authorize, irrevocably, any attorney of any court of record to appear for me in such court, in term time or vacation, at any time hereafter, and confess judgment without process in favor of the holder of this note, for such amount as may appear to be unpaid thereon, together with costs and 10 per cent.

attorney's fees, and to waive and release all errors that may intervene in such proceedings, and consent to immediate execution upon such judgment, hereby ratifying and confirming all that my said attorney may do by virtue thereof."

Acting under the authority of said warrant of attorney, a cognovit or confession of judgment, as it is commonly called, was signed and filed in the circuit court by an attorney named Whitaker, and it was in pursuance thereof that the clerk assumed to enter the judgment. The particular contention respondent makes in reference to the point of jurisdiction is that said note was barred by the statute of limitations long prior to the institution of the proceeding which resulted in the entry of the judgment, that necessarily all authority granted under the warrant of attorney lapsed at the time of the expiration of the remedy to collect the note, and that consequently the cognovit or confession of judgment signed and filed by said attorney in pursuance of said warrant of attorney was void and conferred upon the court no jurisdiction whatever over the person of respondent.

It is definitely settled by the law of Illinois, and of other states as well, that a warrant of attorney, such as we have here, confers no authority to confess judgment on a note after the payee's remedy for the collection of the debt has become barred by the statute of limitations. *Matzenbaugh v. Doyle*, 156 Ill. 331, 40 N. E. 935; *Walrod v. Manson*, 23 Wis. 393, 99 Am. Dec. 187; *Kahn v. Lesser*, 97 Wis. 217, 72 N. W. 739; *First National Bank of La Junta v. Mock*, 70 Colo. 517, 203 P. 272, 21 A. L. R. 770, citing and following the Illinois and Wisconsin cases. Furthermore, it is held that where, without legal authority, an attorney enters the appearance of a defendant, the judgment based on such unauthorized act is void and may be collaterally attacked (*Bruschke v. Der Nord Chicago Schuetzen Verein*, 145 Ill. 433, 34 N. E. 417), and although a recital in the record to the effect that the defendant appeared by attorney is deemed conclusive proof of the fact that the attorney did so appear, it is only prima facie evidence of the authority of the attorney to appear, which latter fact the defendant is at full liberty to disprove (*Welch v. Sykes*, 3 Gilman [Ill.] 197, 44 Am. Dec. 689).

The determinative question presented by this branch of the case is, therefore, whether said note was, as respondent claims, barred by the statute of limitations prior to the institution of the proceedings in the circuit court, for if it was, then, under the authorities above cited, the power granted by the warrant of attorney expired with the remedy to collect the note, and any confession of judgment signed and filed in pursuance thereof subsequent to that time was legally insufficient to support a valid judgment. In this regard, it

is conceded that the Illinois statute fixes a ten-year period within which actions on promissory notes may be commenced. Section 17, c. 83, Rev. Stats. of Ill. 1921. The action on this note was instituted in the circuit court on October 20, 1923, which was more than 15 years after the demand date of the note. The Illinois statute further provides, however, that if any payment shall have been made on the note, the period of limitation commences to run only from the time of such payment. The record of the Illinois court was introduced in evidence at the present trial by appellant and embodied in one of the documents forming part of said record was a copy of said note. On the reverse side of the note appeared certain entries indicating the payment of interest and part of the principal each year up to and including the year 1914. But in this connection the respondent testified without contradiction that he made no payments whatever on said note; that as a matter of fact the note was given by him for the credit and accommodation of his father and that he (respondent) received no part of the principal sum of the note; and that, although he understood that his father was to make payments on said note, he (respondent) did not authorize any such payments to be made, nor did he authorize or consent to the making of any of the indorsements of payment on said note. In that state of the record it cannot be held that the mere presence on the reverse side of the note of entries of payments had the effect of tolling the statute, for in the first place it is the law of that state that an "indorsement of partial payment on a note, made by the holder without the privity of the maker, is not of itself and uncorroborated, sufficient evidence of payment to repel the defense created by the statute of limitations." *Metcalf v. Metcalf*, 219 Ill. App. 98, citing other cases; *Simmons v. Nelson*, 48 Ill. App. 520. In other words, as held in *Robinson v. Waddell*, 184 Ill. App. 29, a mere indorsement of part payment on a note is not such evidence of part payment as will support the implication of a new promise and extend the period of the statute of limitations. And, secondly, it is also the law of that state that part payment on a note by any person, other than the one in whose favor the statute is running, does not operate to extend the period statute as to the latter if he has neither contributed to nor authorized such part payment. *Davis v. Mann*, 43 Ill. App. 301; *Kallenbach v. Dickinson*, 100 Ill. 427, 39 Am. Rep. 47; *Deaton v. Deaton*, 109 Ill. App. 7; *Lash v. Bozarth*, 78 Ill. App. 196. The states of Michigan and New York evidently follow the same rule. *Borden v. Fletcher's Estate*, 131 Mich. 220, 91 N. W. 145; *Akin v. Van Wirt*, 124 App. Div. 83, 108 N. Y. S. 327. We find nothing in the case of *MacFarland v. Utz*, 175 Ill. App. 525, stressed by appellant, at variance with the rule above stated.

[4, 5] Appellant argues that respondent's testimony related to extrinsic matters amounting to a collateral attack upon the judgment, and therefore was erroneous. But, as will be observed, the testimony had a direct bearing upon the question of want of jurisdiction of the Illinois court over the person of respondent; and it is a rule of general application that a judgment of a sister state is always open to attack on the ground of lack of jurisdiction of the court rendering the judgment over the person of the defendant. *Chicago Life Ins. Co. v. Cherry*, 244 U. S. 25, 37 S. Ct. 492, 61 L. Ed. 966; *Thompson v. Whitman*, 18 Wall. 457, 21 L. Ed. 897; *Estate of Hancock*, 156 Cal. 804, 106 P. 58, 59, 134 Am. St. Rep. 177; *Greenzweig v. Strelinger*, 103 Cal. 278, 37 P. 398; 15 Cal. Jur. 245. In other words, as declared in the *Estate of Hancock*, supra: "A judgment of a court of record of another state differs in its conclusive effect from a judgment of a court of record of this state in one material respect, viz., that it is always open to the person against whom the judgment is attempted to be used to show by evidence other than the record of the judgment, and even by evidence opposed to recitals contained in such record, that the court purporting to give the judgment was without jurisdiction either of the cause or of the parties. If such lack of jurisdiction in one or the other of these respects is not made to appear, the judgment is as final and conclusive on collateral attack as would be a judgment of one of our own superior courts; but, if such lack of jurisdiction is made to appear, the judgment must be regarded as a nullity." See, also, *Greenzweig v. Strelinger*, supra; *Estate of James*, 99 Cal. 374, 33 P. 1122, 37 Am. St. Rep. 60. The cases cited and relied upon by appellant deal with the rule relating to domestic judgments and consequently are not in point. For the reasons above stated we are of the opinion that the testimony objected to was admissible upon the issue of jurisdiction.

[6, 7] During the argument before the trial court on motion for a new trial, appellant asked leave to introduce additional evidence for the purpose of showing, as it claimed, that the circuit court was actually in adjournment at the time the judgment by confession was entered by the clerk; also for the purpose of contradicting respondent's testimony to the effect that he gave the note for the accommodation of his father, and that he neither made payments thereon nor authorized the same to be made. The trial court denied such application. Since then and prior to the submission of the cause on appeal, appellant made application to this court, under rule 38 of the Supreme Court and the District Courts of Appeal, and section 956a of the Code of Civil Procedure, for an order permitting the

production of such additional evidence; also of evidence showing that the statute of limitations was suspended by the absence of respondent from the state of Illinois.

It appears from the record, however, that all of the points upon which appellant now seeks to introduce evidence were raised and argued in the trial court prior to the rendition of its decision upon the merits, and that no application was made for continuance to obtain the additional evidence which it now seeks to introduce before this court; the reason assigned for not offering such evidence at the trial being that counsel representing appellant at the trial was not at that time aware that the judgment sued upon was, as now it is claimed, entered during an adjournment of court; and that he believed the other evidence mentioned was not admissible.

Under such circumstances, we are of the opinion that the situation is not such as comes within the purview of the rule of court and the section of the Code above mentioned. As held in *Estate of Wirt* (Cal. Sup.) 277 P. 118, 120: "Section 956a of the Code of Civil Procedure is not intended to have application to cases wherein the production of original evidence was sought to be permitted in this court and the purpose of the production of such evidence would be to lead us to a reversal of the cause upon appeal." In other words, as indicated in *Leal v. Leal* (Cal. Sup.) 274 P. 965, the powers now vested in the reviewing courts on appeal authorize the taking of additional evidence when, in the discretion of the court and in the interest of justice, the record presented should be supplemented, but does not allow the cause to be tried de novo on the application of a party as a matter of right.

The judgment is affirmed.

103 Cal. App. 795

FIRST NATIONAL BANK OF FINDLAY (a Corporation), Plaintiff and Appellant, v. Homer S. TERRY, Defendant and Respondent. (Civ. 6677.)

District Court of Appeal, First District, Division 1, California. Jan. 29, 1930.

Application for an order permitting the taking of additional evidence. Denied.

Dunn, White & Aiken and Hamilton Wright, all of Oakland, for appellant.

Fitzgerald, Abbott & Beardsley, of Oakland, for respondent.

PER CURIAM. Appellant makes application, under the provisions of rule 38 of the Supreme Court and the District Courts of Appeal, for an order permitting the taking of

additional evidence in the above-entitled cause. The merits of the application have been discussed and determined in the decision this day filed ([Cal. App.] 285 P. 336) affirming the judgment on appeal. For the reasons and upon the grounds therein stated, the application is denied.

104 Cal. App. 19

WESTERN STATES ACCEPTANCE CORPORATION v. BANK OF ITALY et al.*
(Civ. 6846.)

District Court of Appeal, First District, Division 1, California. Feb. 13, 1930.

Rehearing Denied March 15, 1930. Hearing Denied by Supreme Court April 14, 1930.

- 1. Estoppel §75—Holder of reserved title to personalty, delivered to dealer in, and displayed for sale with, property of same kind, with seller's knowledge, is estopped to assert title against bona fide subvendee for value.**

Where personal property, such as automobile, is delivered to buyer engaged in business of selling property of same kind and placed on display for sale with such other property, with seller's knowledge, holder of reserved title is estopped to assert it as against bona fide subvendee for value, irrespective of actual title or authority of parties with whom such subvendee dealt directly.

- 2. Estoppel §75—Corporation paying for automobile delivered to dealer held estopped to assert title as against subsequent innocent purchasers from dealer.**

Acceptance corporation, paying for automobile delivered to dealer in cars of same make by manufacturer, which executed no bill of sale to such corporation, whose alleged title under trust receipt executed by dealer was never registered, *held* estopped to assert such title as against subsequent innocent purchasers from dealer without notice of corporation's interest therein.

- 3. Estoppel §75—One financing retail automobile dealer owes duty to see that cars, in which he has interest, are not left under dealer's control on his salesroom floor.**

The duty rests on one financing a retail automobile dealer to see that cars on which he has a lien or other interest are not left under dealer's domain or control on his salesroom floor to be offered to public for sale.

- 4. Estoppel §72—Loss which one of two innocent purchasers must suffer through another's act or negligence should fall on one enabling third person to cause loss.**

Where one of two innocent purchasers must suffer through the act or negligence of a third person, the loss should fall on the one whose conduct created circumstances enabling third party to perpetrate wrong or cause loss.

- 5. Estoppel §119—Nonsuit in replevin held justified, notwithstanding conflicting evidence as to title to automobile, where question of estoppel to assert title was fully presented without conflicting evidence.**

Where question of plaintiff's estoppel to assert title to automobile was fully presented as part of plaintiff's case in replevin without conflict in evidence, court was justified in granting nonsuit, notwithstanding conflicting evidence as to title.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action in replevin by the Western States Acceptance Corporation against the Bank of Italy, a corporation, Mrs. B. Kennon and another. From a judgment of nonsuit as to named defendants, plaintiff appeals. *Affirmed.*

Arnold C. Lackenbach, of San Francisco, for appellant.

Louis Ferrari and J. J. Posner, both of San Francisco, and S. M. Spurrier, of Stockton, for respondents.

TYLER, P. J. The complaint herein sets forth a cause of action in replevin to obtain from defendants possession of a Lincoln automobile alleged to have been wrongfully converted. Judgment was prayed for the return of the property, or the recovery of its value in case delivery could not be had. By separate answers the three defendants, after denying the material allegations of the complaint, set up facts, by reason of which they averred, plaintiff was estopped from asserting any title to or right of possession of the car. Trial was had, and, at the close of plaintiff's case, motion was made for a nonsuit upon various grounds by defendants Bank of Italy and Mrs. B. Kennon. The motion was granted as to such defendants.

The main issue presented by plaintiff at the trial turned upon the question as to whether or not the car was purchased by plaintiff corporation from the Ford Company, on its own behalf, with retention of title in itself, to be thereafter delivered to defendant Ballard under a trust agreement, or whether the car was purchased by defendant Ballard with money obtained by him as a loan from plaintiff corporation. Upon this subject there was a decided conflict in the evidence, and, without more, a nonsuit would have been unjustified. *Rabe v. Western Union Tel. Co.*, 198 Cal. 294, 244 P. 1077. Defendants, however, pleaded an estoppel, and this question was fully gone into as part of plaintiff's case. The evidence upon this subject was without conflict and conclusively showed that plaintiff was estopped from asserting its alleged title as against the particular defendants in whose favor the judgment of nonsuit was

rendered. The question of title therefore became unimportant.

[1, 2] The facts show that on or about April 20, 1925, defendant Ballard was engaged in business as a retail dealer in automobiles at Sacramento. He represented the Lincoln automobile. At this time he was also vice president and a director of plaintiff corporation, which was engaged in the exclusive business of financing Ford and Lincoln automobiles. The Ford Motor Company of Delaware was doing business in San Francisco, but did not sell cars to any one but the recognized dealers. Ballard, being a recognized dealer in Lincoln cars at Sacramento, could buy Lincoln cars only from the Ford Company. He was desirous of acquiring for sale a certain type of Lincoln car, and he consulted the general manager of plaintiff corporation with reference to that company financing it. The manager knew Ballard, having had previous business relations with him, and he also knew that he was a Ford and Lincoln dealer at Sacramento and, further, that he was one of the directors of plaintiff corporation, and he agreed to the arrangement, and thereupon telephoned the Ford Company and obtained the motor number of the desired car. A check was drawn by plaintiff corporation for its full price, and was paid by it to the Ford Company, and delivery was made directly to Ballard. Prior or subsequent to the payment, Ballard executed a certain trust receipt in favor of plaintiff corporation, whereby he agreed to hold the car in trust as the property of plaintiff and not to operate the same for demonstration purposes, and, upon demand, to return it in an unused and good condition. He also agreed not to sell, incur, or otherwise dispose of the same, except upon written consent of plaintiff. About three weeks after Ballard was in possession of the car, he received a notice from the Ford Company informing him that there was a shortage of the type of car it had delivered to him, and requesting that he release the same to the firm of Gaudin & Pahl, Ford dealers, as that firm had a sale for this particular model. Ballard agreed to the arrangement on condition that the company would furnish him another car in its place, as soon as it arrived. Accordingly, Ballard sold the car to Gaudin & Pahl, for \$4,660.50, and received a check for the same. At the time Gaudin & Pahl purchased the car they had no actual notice or knowledge of any claim of ownership, or of possession, or any interest in the same, by plaintiff corporation. Gaudin & Pahl thereafter sold the car to respondent, Mrs. Kennon, under a conditional sales contract, which contract was thereafter sold to respondent, Bank of Italy, which was carrying Gaudin & Pahl's paper. The bank gave credit to Gaudin & Pahl for the sum of \$3,634.40, the balance of the purchase price due under respondent Kennon's

contract. At the time the firm of Gaudin & Pahl made the sale to Mrs. Kennon it made application to the motor vehicle division for certificates of registration. A white certificate was issued to Mrs. Kennon as registered owner, and a pink certificate to the Bank of Italy as legal owner. Plaintiff learned of Ballard's sale and thereafter its officers had a conversation with him concerning the transaction, and Ballard thereupon offered some used cars to offset the amount he was indebted to the company. After investigation the company refused to accept the same and wrote to Ballard a series of letters demanding a settlement of his account. After acquiring knowledge of the sale of the car to respondent Kennon, no demand was made by plaintiff upon Ballard for a return of the same, nor was any notice of claim made upon respondents until some months later when this action was commenced, and only after plaintiff had finally failed to obtain a settlement with Ballard of his various transactions. Defendants Bank of Italy and Mrs. Kennon urgently insisted in the court below, and do here, that, irrespective of the question of title, plaintiff having negligently permitted Ballard, a known automobile dealer, to appear as the apparent owner with the right of disposition of the car, should be estopped from asserting title as against them. There can be no question that the evidence clearly establishes an estoppel. It is well settled in this state that if personal property is delivered to a buyer who is engaged in the business of selling property of the same kind and, with knowledge of the seller, is placed on display for sale with such other property, the holder of the reserved title is estopped to assert it as against a bona fide subvendee for value. In such a case the rights of the innocent subvendee do not depend upon the actual title or authority of the party with whom he deals directly, but are derived from the act of the real owner, which precludes such owner from disputing, as against the innocent party, the existence of the title or power which, through negligence or mistaken confidence, he has caused or allowed to be vested in the party making the sale. *Pacific Finance Corporation v. Hendley* (Cal. App.) 284 P. 736. Here, so far as the evidence before us shows, plaintiff did nothing whatsoever to protect the rights of innocent purchasers, and the apparent title was at all times in Ballard. The Gaudin & Pahl company was never informed by any one, nor did it have any knowledge whatsoever, of any kind or character, that plaintiff had any interest in the property. No bill of sale of the car was ever executed by the Ford Company to plaintiff corporation, nor was its alleged title ever registered with the motor vehicle division. Entire lack of notice of plaintiff's claimed interest misled respondents to their detriment.

[3, 4] The duty rests upon one financing a retail dealer to see to it that cars upon which he has a lien or other interest are not left under the domain or control of such sale dealers on his salesroom floor, to be offered to the public. Secret arrangements which place it in the power of a dealer to deceive unsuspecting purchasers should be, and they are, condemned. *General Securities Corp. v. Reo Motor Co.*, 91 Cal. App. 16, 266 P. 576. Whether, therefore, plaintiff had or had not any interest in the car is unimportant, for if it had, it negligently permitted Ballard, a known automobile dealer in this make of car, to appear as apparent owner with the right of selling the same, and it should therefore be estopped from asserting its alleged title as against respondents, who are innocent purchasers without notice. Where one of two innocent purchasers must suffer through the act or negligence of a third person, the loss should fall upon the one who by his conduct created the circumstances which enabled the third party to perpetrate the wrong or cause the loss.

[5] The question of estoppel having been fully presented as part of plaintiff's case, and there being no conflict upon this subject, the conflict in the evidence as to title becomes unimportant and the court was justified in granting the nonsuit.

The judgment is affirmed,

We concur: KNIGHT, J.; CASHIN, J.

103 Cal. App. 558

SCHOMAKER v. PETERSEN et al.★
(Civ. 6968.)

District Court of Appeal, First District, Division 1, California. Jan. 30, 1930.

Rehearing Denied Feb. 28, 1930. Hearing Denied by Supreme Court March 31, 1930.

1. Principal and agent ⇨119(5), 147(4)—Borrower making payment to person other than lender himself acts at his peril, and has burden of showing recipient was authorized agent.

Borrower making payment to person other than lender himself does so at his peril, and has burden of showing recipient of money to have been an authorized agent of lender for collection.

2. Principal and agent ⇨105(3)—Negotiation of loan by person acting as lender's agent does not invest agent with authority to receive payment of interest or principal.

Negotiation of loan by person acting therein as agent of lender does not operate to invest

that agent with authority to receive payment either of interest or principal.

3. Principal and agent ⇨105(8)—Authority to receive payments of interest does not authorize collection of principal.

Authority to receive payments of interest does not carry with it authority to collect the principal.

4. Principal and agent ⇨105(2)—To justify payment to custodian of securities, borrower must have knowledge of fact of possession at time of payments.

To justify payment to custodian of securities, borrower must have knowledge of fact of possession at time of each payment, mere possession alone being insufficient.

5. Principal and agent ⇨105(5)—No authority in agent arises by implication to receive principal before maturity.

No authority to agent arises by implication to receive principal of note secured by deed of trust before maturity.

6. Principal and agent ⇨105(8)—Where one having no authority to collect more than interest for first six months, and, lacking possession of indicia of indebtedness, solicited payment of principal before due, defendants made latter payment at their peril.

Where agent was expressly authorized to collect interest which had accrued for first six months only, and he lacked at all times possession of indicia of indebtedness, and solicited and obtained payment of principal before it was due, and, to induce such payment, offered reduction of principal of note secured by deed of trust, such circumstances put the defendants on inquiry as to agent's authority, and payments, other than first payment of interest, were made at defendants' peril.

7. Principal and agent ⇨154(1)—Where defendants paid note secured by trust deed to one without authority to collect it, situation was not changed by ultimate deed of reconveyance.

Where defendants paid amount of note secured by deed of trust to one who had no authority to collect it and who misappropriated money, situation was not changed by reason of ultimate delivery of deed of reconveyance which was delivered at time defendants made their last payment of small sum, where trustee, without inquiring as to payment of indebtedness, had deed of reconveyance signed by one of its officers, using ordinary form which recited payment of indebtedness in full, and which document passed into collector's hands without any direction from beneficiary under trust deed.

8. Principal and agent ⇨105(8)—Even habitual payment of interest to agent, who in turn remits to creditor, does not establish authority to receive principal.

Even habitual payment of interest to an agent, who in turn makes remittance to creditor, does not establish his authority to receive any part of principal.

9. Principal and agent ⇨137(1)—Habitual payment of interest to an agent, who in turn makes remittance to creditor, does not raise any estoppel against creditor as regards authority to collect principal.

Even habitual payment of interest to an agent, who in turn makes remittance to creditor, does not raise any estoppel against creditor to claim agent had no authority to collect principal.

10. Principal and agent ⇨166(2)—Payee of note secured by trust deed did not ratify unauthorized acts of person collecting principal and misappropriating money by accepting two payments from him, where payee did not know all of facts.

Payee of note secured by deed of trust did not ratify unauthorized acts of person collecting principal and misappropriating money collected by accepting two payments from such person, after meetings between payee and debtors in district attorney's office, where it did not appear that payee knew that person collecting money had represented that payee needed money, and if debtors would help her by payment in advance of maturity, she would deduct \$50 from amount owing, and that it was on the strength of this statement that debtors delivered their checks drawn to his order.

11. Principal and agent ⇨166(1)—"Ratification" rests upon assent and must be made with full knowledge of all facts necessary to intelligent exercise of judgment.

Ratification rests upon assent, and to be binding, it must be made with full knowledge of all facts necessary to intelligent exercise of judgment.

[Ed. Note.—For other definitions, see Words and Phrases, First, Second, and Third Series, Ratification.]

12. Principal and agent ⇨169(1)—Intention to confirm agent's unauthorized acts, when implied from conduct, must be exhibited by acts inconsistent with any other hypothesis.

An intention to confirm agent's unauthorized acts, when implied from conduct, must be exhibited by acts inconsistent with any other hypothesis.

13. Principal and agent ⇨164(1)—Ratification is effectually implied only in respect of act done by person professedly acting as agent of party sought to be charged as principal.

Ratification is effectually implied only in respect of an act done by person professedly acting as agent of party sought to be charged as principal.

14. Novation ⇨5—Agent making unauthorized collections and converting proceeds was not substituted as debtor, nor were original debtors released by creditor's acceptance of payments from agent's earnings to minimize loss.

Creditor's acceptance of payments from agent's earnings to minimize loss on account of proceeds of unauthorized collections converted by agent, did not substitute agent as debtor in place of original debtors or release latter.

Appeal from Superior Court, Alameda County; James G. Quinn, Judge.

Action by Margaret Schomaker against J. B. Petersen and wife and others, upon a promissory note. From the judgment, plaintiff appeals. Reversed.

Hearing Denied by Supreme Court; SEAWELL, PRESTON, and LANGDON, JJ., dissenting.

Cross & Brandt, of San Francisco, for appellant.

Dunn, White & Aiken, Carlos G. White, and Edward J. Smith, all of Oakland, for respondents.

JOHNSON, Justice pro tem. This is an action based on a promissory note executed to the plaintiff by the defendants, J. B. Petersen and S. Matthesen, together with their respective wives, and at all times after its delivery kept by plaintiff in her own exclusive possession.

The question presented on this appeal by plaintiff concerns itself with the authority of a real estate agent, who had negotiated the transaction giving rise to the note, to bind the payee by receipt of a payment procured on such agent's own solicitation, and misappropriated by him.

The plaintiff, Mrs. Schomaker, acting through E. B. Field, doing a brokerage business in Oakland under the trade name of E. B. Field Co., sold to Messrs. Petersen and Matthesen a lot of land, taking as part payment a promissory note for \$1,900, executed by all the defendants and secured by their deed of trust. The sale was closed by an employee of Field, named Fred Hauschildt; and the note, with the deed of trust, was duly delivered to the plaintiff and has been retained ever since in her possession.

The note, which was dated October 29, 1923, was made payable one year thereafter, and bore interest at the rate of seven per cent. per annum, payable monthly, and compounding if not so paid. The trustee named in the deed of trust was the Oakland Title Insurance & Guarantee Company; and the instrument was recorded November 14, 1923.

Mrs. Schomaker, who is described by Mr. Sevier, deputy district attorney of Alameda county, as an ignorant woman, appears to have had no business experience; and, moreover, she was occupied with the care of a helpless son. A period of six months having gone by without any interest being paid, she informed Hauschildt of the default. He told her that he would procure the interest money; and soon thereafter, on March 3, 1924, he obtained from Petersen a check for \$66.60, which Petersen drew in favor of Hauschildt, and the latter, after giving Petersen a receipt for interest from October 25, 1923, to April 25,

1924, sent his own personal check for \$66 to Mrs. Schomaker.

On August 15, 1924, Hauschildt, acting on his own initiative, procured from Matthesen a check of \$66 in Hauschildt's favor, receipting for the amount as "six months interest on loan of \$1,900 to Margaret Schomaker from March 29, 1924, to August 29, 1924." Mrs. Schomaker had no knowledge of this payment, nor did she receive any of the proceeds of the check.

At about this time Hauschildt chanced to see Mrs. Schomaker and stated to her that the makers of the note were getting ready to pay her, whereupon she remarked that "that was all right." She heard no more of the matter until the following September, at which time Hauschildt told her that the makers were in position to pay her, but that she would have to sign a reconveyance; and he asked her if she would do so. She replied that she would, if she had to sign in order to get her money; and he then said that he would mail the paper to her for signature.

Shortly thereafter Hauschildt sent to plaintiff, by mail, a form which in express terms directed the Oakland Title Insurance and Guarantee Company to execute and deliver a reconveyance of the property described in the deed of trust executed by the defendants. Nothing was mentioned in these instructions concerning any collection to be made, nor was delivery of the reconveyance made conditional upon payment of the note. But in his letter to Mrs. Schomaker, Hauschildt said: "If you will kindly sign this and mail same back to me, I will see that the money is deposited in the Oakland Title Insurance and Guarantee Co. and mailed to you." Mrs. Schomaker accordingly signed the form, and mailed it back to Field's office in an envelope which came with the letter to her. The instructions were then delivered, presumably by Hauschildt, to the trustee; and on November 12, 1924, the trustee, without inquiring as to payment of the indebtedness, had a deed of reconveyance signed by its officers, using one of its ordinary forms, which recited payment of the indebtedness in full. This document then passed, without any direction from Mrs. Schomaker, into the possession of Hauschildt in some way not disclosed in the evidence. It was not recorded until February 25, 1925.

Before procuring from Mrs. Schomaker the instructions to the trustee, Hauschildt, by false representations, had already induced Petersen and Matthesen to pay to him \$1,815 of the principal amount of the indebtedness. In September he represented to Petersen that Mrs. Schomaker was greatly in need of money; and that if Petersen could help her, she would deduct \$50 from the amount owing. Petersen, without any inquiry concerning either the possession of the note or Hauschildt's authority to collect the indebtedness, gave Hauschildt a check on September 19, 1924, for \$890, and had Matthesen, on October 22,

1924, give Matthesen's check to Hauschildt for \$925. These checks were both drawn in favor of Hauschildt, and were cashed by him. At the time of the delivery of Petersen's check, Hauschildt promised that he would get a reconveyance on payment of the residue; and when he received Matthesen's check, he said the reconveyance would be sent in a few days. After procuring the reconveyance from the trustee, Hauschildt gave it to Petersen on November 14, 1924, and at the same time demanded and received from Petersen a check for \$33, which Hauschildt stated was for interest and the expense incident to execution of the reconveyance. This amount, together with the moneys previously collected by Hauschildt, aggregated \$1,980.60, all of which Hauschildt appropriated to his own use, with the exception of the item of \$66 sent in March, 1924, to Mrs. Schomaker, as a payment of interest for the first six months.

After Mrs. Schomaker had signed the instructions to the trustee she heard nothing further from any one, and waited until March, 1925. At that time she telephoned to Hauschildt, who told her that nothing had been paid, that failure to make payment was mere carelessness, and that the money was perfectly safe and the security ample. Thus reassured, and her attention being centered on her helpless son, Mrs. Schomaker let matters drift until the following October, at which time she again made inquiry of Hauschildt, and was told as before that nothing had yet been paid. So matters went on with repeated inquiries and reassurances for about a year until October, 1926. Being then in need of money, Mrs. Schomaker communicated with a friend, who suggested that she make inquiry of the Oakland Title Insurance and Guarantee Company. Upon doing so, Mrs. Schomaker learned that a deed of reconveyance had been made and recorded long before; and she was advised to see Mr. Field. This she did, and then sought out Mr. Petersen also, whom she had never met previously; and from him learned that payments had been made to Hauschildt.

Hauschildt had been discharged from Field's employ on September 1, 1926, and thereupon became connected with the real estate office of Tucker-McElhinney Company. Upon being informed of the misconduct of Hauschildt, Field brought the matter to the attention of Mr. Sevier, deputy district attorney, who issued a citation requiring Hauschildt's attendance at the district attorney's office. Two meetings were held. Besides Hauschildt and Sevier, there were present at both meetings Field, Petersen, Matthesen and Mrs. Schomaker; and at the second meeting there were in addition Edward J. Smith, attorney for Petersen and Matthesen, and Warren Tucker, Hauschildt's new employer. Hauschildt admitted his guilt, and at the first meeting it was suggested by Mr. Sevier that the conference be continued for a week to see what could be done by Hauschildt about mak-

ing reparation. At the next meeting Mr. Tucker, stating that Hauschildt had good earning capacity, proposed that after allowing Hauschildt a limited sum for living expenses, he himself would arrange to have the residue of Hauschildt's earnings applied in a way to rectify the wrong.

Petersen and Matthesen, claiming through their attorney to be discharged of all liability, expressed utter indifference as to the whole proceeding. Mrs. Schomaker had not an attorney present, and no one explained to her that question had been raised as to Hauschildt's agency. She sat mute, and at times in tears, throughout the discussion, until she was asked whether the arrangement proposed was agreeable to her. To this question she replied that as long as she got her money, she did not care where it came from. The conference ended after a suggestion had been made that Tucker should make payments from Hauschildt's earnings to Field, and Field should pay the amounts as received to Mrs. Schomaker.

Thereafter, on March 3, 1927, Hauschildt brought Mrs. Schomaker a check of Tucker-McElhinney Company for \$100, and on June 30 he brought \$100 in currency. Subsequently Hauschildt absconded and Mrs. Schomaker received nothing more from any source.

On October 5 this action was instituted against the defendants to recover on their promissory note. In their answer the defendants allege that Mrs. Schomaker held forth Hauschildt and Field as her agents, authorized to receive payment, and that believing them to possess such authority, the defendants had paid to Hauschildt for plaintiff the full sum demanded in satisfaction of the note, and had received from Hauschildt deed of reconveyance. Defendants further averred that they would not have paid Hauschildt except for the fact that they had made previous payments to him which plaintiff had received and accepted, and that plaintiff had caused the deed of reconveyance to be placed in Hauschildt's hands for the purpose of effecting collection. Upon these grounds, defendants charged that plaintiff was estopped to deny the agency of "Fred Hauschildt and/or E. B. Field Co." to make collection for her. Defendants pleaded in addition that plaintiff had ratified the acts of the defendants in making the payments as they had, and "agreed to look solely to said Fred Hauschildt and/or E. B. Field Co. as her agents therefor"; and that in March and June, 1927, she had received from Hauschildt payments of principal and interest on account.

The case was tried without a jury, and the court, deciding in favor of defendants, made a general finding that all the allegations of the answer were true. Owing to the ambiguous character of the averments of agency ascribed to "Fred Hauschildt and/or E. B. Field Co.,"

it is not altogether certain whether the court regarded only an undetermined one of the two persons, Hauschildt and Field, as the agent of Mrs. Schomaker to make collection, or both as vested with equal authority. As a matter of fact, Field knew nothing of the collection until after Mrs. Schomaker had learned of it from Petersen, and had then informed Field. However, we will assume that the court drew from the evidence the inference that Hauschildt and Field were authorized to bind Mrs. Schomaker by collections made by either independently, or by both in concert.

The question thus becomes primarily one of law as to the sufficiency of the evidence to establish such agency. Our courts have not had occasion hitherto to promulgate a rule on this subject; but the principles applicable have become so firmly established as to make our way plain.

It is to be borne in mind that at no time after the delivery of the note and the deed of trust to Mrs. Schomaker in November, 1923, did either Hauschildt or Field have possession of either instrument. And the deed of reconveyance was not exhibited by Hauschildt, or delivered to Petersen, until the last payment of \$33 was made.

"Whoever insists," says Mechem in his treatise on Agency, "that he has discharged an admitted debt, by paying it to some one other than the creditor himself, has ordinarily the burden of proving that the person to whom he paid it was authorized by the creditor to receive the payment." 1 Mechem on Agency (2d Ed.) p. 667.

While authority may arise by implication, still agency is not lightly to be inferred. And in the matter of a loan, "the mere fact that the agent was employed to make the loan or negotiate the contract or draft the securities upon which the money is payable, will not, as of course, confer upon him the incidental authority to receive a payment which may become due upon such contract. If the authority goes no further, the agent's power will be exhausted when the loan is made or the contract is negotiated." 1 Mechem, p. 669.

If, however, the agent who negotiated the transaction is allowed to retain possession and control of the securities, his authority to collect is implied under what is sometimes called "the scrivener's rule."

"The presumption in these cases is founded upon the negotiating agent's possession of the securities; it does not arise if the securities are not left in the agent's possession, and if once created, it ceases when the securities are withdrawn by the principal. It is incumbent, therefore, upon the debtor to assure himself on each occasion when a payment is made that they still continue in the agent's possession, for if they have been withdrawn, the payment will not bind the principal, unless actual authority can be shown or his conduct

has been such as to estop him to deny the agency." 1 Mechem, p. 672.

The leading American case on the subject is *Williams v. Walker*, 2 Sandf. Ch. (N. Y.) 325, where the English authorities are gathered and reviewed; and the principles there applied are discussed at length and followed in *Smith v. Kidd*, 68 N. Y. 130. The current of authority runs steadily in one direction; and a study of the numerous decisions shows concurrence in the following rules:

[1] 1. A borrower making payment to a person other than the lender himself does so at his peril, and has the burden of showing the recipient of the money to have been an authorized agent of the lender for collection.

[2] 2. Negotiation of the loan by a person acting therein as agent of the lender does not operate to invest that agent with authority to receive payment, either of interest or principal.

[3] 3. Authority to receive payments of interest does not carry with it authority to collect the principal.

4. If, however, the agent who negotiated the loan is entrusted with possession and control of the securities, then in the absence of notice to the contrary, the implication arises that he possesses authority to collect principal as well as interest while he is known to retain control of the securities, but no longer.

[4] 5. To support the implication of authority to collect under the scrivener's rule, there must be the union of two elements—agency in making the loan, and known possession of the indicia of indebtedness intentionally left in the negotiating agent's custody.

6. To justify payment to a custodian of the securities, the borrower must have knowledge of the fact of possession at the time of each payment. Mere possession alone does not suffice. It is the possession, known at the time, which gives the appearance of authority. Neither possession existing at the time, if unknown to the borrower, nor possession known to exist before or after, but not at the time of, payment, will give rise to any implication of authority. Absence of the securities on the occasion of any payment implies absence of authority at that time.

[5] 7. Authority inferred from the known possession of securities is at most, authority to collect interest and principal as they fall due. No authority arises by implication to receive the principal before maturity. Nor even when there is express authority to collect, is the agent authorized to receive payment before it is due.

For verification of the principles embodied in the rules here formulated, reference may be made to *Williams v. Walker*, 2 Sandf. Ch. (N. Y.) 325; *Smith v. Kidd*, 68 N. Y. 130, 23 Am. Rep. 157; 2 C. J. 619-622; 21 R. C. L., 868-

672; 2 Jones on Mortgages (8th Ed.) §§ 1231, 869; 1 Mechem on Agency (2d Ed.) pp. 669-1232, 1235.

[6] *Hauschildt* was expressly authorized to collect the interest which had accrued for the first six months. That collection was made, and the money transmitted to Mrs. Schomaker. He had no express authority to make any other collection, nor from the circumstances does any implication of authority arise. He lacked at all times possession of the indicia of the indebtedness, solicited and obtained payment of the principal before it was due, and to induce such payment offered a reduction of the principal. These circumstances all put the defendants on inquiry as to *Hauschildt's* authority; and the payments, other than the first payment of interest, were made at defendants' peril.

[7] Express authority was equally necessary for any reduction of principal, and for acceptance of principal prior to maturity. Defendants make no contention of any express authority; and there is likewise an insufficiency of evidence to show any implied authority to collect any of the moneys here in question.

Nor is the situation changed by reason of the ultimate delivery of the deed of reconveyance. This was not delivered until November 14, 1924, at which time defendants made their last payment amounting to \$33. Even when a trustee releases a deed of trust and receives payment of the amount of the debt, without actual authority and without producing the securities, the party paying is charged with notice of the lack of authority in the trustee. *Fortune v. Stockton*, 182 Ill. 454, 462, 55 N. E. 367; *Wynn v. Grant*, 166 N. C. 39, 52, 81 S. E. 949; *Cummings v. Hurd*, 49 Mo. App. 139, 147.

[8, 9] The plaintiff in no way held out *Hauschildt* to the defendants as her agent for the collection of the principal. And even habitual payment of interest to an agent, who in turn makes remittance to the creditor, does not establish his authority to receive any part of the principal. Nor does it raise any estoppel against the creditor. *Dorman v. West Jersey T. & G. Co.*, 92 N. J. Law, 487, 489, 105 A. 195. There was nothing in the plaintiff's conduct calculated to mislead the defendants, or to make it appear that *Hauschildt* had the authority which he assumed. The defendants placed their trust and confidence entirely in the assertions of *Hauschildt* himself, and it was by him that they were deceived. If they had taken the precaution of following the general custom, and demanding surrender of the securities, as a condition of payment of the principal, this litigation would probably have been avoided. In *Smith v. Kidd*, 68 N. Y. 130, 141, the court says, quoting from *Henn v. Conisby*, 1 Ch.

Cas. 93: "The circumstance of the creditor keeping the security is conclusive. No man would pay the money due on a mortgage or bond without having the security given up. The debtor's payment to the scrivener without taking up his security, was an evidence that he trusted the scrivener more than the creditor did, who always kept the security." Any other principle would be dangerous in the extreme."

This case differs from *Quinn v. Dresbach*, 75 Cal. 159, 16 P. 762, 7 Am. St. Rep. 138, on which defendants lay stress, in that there the creditor accepted several payments of interest, and also payments of part of the principal, made through his attorney; and the acceptance of principal so paid without repudiation of agency was regarded as an indication of authority sufficient to justify the debtor in paying the balance of the principal through the same agency. In the present case the only payment by defendants which the plaintiff received through Hauschildt was the one payment of interest; and authority to collect interest creates no ostensible authority to collect principal in the absence of the securities, especially when payment is made before maturity and in a reduced amount.

[10-12] As there is nothing in the evidence to create an estoppel against the plaintiff, so, also, the evidence fails to show ratification of Hauschildt's unauthorized acts. For purposes of ratification there must be "confirmatory conduct, or at least conduct inconsistent with disapproval. Facts are not to be stretched, or ambiguous, inconclusive or independent acts made the basis of a ratification." 1 *Mechem on Agency* (2d Ed.) p. 348. It is contended by defendants that the acceptance by plaintiff of two payments of \$100 each, after the meetings at the district attorney's office, operated as ratification of Hauschildt's assumed agency. Ratification rests, however, upon assent; and to be binding it must be made with full knowledge of all the facts necessary to an intelligent exercise of judgment. An intention to confirm, when implied from conduct, must be exhibited by acts inconsistent with any other hypothesis. 2 *C. J.* 492; *Culver v. Nichols*, 140 Md. 448, 453, 117 A. 873; *Ballard v. Nye*, 138 Cal. 588, 597, 72 P. 156.

[13] It does not appear from the evidence that Hauschildt represented to Petersen or Matthesen that he had any real authority to receive the money for Mrs. Schomaker. His statement to Petersen was that Mrs. Schomaker needed the money, and if Petersen would help her by payment in advance of maturity, she would deduct \$50 from the amount owing. It was on the strength of this statement that Petersen and Matthesen delivered to Hauschildt their checks drawn to his order. One might infer that they trusted

him as their own messenger. These were material facts for Mrs. Schomaker to know; but the evidence does not bring knowledge of such facts home to her at the time when she received the two installments from Hauschildt. And ratification is effectually implied only in respect of an act done by a person professedly acting as the agent of the party sought to be charged as principal. *Pacific B. C. & F. Co. v. Bleakmore*, 81 Cal. App. 659, 665, 254 P. 618; *Puget Sound L. Co. v. Krug*, 89 Cal. 237, 243, 26 P. 902. Moreover, in receiving those payments, Mrs. Schomaker was not accepting any benefits of Hauschildt's corrupt acts. There were no benefits for her to accept. Hauschildt had maneuvered so as to get the debtors' money for himself and had squandered it. The case is not one where an agent abused or exceeded an authority conferred. There was utter want of authority; and in such case ratification is less readily inferred. *John A. Eck Co. v. Coachella V. O. G. Ass'n* (Cal. App.) 282 P. 408. Whatever reparation Hauschildt made was a benefit to the debtors whose trust he had betrayed. We discover nothing in the occurrences at the district attorney's office indicating confirmation or adoption of Hauschildt's actions; and when Mrs. Schomaker was asked whether Mr. Tucker's proposal looking to reparation by Hauschildt was agreeable to her, her answer was that so long as she got her money she did not care where it came from. This assuredly was not a consent to look to Hauschildt instead of her real debtors. Perhaps if she had been represented by an attorney, he might have suggested for form's sake that Hauschildt make his payments through Petersen and Matthesen; but the mechanics do not change the essential character of the arrangement. What Hauschildt paid, he paid not as Mrs. Schomaker's agent, but as the individual who had defrauded Petersen and Matthesen; and the amounts paid redounded to their benefit. It was the part of common sense to take whatever could be obtained in the way of redress; and the installments paid to Mrs. Schomaker should, in law, not be regarded otherwise than if Hauschildt had paid the money to Petersen and Matthesen, and they had transmitted it to Mrs. Schomaker to apply on the note.

We think it quite clear that Mrs. Schomaker had no knowledge of her rights until after Hauschildt had absconded; and it is of the essence of ratification that what is done shall be done advisedly and with full knowledge of the party's rights. *Brown v. Rouse*, 104 Cal. 672, 676, 38 P. 507; *King v. Lagrange*, 50 Cal. 328, 332.

[14] The mere willingness to receive and apply on the note what might become available from Hauschildt's earnings was in no sense equivalent to substituting Hauschildt as the debtor in place of Petersen and Mat-

thesen. Mrs. Schomaker was neither reaping the fruits of Hauschildt's wrongful acts, nor adopting them as acts done on her account. The money paid was not part of the proceeds realized by Hauschildt, nor was it accepted on the basis of any valid exercise of agency. Remedy against a party legally liable is not forfeited by efforts to effect a friendly settlement or to avoid needless loss. 2 C. J. 490, § 110; Crute v. Burch, 154 Mo. App. 480, 135 S. W. 1004; Gilman Linseed Oil Co. v. Norton, 89 Iowa, 434, 56 N. W. 663, 48 Am. St. Rep. 400.

Hauschildt's payments of \$200 from his earnings served to mitigate the defendants' loss to that extent, but did not absolve defendants of liability for the residue.

The evidence, being insufficient to show either agency, ratification, or estoppel, does not afford justification for the findings; and hence the judgment in favor of defendants is without legal support.

The judgment is reversed.

We concur: TYLER, P. J.; CASHIN, J.

104 Cal. App. 33

IN re CARPENTIER'S ESTATE.

WINTER v. FERRIS et al.

Civ. 7250.

District Court of Appeal, First District, Division 2, California.

Feb. 13, 1930.

Wills §229.—Will, though irrevocable as contract, is revocable as will, and injured party may not contest later will, but is remitted to independent action to enforce rights under contract.

Will, though it may be irrevocable as contract, is nevertheless revocable as a will, and, in case such will is revoked, injured party cannot contest later will in probate court on that ground or insist on probate of earlier will, but is remitted to an independent action at law or in equity to enforce whatever rights he may have.

Appeal from Superior Court, City and County of San Francisco; Thomas F. Graham, Judge.

Lizzie Ferris and others presented the will of Dr. F. G. Carpentier, also known as Franklin George Carpentier, also known as Dr. G. Still, also known as Dr. F. O. Reitenprac, also known as Dr. Williams, deceased, to the court for probate, and Hazel-Wood Winter filed a contest. The court sustained a demurrer to the contest and admitted the will to probate, and the contestant appeals.

Affirmed.

Kington & Cunningham, of San Francisco, for appellant.

Raymond D. Williamson, of San Francisco, for respondents.

DOOLING, Justice pro tem.

On February 28, 1919, the decedent, F. G. Carpentier, executed a document which is claimed by appellant to be both a will and a contract to leave by will certain property therein described to appellant. On April 17, 1927, the decedent executed a will expressly revoking all previous wills and making a different disposition of such property. Respondents presented the later will to the court for probate, and appellant filed a contest based solely on the document of February 28, 1919, and the contract alleged to be evidenced thereby. Appellant also proposed said document for probate. The probate court sustained a demurrer to the contest, admitted the will of April 17, 1927, to probate, and denied probate to the document of February 28, 1919.

The court's action was correct. A will, though it may be irrevocable as a contract, is none the less revocable as a will, and in case such a will is revoked, the injured party cannot contest the later will in the probate court on that ground or insist on the probate of the earlier will, but is remitted to an independent action at law or in equity to enforce whatever rights he may have. Estate of Rolls, 193 Cal. 594, 226 P. 608; Estate of Berry, 195 Cal. 354, 233 P. 330.

The decree and orders appealed from are affirmed.

We concur: NOURSE, Acting P. J.; STURTEVANT, J.

104 Cal. App. 59

PEOPLE v. TURCO.
Cr. 1559.

District Court of Appeal, First District,
Division 1, California.
Feb. 14, 1930.

Poisons ¶9—Evidence held to sustain conviction of possessing poisons, though defendant's testimony as to innocently obtaining possession was uncontradicted and not improbable (State Poison Act).

Evidence held sufficient to sustain conviction of possessing poisons, in violation of State Poison Act (St. 1907, p. 124, as amended), though defendant's testimony as to obtaining possession of drugs in innocent manner was uncontradicted and not improbable.

Appeal from Superior Court, City and County of San Francisco; Lile T. Jacks, Judge.

Angelo Turco was convicted of unlawful possession of poisons, and he appeals.

Affirmed.

Nathan C. Coghlan and E. H. Lomasney, both of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Lionel Browne, Deputy Atty. Gen., for the People.

TYLER, P. J.

Appellant was charged by an information consisting of two counts, filed by the district attorney of the city and county of San Francisco, with violations of the State Poison Act (St. 1907, p. 124, as amended). The first count referred to the willful, unlawful, and felonious possession of a preparation of heroin. The second related to the willful, unlawful, and felonious possession of cocaine. Trial was had and he was found guilty on both counts. Motion for a new trial was made and denied, and appellant was sentenced to San Quentin for the period prescribed by law. This is an appeal from the judgment and order.

It is claimed that there is no evidence in the record to sustain the verdict. The material facts are without conflict. In the month of June, 1929, appellant was seated in an automobile at the intersection of Clay and Leavenworth streets, in this city and county, reading a paper. While so occupied a large automobile proceeding west on Clay street passed the car in which appellant was sitting. The driver blew his horn, and appellant left his car, carrying a package over his arm, when he was placed under arrest by an inspector of the state board of pharmacy. The package proved to contain nineteen bottles of cocaine and three large packages of heroin. Appellant was thereupon taken to the city prison and questioned concerning the narcotics, and he claimed that he did not know what the package contained; that it had been given to him by one Enrica to be

delivered to an unknown party who would meet him in the particular locality of his arrest.

As ground for a reversal, it is claimed that as the prosecution failed to prove knowledge on the part of the appellant as to the contents of the package, his testimony relating to the manner in which he became possessed of the drugs should have been believed by the jury, as it was uncontradicted and not improbable. There is no merit in this claim. The circumstances surrounding the case were such as to reasonably justify an inference of guilt, and the jury was not bound to believe defendant's testimony. *People v. Neary*, 104 Cal. 373, 37 P. 943. If the rule were otherwise, few criminals would ever be convicted. *People v. Hall*, 87 Cal. App. 634, 262 P. 50.

The judgment and order are affirmed.

We concur: KNIGHT, J.; CASHIN, J.

104 Cal. App. 122

SCOTT v. CLINE ELECTRIC MFG. CO.
Civ. 6346.

District Court of Appeal, Second District, Division 1, California.
Feb. 18, 1930.

Contracts ¶10(4)—Agreement to push sale of manufacturer's motors wherein dealer did not agree to buy anything held void for lack of mutuality (Civ. Code, § 1550).

Contract whereby dealer agreed with manufacturer to push sale of manufacturer's motors, save where customer specified some other make, but wherein dealer did not agree to buy anything from manufacturer, held void for lack of mutuality, since promise to "push sale of motors" is too uncertain and indefinite to constitute enforceable consideration under Civ. Code, § 1550.

Appeal from Superior Court, Los Angeles County; Frank C. Collier, Judge.

Action by H. W. Scott against the Cline Electric Manufacturing Company. Judgment for defendant, and plaintiff appeals.

Affirmed.

Joe Crail, Harold C. Morton, Claude A. Shutt, and Edward A. Penprase, all of Los Angeles, for appellant.

Neice & Packard and Wm. A. Conover, all of Los Angeles, for respondent.

ELLIOT CRAIG, Justice pro tem.

This is an appeal by plaintiff from a judgment in favor of defendant rendered after the

sustaining of an objection to the introduction of any evidence, at the commencement of the trial, on the ground that the second amended complaint did not state facts sufficient to constitute a cause of action and after the sustaining of an objection to an offer of proof on the ground "that the offer does not prove or tend to prove the case in the pleadings set forth."

For the purposes of said rulings, the trial court had to consider as true all of the allegations of said second amended complaint and all of the facts stated in the offer of proof. We therefore state the facts as therein set forth, although the truth of a part thereof was in fact denied by the answer.

The second amended complaint alleges (in substance): That on or about May 11, 1922, plaintiff, an electrical contractor and merchant, in Los Angeles, Cal., entered into an agreement with defendant, a manufacturer, the portions of said agreement which are herein material being:

"If you are willing to push the sale of our motors in connection with your machines, save where the customer specifies some other make, your acceptance of one copy of this letter will constitute a motor manufacturer's agreement and will entitle you to contract discounts on all motors purchased by you from us.

"This agreement to remain in force for one year from date of acceptance and to continue in force from year to year unless cancelled by one of the parties hereto thirty days prior to the expiration of any yearly period, it being understood and agreed that the motor prices and discounts will be subject to variations that may be made by the Westinghouse Company and published in their regular price sheets. We shall be glad to fill your orders and give them the attention that will show our interest in your business."

This was signed by defendant. Plaintiff signed thereon: "This proposal is hereby accepted: H. W. Scott."

Said complaint further alleges that plaintiff complied with said agreement and performed all of the covenants and conditions as agreed by him to be performed, and that he did push the sale of defendant's motors in connection with his machines, and that said agreement was fully kept and performed by both parties from May 11, 1922, to June 25, 1925, on which latter date and continuously thereafter defendant refused to further perform under said contract. Plaintiff prayed for \$20,000 as damages for said breach of contract.

The offer of proof supplements the said complaint, in part as follows: "That under the contract the plaintiff and defendant entered into a motor manufacturer's agreement and we, in support of the contract and for the purpose of showing what a motor manu-

facturers agreement is, we desire to show and intend to show that * * *" (stating length of time contract was performed and volume of business done thereunder) "and that plaintiff held himself out as the agent and representative of the defendant, with the consent and knowledge of the defendant; that he did purchase from the defendant articles reaching something like \$42,000.00, probably more, that defendant gave discounts, * * *" etc.; "that the plaintiff did push the sales of the motors here in Los Angeles for the defendant, that he did advertise himself and created an enormous expense in doing said advertising; that he has been doing that from May 11, 1922, down to June 25, 1925"; that on June 25th defendant terminated the relation, and from that time defendant has refused to permit plaintiff to represent it as agent; and that defendant has established another agency in Los Angeles.

The trial court stated, in reference to the rulings complained of: "The contract as set forth in the complaint is what is known under the law as a unilateral contract, a one-sided contract where one party was not obliged to do anything and the other parties might, and one that is not binding under the statutes and the law as decided by the Supreme Court."

The alleged errors specified by appellant are:

"I. That the court erred in refusing [to permit] plaintiff to introduce evidence in support of the allegations set forth in his second amended complaint.

"II. That the decision of the court in refusing to permit plaintiff to introduce evidence in support of the allegations set forth in his second amended complaint was contrary to law.

"III. That the judgment entered in the aforesaid cause is contrary to law."

Separate discussions of these three specifications need not be made, for the reason that each is primarily dependent upon the sufficiency of the document set forth in the said complaint, aided, if at all, by the offer of proof, to constitute a contract binding upon defendant from and after June 25, 1925.

From a study of the document set forth in said complaint and of the offer of proof as made, it is apparent that plaintiff agreed only "to push the sale" of defendant's motors in connection with his machines, "save where the customer specifies some other make." He did not agree to buy anything of defendant. The dealings of the parties prior to June 25, 1925, were measured by said document, but from that date the agreement is wholly executory.

A sufficient cause or consideration is one of the essential elements of a contract. Section 1550, Civ. Code.

"A promise is a good consideration for a promise, provided always that it imposes some legal liability on the person making it. If it imposes none, then it cannot be a good consideration. A promise may be too vague and uncertain to amount to a consideration for a promise made by the other party." 13 Cor. Jur., p. 329.

"A purported contract between a cement manufacturer and a cement dealer, whereby the dealer, in consideration that he would give the manufacturer's brand the preference in his sales and 'push' the same, was to have a lower rate per barrel than other dealers, was void for lack of mutuality, since the dealer did not bind himself to make any sales of cement." Jackson v. Alpha Cement Co., 122 App. Div. 345, 106 N. Y. S. 1052.

In the case of Leach v. Kentucky Coal Co. (D. C.) 256 F. 686, the complaint alleged that plaintiff entered into a contract with defendant for the sale and distribution of defendant's products for five years. "Plaintiff was to introduce defendant's products in the territory in question, and to sell as much thereof as possible," and in consideration therefor defendant agreed to sell coal to plaintiff at a certain price. The court therein said, at page 688 of 256 F.: "There is no obligation whatever upon plaintiff to order any coal. If plaintiff had refused or neglected to order coal, defendant would not have had any cause of action against him. The case is not one where one party agrees to supply the requirements of another. * * * It is an agreement clearly lacking in mutuality."

The case of Bartlett Springs Co. v. Standard Box Co., 16 Cal. App. 671, 117 P. 934, shows the distinction between the case before us and that class of cases where the purchaser agrees to buy all the commodity agreed to be sold, *which he will need in his business*. Such a contract is held binding because it is held that the purchaser is bound to buy all his needs for the given period of the seller, and to purchase elsewhere would be a breach of the contract.

In the case of Schimmel v. Martin, 190 Cal. 429, 213 P. 33, 34, the Supreme Court had before it a contract between the owner of a pumping plant and an owner of adjoining land for water to be furnished for said land. The court therein said: "The contract is lacking in mutuality. Considered as a contract for the sale of personal property, as the parties to the action treated and considered it, and as the trial court in effect found it to be, there is clearly no mutuality in the absence of an agreement by the plaintiffs to buy the water offered for sale by the contract. The cases cited in the brief by counsel for respondents in support of the contention that the contract is mutual were all cases wherein the purchaser agreed in effect to purchase so

much of the commodity as he should need in his business during the time specified in the contract. As a matter of course, under the circumstances narrated in those cases, the purchaser was legally bound to accept and pay for so much of the commodity as he should need. But in the instant case we are unable to find in the contract any obligation or promise * * * to take or purchase any water at all."

Assuming the full truth of the allegations of the said complaint and of the statements of fact in the offer of proof, and giving to plaintiff the benefit of any possible uncertainty in the construction of said agreement, we conclude that the said complaint, even aided by the offer of proof as to technical meaning of terms used in this contract, does not state facts sufficient to constitute a cause of action, for the reason that said agreement lacks mutuality. The agreement, therefore, is unilateral as to all executory provisions. It is not a unilateral contract of the kind which may be enforced, such as an option founded on consideration, or where the party not bound has fully performed his part of the contract.

The promise to "push the sale" of motors is too uncertain and indefinite to constitute an enforceable consideration, and, there being no other promise or other consideration on the part of the plaintiff, the rulings of the trial court were correct.

The judgment is affirmed.

We concur: CONREY, P. J.; HOUSER, J.

103 Cal. App. 768
McCLINTICK v. LEONARDS,
Civ. 92.

District Court of Appeal, Fourth District, California.

Feb. 7, 1930.

1. Contracts $\S$ 316(4)—If offer to perform obligation be defective, offeree must object therefor, or defect is waived.

If an offer of performance of an obligation be defective, the offeree must object on that ground or the defect is waived, and he cannot be heard to urge that objection in a subsequent suit.

2. Mines and minerals $\S$ 73—Lessee preparing documents is chargeable with ambiguities therein (Civ. Code, $\S$ 1649, 1654; Code Civ. Proc. $\S$ 1864).

Lessee preparing and presenting to lessors oil lease, letter to himself, and agreement between himself and lessors, must be charged with any ambiguity in documents which he prepared, as any uncertainties existing in agreement are to be interpreted most strongly against one who prepared instrument and caused uncertainty to be present, under Civ. Code, $\S$ 1649 and 1654, and Code Civ. Proc. $\S$ 1864.

3. Mines and minerals $\hookrightarrow$ 79(1)—Lessee assuming duty to secure owner's consent to lease, and not objecting to form thereof, cannot escape payment of amount owing lessor because owner's consent was defective (Civ. Code, § 1501).

Where lessee of oil lease from lessors purchasing property from owner under executory contract of sale had duly executed oil lease in his possession with letter addressed to him, signed by lessor, containing written authority to owner to consent in writing to execution of lease and order on lessee to pay stated amount to landowner, lessee assumed duty of securing consent of landowner, and cannot escape payment of money on ground form of consent given by owner in letter to lessee showing his intention to consent was not in proper form, where lessee failed to object to it or ask for another in more definite form, as required by Civ. Code, § 1501.

Appeal from Superior Court, Kern County;
Robert B. Lambert, Judge.

Action by G. W. McClintick against R. T. Leonards. Judgment for plaintiff, and defendant appeals, and subsequently Marianna R. Leonards, as executrix of the estate of Reuben T. Leonards, deceased, also known as R. T. Leonards, was substituted as defendant and appellant.

Affirmed.

V. L. Ferguson, of Los Angeles, for appellant.

Siemon & Garber, of Bakersfield, for respondent.

MARKS, J.

Respondent commenced this action against R. T. Leonards to recover thirteen hundred dollars alleged to be due under the terms of a written contract. Judgment was rendered in favor of respondent, and, after the appeal had been taken, Leonards died and appellant was substituted herein.

The action grew out of an oil lease on real property situated in Kern county, Cal., the record title to which stood in the name of Alex Kirkpatrick, trustee. Respondent and H. A. McClintick, his mother, were purchasing the property under an executory contract of sale.

On January 30, 1926, Leonards himself prepared and presented to respondent three documents, consisting of an oil lease in triplicate, a letter to himself, and an agreement between himself and respondent. On the same day the three copies of the oil lease were signed by G. W. McClintick and Catherine McClintick, his wife, and H. A. McClintick, by G. W. McClintick, her attorney in fact, as lessors, and R. T. Leonards as lessee. One copy was kept by Leonards and another sent to Alex Kirkpatrick, who received the same.

The letter and agreement are important to the case and are set forth in full in words and figures as follows:

"Delano, California, January 30th, 1926.

"Mr. R. T. Leonards, 728 South Spring Street.
Los Angeles, California.

"Dear Sir: I am handing you herewith Oil and Gas lease in triplicate conveying to you or your order the right to explore certain lands for oil or gas.

"These lease is more fully described as to detail as being situate in Section twenty seven Township twenty seven S. R. 24 E. M. D. B. & M. Kern County.

"The present title to these lands is vested in Alex Kirkpatrick or Alex Kirkpatrick Trustee, of Los Angeles, California.

"The described lands as set forth in said lease dated January 30th, 1926, is being purchased by the undersigned, G. W. McClintick and H. A. McClintick, a widow of Denver, Colorado, each of the above named parties having a joint one half undivided interest in said purchase contract with Alex Kirkpatrick or Alex Kirkpatrick Trustee.

"Mr. Alex Kirkpatrick individually or as trustee is authorized to consent to the signing of an agreement, should he see fit to do so, wherein all legal requirements may be complied with in order to fully validate the terms of the within mentioned lease as to each separate detail.

"You are authorized to pay Mr. Kirkpatrick on account of the purchase contract upon said lands the sum of One Thousand Dollars upon receipt of such written consent and payment of One Hundred Dollars on the first day of March, 1926, and each thirty days thereafter until the total sum of Thirteen Hundred Dollars shall have been paid to said Alex Kirkpatrick.

"It is understood that I am to furnish you with necessary quit claims covering lands described in lease referred to. It is further understood that monies to be paid in accordance with this letter and the terms of the lease are to cover rentals on the said leased lands for a period of one year from January 30th, 1926.

"I further agree to furnish you with a true and correct copy of power of attorney from H. A. McClintick, wherein I am vested with due power and authority to execute the documents or leases herein mentioned.

"[Signed.] G. W. McClintick,

"Catherine McClintick.

"Witness—

"Delano, California, January 30th, 1926.

"Received of R. T. Leonards the sum of Two Hundred Dollars (\$200.00) said Money is acknowledged as consideration towards the payment of one years land rental covering a certain Oil and Gas lease as of this date executed by H. A. McClintick by G. W. McClintick, her attorney in fact, Catherine E. McClintick, and G. W. McClintick. Accompanied with said lease is a certain letter authorizing Alex Kirkpatrick to consent to said lease account of a certain purchase

contract covering said lands by lessees. It is understood that R. T. Leonards shall pay to said Alex Kirkpatrick the sum of money stipulated in said letter and agreements referred to within ten days after the delivery by me of quit claims and power of attorney referred to in said agreements. In the event or failure on the part of R. T. Leonards to Comply with the terms of payment then in that event the said Two Hundred Dollars shall be retained by me and forfeited as liquidated damages.

"[Signed.] G. W. McClintick
"Accepted: R. T. Leonards."

The parties agree that respondent furnished the quitclaim deeds, power of attorney, and other documents mentioned in the letter, excepting the written consent of Alex Kirkpatrick to the execution of the lease. Whether or not this consent was given is in dispute and presents the sole question to be decided on this appeal. The trial court found that it had been given, and found for the respondent and rendered judgment in his favor for thirteen hundred dollars. The evidence shows that during the latter part of February, 1926, Kirkpatrick saw Leonards and gave his verbal consent to the execution and delivery of the oil lease in question, and at that time Leonards promised to pay the thirteen hundred dollars to him. On March 8, 1926, Kirkpatrick wrote Leonards as follows:

"Los Angeles, Cal., Mar. 8th, 1926.

"Mr. R. T. Leonards, 728 So. Spring St., Los Angeles, Calif.

"Dear Sir: I herewith advise you that I now hold lease in my possession from Mr. G. W. McClintick on the following described property:

"The S-W $\frac{1}{4}$ of the S-W $\frac{1}{4}$, and the S-E $\frac{1}{4}$ of the S-W $\frac{1}{4}$; and the S $\frac{1}{2}$ of the S $\frac{1}{2}$ of the N-W $\frac{1}{4}$ of the S-W $\frac{1}{4}$; and the S $\frac{1}{2}$ of the S $\frac{1}{2}$ of the N-E $\frac{1}{4}$ of the S-W $\frac{1}{4}$; Section 27, Township 27 S., Range 24 E., Mt. Diablo Base and Meridian—comprising 100 acres.

"I have been instructed to turn this lease over to you upon the payment of \$1,000 and the further three months rental of \$100 per month.

"However, I understand that there are certain matters pertaining to former lease granted on this property which you are desirous of having cleared, before making initial payment, and for your protection I hereby guarantee that I will deliver the aforesaid lease at any time within 30 days, allowing sufficient time for you to work this matter out.

"Yours very truly."

This letter was signed by Kirkpatrick, mailed to Leonards and received at his office in Los Angeles. The copy introduced in evidence was furnished to respondent by one of Leonards' clerks.

It must be borne in mind that the agreement and the letter signed by respondent

were prepared by Leonards, and that the letter was addressed to Leonards. In so far as the paragraph of the letter of importance here is concerned, it constituted an order on Leonards to pay the one thousand dollars of the thirteen hundred to Kirkpatrick when he (Kirkpatrick) had given a written consent to the execution of the lease. It does not provide who shall obtain this consent; certainly the burden is not placed upon respondent. The agreement contains the direct statement that Leonards will pay Kirkpatrick this money within ten days after the delivery of the quitclaim deeds and power of attorney by respondent, which Leonards received shortly after February 8, 1926. A reading of the two instruments leaves the impression that the parties intended to place the duty of securing the consent from Kirkpatrick upon Leonards. There is nothing in the record to throw any light upon the intention of the parties other than the language of the instruments themselves.

[1] While the letter from Kirkpatrick to Leonards under date of March 8, 1926, does not make the definite and explicit statement that he consented to the execution of the lease, still it clearly shows that it was his intention to do so. This is especially true in view of Kirkpatrick's verbal statement to Leonards that he consented to the lease, and Leonards' oral promise to pay the money according to the terms of the written agreement. Clearly, the letter was intended as a written consent, and, if Leonards objected to its form, he should have promptly communicated his objections to the other parties or be subject to the conclusion that he had waived them. Section 1501, Civ. Code. The parties evidently regarded the latter as a consent, for we find that, on March 11, 1926, three days after it was mailed in Los Angeles to Leonards in Los Angeles, they were still proceeding with the transaction. In the due course of business the letter should have been received in Leonards' office not later than March 9, 1926, if not on the day it was mailed.

[2] If an offer of performance of an obligation be defective, the offeree must object on that ground or the defect is waived, and he cannot be heard to urge such objection in a subsequent suit. Lockhart v. J. H. McDougall Co., 190 Cal. 308, 212 P. 1. Had the letter contained the direct statement over Kirkpatrick's signature, "I consent to the execution of the lease between McClintick and yourself," Leonards would have been in no better position to enforce his rights had he proceeded with the transaction than he would have been with the letter in the form submitted to him, for Kirkpatrick would have been in no position to maintain that the letter was not a consent to the execution of the lease.

[3] As we have mentioned before, the written instruments did not place any express du-

ty on respondent to secure the written consent of Kirkpatrick to the execution of the lease, nor was a like duty expressly placed upon Leonards, who must be charged with any ambiguity in the documents which he prepared. "Any uncertainties existing in an agreement are to be interpreted most strongly against the one who prepared the instrument and caused the uncertainties to be present. Section 1654 of the Civil Code declares: 'In cases of uncertainty not removed by the preceding rules, the language of a contract should be interpreted most strongly against the party who caused the uncertainty to exist. The promisor is presumed to be such party.' Such presumption is furthered where it appears that the promisor drew the contract. Thus, any uncertainty or ambiguity in an insurance contract is to be construed most strongly against the insurer. He frames it, and is supposed to make it as potent as possible in his own favor. Where the language of one party may be understood in more senses than one, it is to be interpreted in the sense in which he had reason to suppose it was understood by the other party. This is the rule stated in section 1649 of the Civil Code, and in section 1864 of the Code of Civil Procedure." Section 185, 6 Cal. Jur. 307. In view of the fact that Leonards left respondent on January 30, 1926, with the duly executed oil lease in his possession, together with the letter addressed to him signed by McClintick, which contained written authority to Kirkpatrick to consent in writing to the execution of the lease and an order on Leonards to pay the thirteen hundred dollars to Kirkpatrick, and that no express act was required of respondent to complete the transaction except the furnishing of the quitclaim deeds and power of attorney, which he did, we conclude that Leonards assumed the duty of securing the consent from Kirkpatrick. He cannot escape payment of the money on the ground that the form of the consent given was not to his liking, it appearing that he failed to object to it and failed to ask for another in a more definite form.

Judgment affirmed.

We concur: SLOANE, P. J.; BARNARD, J.

104 Cal. App. 95

SMITH v. MINGRAMM et al. ★
Civ. 7268.

District Court of Appeal, First District, Division 2, California.

Feb. 17, 1930.

Rehearing Denied March 19, 1930. Hearing Denied by Supreme Court April 17, 1930.

1. Appeal and error ⇨151(1)—Right of appeal is limited to party aggrieved (Code Civ. Proc. § 938).

Under Code Civ. Proc. § 938, right of appeal is limited to party aggrieved.

2. Parties ⇨46—One may make himself party to cause by moving to set aside judgment or order complained of or by otherwise submitting to court's jurisdiction.

One not made party to cause may make himself party thereto by moving to set aside judgment or order complained of, or by otherwise submitting to jurisdiction of court.

3. Appeal and error ⇨612(1)—Trial judge settling reporter's transcript as record on appeal must at end thereof certify that record is true and correct (Code Civ. Proc. § 953a).

Trial judge settling reporter's transcript as record on appeal must, under Code Civ. Proc. § 953a, at end of record certify that record is true and correct.

4. Appeal and error ⇨931(1)—On defendant's appeal on typewritten transcript from order directing execution of deed to purchaser under foreclosure decree, appellate court must presume trial court had sufficient evidence before it warranting order.

On defendant's appeal from order directing commissioner to execute deed to purchaser of realty at sale under foreclosure decree after denying defendant right to redeem, where appeal was presented on typewritten transcript, appellate court must presume in support of order that trial court had before it sufficient evidence to sustain finding which may have included positive evidence showing defendant had no interest entitling her to redeem.

5. Mortgages ⇨617—Defendant in foreclosure action, claiming she was entitled to redeem held to have burden to show she was person entitled to redeem (Civ. Code, § 2903).

Defendant in mortgage foreclosure action, claiming she had right to redeem under Civ. Code, § 2903, held to have burden to show that she was person entitled to redeem.

Appeal from Superior Court, Los Angeles County; Hartley Shaw, Judge.

Suit by Sydney T. Smith, as administrator with the will annexed of the estate of Abbie A. Baldwin, deceased, substituted for Abbie A. Baldwin, against Walter E. Mingramm and wife and others, for foreclosure of mortgage, wherein defendant named filed cross-complaint seeking foreclosure of second mortgage assigned to him. Decree ordering foreclosure of both mortgages, and from an order directing execution of deed to purchaser, defendant Wilina Mingramm appeals.

Motion to dismiss appeal denied, and order affirmed.

William G. Randall, of Los Angeles, for appellant.

Redwine & Redwine, of Los Angeles, for respondents.

NOURSE, Acting P. J.

This is an appeal from an order of the superior court directing the commissioner appointed by the court to execute a deed to the

purchaser of certain real property at a sale under a decree of foreclosure of two mortgages. The appeal is presented on a typewritten transcript.

The appellant joined with her husband in the execution of a mortgage on the property on April 11, 1913. The defendants Otto and Minna Pachmayr on April 11, 1921, executed a second mortgage on the same property in favor of Thomas W. Miller, the alien property custodian. On January 22, 1926, this mortgage was duly assigned by the custodian to Walter E. Mingramm. In this suit for foreclosure of the first mortgage, Walter E. Mingramm was joined as a party defendant and then came forward as a cross-plaintiff seeking foreclosure of the mortgage thus assigned to him. Issue being joined, the trial court made its decree ordering the foreclosure of both mortgages in favor of these respective plaintiffs. A commissioner was duly appointed, who made the sale to the respondent Hooper, to whom certificate of sale was duly issued.

Before the expiration of one year from the date of the sale an attorney claiming to represent Mrs. Mingramm paid to the commissioner an amount sufficient to redeem the property from execution sale. This sum the commissioner tendered to the purchaser at the sale, who refused to accept it. After the expiration of the year the court directed the commissioner to execute a deed to the purchaser, and such deed was executed and delivered. It is from this order that the appeal is taken on behalf of Mrs. Mingramm.

The respondent, the purchaser at the commissioner's sale, urges in support of the order that appellant is not a party entitled to redeem. He also has moved to dismiss the appeal on the ground that the appellant is not a "party" aggrieved by the order and also on the ground that the order having been fully executed the questions raised are moot.

The appellant was joined as a party defendant, but the cause was dismissed as to her and she was not thereafter a party to the proceeding. The attorney appearing for her on this appeal filed an affidavit in the court below stating that he appeared for her, but the court, after a hearing upon oral and documentary evidence, recited in its order that this attorney appeared for the court commissioner. The appellant is a resident of Holland and has not in person or by letter of any character made any appearance in the proceedings except as may have been done in the manner above noted.

[1, 2] The right of appeal is limited to a "party aggrieved." Section 938, Code Civ. Proc. One who has not been made a party to a cause may make himself a party by moving to set aside the judgment or order complained of, or by otherwise submitting himself to the jurisdiction of the court. Elliott v. Superior Court, 144 Cal. 501, 506, 77 P.

1109, 103 Am. St. Rep. 102; Postal, etc., Co. v. Superior Court, 22 Cal. App. 770, 773, 136 P. 538.

If we are bound by the recitals in the order of the trial court, it must be apparent that the appellant has not submitted to the jurisdiction of the court in any manner and that she is not therefore a party entitled to appeal from the order. It would also seem that the entire controversy over the order is moot because the deed has been executed and delivered and the order is now functus officio. But the record is in such condition that we do not deem it proper to grant the motion to dismiss on either ground.

[3-5] On the merits the issue is plainly stated by both parties to be whether the appellant is a party entitled to redeem under the provisions of section 2903, Civil Code. This section reads in part: "Every person, having an interest in property subject to a lien, has the right to redeem it from the lien, at any time after the claim is due, and before his right of redemption is foreclosed. * * * Manifestly, any one claiming the benefits of this section must, at the very outset, show that he is a "person having an interest in the property." If any such showing was made it does not appear in the record. The trial court found that no redemption was made during the legal period. This finding was made after a hearing upon both oral and documentary evidence, and what this evidence tended to prove we have no method of knowing except through the recitals of the order. The record is designated as the clerk's transcript of papers on file in his office. Among these papers are certain affidavits. If they were read or used at the hearing the record does not so disclose. At the end of this record appears the certification of the trial judge that the record is true and correct. This is what is required of the trial judge in the settlement of the reporter's transcript under section 953a, Code of Civil Procedure. But, if we were to treat the record as being both a clerk's and a reporter's transcript within the meaning of that section, we cannot escape the conclusion that the appellant has failed to show error. We must presume, in support of the order, that the trial court had before it sufficient evidence to sustain its finding, and that this may have included positive evidence showing that appellant had no interest. On the other hand, if no evidence was taken, the result is the same. The burden was on appellant to show that she was a person entitled to redeem. If she failed to make the showing she cannot now claim error. If she made the showing she should have it in the record.

The motion to dismiss is denied.

The order is affirmed.

We concur: STURTEVANT, J.; DOOLING, Justice pro tem.

104 Cal. App. 64

WOODY et al. v. SECURITY TRUST & SAVINGS BANK et al.

Civ. 231.

District Court of Appeal, Fourth District,
California.

Feb. 14, 1930.

1. Exceptions, bill of $\S$ 53(1)—Evidence held not to show clearly that defendants were in default in presenting and having certified proper bill of exceptions (Code Civ. Proc. $\S\S$ 649, 650).

On motion to be relieved of default in filing of bill of exceptions, evidence held not to show default clearly, as is required in order to justify refusal to certify bill of exceptions on ground of default in strictly complying with terms of statute, Code Civ. Proc. $\S\S$ 649, 650, in view of showing as to submission of bill to judge.

2. Exceptions, bill of $\S$ 42—Plaintiffs held to have waived any default of defendants in filing bill of exceptions by failing to make prompt objection and by correspondence and conduct.

On motion of defendants to be relieved of default in filing of bill of exceptions, record held to show that if defendants were in default plaintiffs had waived such default by failing to make prompt objection, even when matter was set for hearing, and by correspondence and conduct.

3. Common law $\S$ 9—Party seeking to avail himself of technicality must himself be held to prompt, consistent, exact assertion of such technical right.

Party or attorney who seeks to avail himself of technicality not affecting substantial right must himself be held to prompt, consistent, and exact assertion of such technical right.

4. Appeal and error $\S$ 708—Reviewing court cannot review question, where trial court's refusal to settle first bill of exceptions left no record relating to such question (Code Civ. Proc. $\S$ 473).

Question whether court erred in denying relief to defendants under Code Civ. Proc. $\S$ 473, for original default in failing to appear in action within 30 days after service of summons, cannot be reviewed, where refusal of trial court to settle first bill of exceptions left no record before reviewing court relating to such question, notwithstanding that bill of exceptions set forth copy of prior proposed bill of exceptions, since reviewing court in absence of settlement by trial judge does not know whether they were full and complete.

Appeal from Superior Court, Kern County; Erwin W. Owen, Judge.

Action by S. A. Woody and others against the Security Trust & Savings Bank and another. From orders denying a motion to relieve of default in filing of bill of exceptions and refusing to settle same, defendants appeal.

Reversed with instructions.

Frank P. Doherty, M. Eleanor Mack, and Franklin W. Peck, all of Los Angeles, and C. L. Clafin, of Bakersfield, for appellants.

Brittan & Brittan, of Bakersfield, for respondents.

BARNARD, J.

The plaintiffs on May 4, 1926, filed an action in the superior court of Kern county against Security Trust & Savings Bank, a corporation, and fictitious defendants, for the purpose of quieting title to certain land in that county. The summons in said action was served on the bank in the county of Los Angeles on May 6, 1926. The bank having failed to appear in the action its default was entered on June 7, 1926. On June 24, 1926, the said bank and C. H. Barlow, sued in the action as John Doe, filed a notice of motion to vacate and set aside the default and decree, together with supporting affidavits, and a proposed answer. This motion was heard and submitted on July 12, 1926, and on March 24, 1927, an order was entered denying the same. Notice of this order was served on April 15, 1927. On May 2, 1927, defendants served and filed notice of appeal from the order denying the motion referred to, and on the same day the attorneys entered into a written stipulation giving the defendants until May 20, 1927, in which to prepare and file a proposed bill of exceptions. On May 17, 1927, defendants mailed the original and a copy of their proposed bill of exceptions to the attorneys for plaintiffs, with the request that they stipulate to its correctness, and have it presented to the judge. With this they inclosed a stipulation giving the plaintiffs twenty days' additional time in which to prepare amendments to the proposed bill of exceptions. On June 7, 1927, plaintiffs' attorneys mailed a copy of their proposed amendments to defendants' attorney, stating that the original thereof and the original bill of exceptions had been submitted to the judge, and requesting a stipulation, if the amendments were consented to, so that the exceptions and amendments might be engrossed. On July 8, 1927, the county clerk wrote to defendants' attorney as follows: "Judge Owen has directed us to advise you that he will sign the proposed bill of exceptions in the above entitled case, when the proposed amendments are engrossed in said bill of exceptions."

On August 11, 1927, defendants' attorney wrote to the attorneys for plaintiffs, suggesting that they had inadvertently left out of their proposed amendments a certain affidavit, and inquiring if they desired to include the same in their amendments. On August 15, 1927, plaintiffs' attorneys replied as follows: "We were advised by the County Clerk some time ago, and he said he would write to you asking you to engross the bill

of exceptions, if the amendments had been allowed, and I presumed that this had been done. Judge Owen is now away and will not return for some time. I will take it up with him at the first opportunity and go over the matter with him, and advise you accordingly." On September 17, 1927, defendants' attorney again wrote to plaintiffs' attorneys, as follows: "I have not heard from you relative to inserting in your proposed amendments to the bill of exceptions in the above case, the affidavit of S. A. Woody. Please advise me if you desire this affidavit in your proposed amendments so we may have the bill of exceptions engrossed and presented to the judge for final settlement. I will appreciate hearing from you." On September 19th plaintiffs' attorneys replied that they saw no necessity for adding the affidavit in question, and closed with this sentence: "Consequently, we suggest that you go ahead and have the bill engrossed so that the matter will get on its way." To this defendants' attorney replied on September 26, 1927, as follows: "I have your letter of September 19th in reply to mine asking if you cared to have the Woody affidavit incorporated in the proposed amendments to proposed bill of exceptions in the above entitled case. In accordance with your letter, I have amended the proposed bill of exceptions and enclose it herewith, in order that you may sign the stipulation as to its correctness. Will you then please file the same with the clerk, in order that the same may be settled and allowed at an early date."

On October 7, 1927, defendants' attorney again wrote plaintiffs' attorneys, inquiring whether the engrossed bill of exceptions had been delivered to the clerk, and whether or not the judge had approved the same. On the same day plaintiffs' attorneys wrote to defendants' attorney as follows:

"We do not feel as though we wanted to sign the stipulation as to the bill of exceptions in the above matter, as one of the parties to the action, George Parker, is an attorney, and he feels we are under no obligation to sign the stipulation for the reason that if there are any particular advantages to be taken by reason of the fact that the bill of exceptions is not engrossed and filed within time, that we should take advantage of the same; and he therefore objects to me signing or making the stipulation requested.

"I therefore wish you would take the matter up directly with the court and have it taken care of in that manner so that I will not have to sign the stipulation in connection with the matter at all."

On October 8, 1927, defendants' attorney wrote to Judge Owen, stating he was inclosing the engrossed bill of exceptions; that plaintiffs' attorneys had stated they did not care to stipulate to the same, for the reason that advantage might be taken for failure to

present within the time allowed by law, and closing: "In the event Mr. Brittan objects to the settlement of the bill of exceptions by you, I would appreciate it, if you would advise me as I wish to be heard." On October 10, 1927, the county clerk wrote defendants' attorney as follows: "Judge Erwin W. Owen has directed that you be notified that the proposed engrossed bill of exceptions in the above entitled case will be heard Monday, October 17, 1927, at 2 o'clock p. m., in Department No. 2."

The hearing on said proposed bill of exceptions was continued from October 17, 1927, to October 31, 1927, and again continued to November 28, 1927, at which time it was continued until December 5, 1927. In the meantime, on November 7, 1927, plaintiffs' attorneys served an "objection to settlement, or allowance, or engrossment, or certification of bill of exceptions by plaintiffs." This was based on the claim that the same had not been presented, or engrossed, or certified, as provided in sections 649, 650, of the Code of Civil Procedure; that the defendants had not shown due diligence or excusable neglect in relation to the same; and that the court was without jurisdiction to allow or certify said proposed bill of exceptions.

On December 5, 1927, a motion of the defendants to be relieved of their default by reason of inadvertence and excusable neglect, as set forth in an affidavit appearing in the bill of exceptions, was heard and denied by the court, and at the same time the court refused to settle, or order engrossed, or certify the proposed bill of exceptions. The defendants have appealed from these last two orders and have presented a bill of exceptions setting forth the prior proposed bill of exceptions, submitted on May 17, 1927, with plaintiffs' amendments thereto, submitted on June 7, 1927, together with letters, documents and affidavits showing the state of facts above set forth.

The only question presented by this appeal is that raised by defendants' first and second specifications of error, as to whether or not the trial court erred in its order made on December 5, 1927, refusing defendants relief from their default, if any, in presenting and getting certified the first bill of exceptions, and in further refusing to settle, allow and certify the proposed bill of exceptions.

[1] In the first place, it does not clearly appear that the defendants were in default in the matter of presenting and having certified a proper bill of exceptions. In order to justify a refusal to certify a bill of exceptions, the effect of which may be to deprive a party of his right to his day in court, upon the ground of the default of such party in strictly complying with the terms of the statute, it must be made to clearly appear that such default actually existed. Section 649 of the Code of Civil Procedure provides that a bill

of exceptions may be presented to the court, or judge, "and after having been settled must be signed by the judge and filed with the clerk." Section 650 of the same Code provides that the proposed bill and proposed amendments must, within ten days after the serving of the proposed amendments, be presented by the party seeking the settlement of the bill, to the trial judge, upon five days' notice to the adverse party, or be delivered to the clerk of the court for the judge. When delivered to the judge, this section makes no provision for the time within which it must be engrossed, after approval by the judge, and re-presented to him for certification; but the section does provide that when it is delivered to the clerk, he must immediately deliver it to the judge, and that the judge must then designate the time at which he will settle the bill, and the clerk must immediately notify the parties of such designation, at which time the judge must settle the bill, and that thereupon the bill must be engrossed and presented to the judge for certification, by the party presenting it, within ten days.

In the instant case plaintiffs' attorneys wrote to defendants' attorney on June 7, 1927, as follows: "We are enclosing herewith, copy of proposed amendments to proposed bill of exceptions, the original of which, together with the original bill of exceptions, has been submitted to the judge."

It does not appear from this whether it had been submitted to the judge by the attorneys for the plaintiffs' or whether they had delivered it to the clerk, and it had been by the clerk submitted to the judge. If it was handed directly to the judge, the statute provides no time within which it must have been engrossed. And there appears nowhere in the record any minute order, or any order of any character, purporting to settle the proposed bill of exceptions, or allowing any or all of the amendments proposed. If it were delivered to the judge by plaintiffs' attorneys, the adverse party had, not only five days' notice, as provided in the statute, but immediate notice, having delivered it themselves. On the other hand, if the proposed bill was delivered to the clerk, and by him delivered to the judge, under the terms of the statute it became the duty of the judge to designate the time at which he would settle the bill, and of the clerk to notify the defendants' attorney of such time. The first notice of this kind appearing in the record, is that of October 10, 1927, when the clerk wrote to the defendants' attorney, informing him that the trial judge had directed that he be notified that the proposed engrossed bill of exceptions would be heard on October 17, 1927. The fact that this time was fixed by the judge, and notice given by the clerk, would indicate that the proposed bill had been handed to the clerk, and by him delivered to the judge. The notice having been given by

direction of the court, and apparently in conformance to the provisions of the statute, if it be assumed that the acts of the court are regular and legally done, the record would indicate the bill had been submitted by the clerk. In either event, a default does not clearly appear.

[2, 3] It further appears from the record that, even if the defendants were in default in the respect complained of, the plaintiffs themselves had waived such default, and had failed to make prompt objection thereto, even when the matter was set for hearing. In *Hicks v. Masten*, 101 Cal. 651, 36 P. 130, 131, the court uses this language: "The party or attorney who seeks to avail himself of a technicality not affecting a substantial right must himself be held to a prompt, consistent, and exact assertion of such technical right." See, also, *Bollinger v. Bollinger*, 153 Cal. 190, 94 P. 770; *Houghton v. Superior Court*, 128 Cal. 352, 60 P. 972; *Silverman v. Thompson*, 196 Cal. 585, 238 P. 684.

No objection of any kind was filed by plaintiffs' attorneys, prior to the time set for hearing the matter on October 17, 1927, nor at that time, nor up to the time of the next continuance thereof, October 31, 1927. The first objection filed or served, so far as the record shows, was on November 7, 1927.

In addition to this more technical waiver, the correspondence and conduct of the parties, especially in view of the somewhat irregular manner in which the matter was being handled, must be held to constitute a waiver. In their letter of June 7, 1927, plaintiffs' attorneys asked defendants' attorney for a stipulation, as to their amendments, so that the bill of exceptions and amendments might be engrossed. Without a reply to this, on August 11th, defendants' attorney wrote them in regard to a matter he thought they had inadvertently left out. Without replying to this suggestion, plaintiffs' attorneys answered to the effect that the judge was away, would not return for some time, and that they would take it up with him at the first opportunity, go over the matter with him, and advise defendants' attorney accordingly. On September 17th, defendants' attorney again wrote to the attorneys for the plaintiffs, in regard to the suggested inadvertent omission, to which these attorneys replied to the effect that they did not desire the correction suggested, and closed by saying, "Consequently, we suggest that you go ahead and have the bill engrossed so that the matter will get on its way." Within six days after that letter could have been received, defendants' attorney mailed the proposed bill of exceptions to plaintiffs' attorneys, with the request that it be filed with the clerk. No objection was then made, and it was not until two weeks later that the first intimation of an objection appeared, and this was to the effect that it was preferred that it be left to the court,

rather than be approved by stipulation. It is a not unusual practice for attorneys located in distant cities, to ask opposing counsel, located at the seat of the court, to deliver or file papers, the delivery or filing of which is more incumbent upon the other party. That they have no right to so request, may be conceded. It may also be conceded that for a time after July 8, 1927, the attorney for the defendants, if not technically in default, was at least negligent. But under the circumstances, especially as they appear after that time, and with such acquiescence as is shown by the record here, we feel that plaintiffs' attorneys have, more than in a mere technical sense, waived any default in the matter complained of, if such default there was.

[4] The second point raised and argued in the briefs of both parties is whether or not the court erred in its order of March 24, 1927, denying relief to the defendants, under section 473 of the Code of Civil Procedure, for their original default in failing to appear in the action within thirty days after the service of summons. Unfortunately, we are not in position to pass upon this point, for the reason that the refusal of the trial court to settle the first bill of exceptions leaves no record before us, relating to that question. While it is true that the bill of exceptions upon this appeal sets forth a copy of the prior proposed bill of exceptions, and the proposed amendments thereto, in the absence of settlement by the trial judge, we do not know whether or not they are full and complete, or whether or not they contain assertions not in accord with the facts.

The orders appealed from are reversed, with instructions to the trial court to settle and certify the bill of exceptions.

We concur: SLOANE, P. J.; MARKS, J.

104 Cal. App. 201

KIMES v. RASOR.

Civ. 5877.

District Court of Appeal, Second District,
Division 2, California.

Feb. 21, 1930.

1. Appeal and error $\S$ 1039(13)—**Variance, if any, in assignee's action upon account, between assignor's full name and company name, held not prejudicial under evidence.**

In action for money by assignee of indebtedness, variance, if any, between corporate assignor's name appearing upon its stationery and signature upon purported transfer of account, held not prejudicial under evidence showing assignor was generally recognized and understood

in business transactions and in present suit under its full name as well as company name, as one and the same.

2. Corporations $\S$ 411—**Local agent of corporation having general direction and control of affairs in district held to have authority to assign account for collection.**

Local agent of foreign corporation having general direction and control of its affairs in district where local business was transacted, and having full charge of all sales and collections for corporation, held to have authority to assign account for collection.

Appeal from Superior Court, Los Angeles County; Wm. D. Dehy, Judge.

Action by H. Z. Kimes against Jesse A. Rasor. Judgment for plaintiff, and defendant appeals.

Affirmed.

Samuel D. Weil, of Los Angeles, for appellant.

Ben Rosenthal and Avery M. Blount, both of Los Angeles, for respondent.

CRAIG, J.

The respondent instituted an action in the superior court for recovery of an indebtedness alleged to have been assigned to him by the Lee Tire & Rubber Company, a foreign corporation. Of the technical defenses interposed at the trial, appellant at this time only questions the sufficiency of the assignment.

[1] The corporate name appearing upon stationery of the company was Lee Tire & Rubber Company of New York, Inc., and the signature upon the purported transfer of the account was written: "Lee Tire & Rubber Co., By George Belles, Gen. Mgr. L. A. Branch." It is contended that there was a fatal variance as to identity of the corporation, and that an assignment of a nonresident corporation by one not its California general manager is insufficient to vest title to a demand in the plaintiff for the purposes of maintaining suit thereon.

It was testified by George Belles that the executive offices of his principal were in New York, that it had branches on the Pacific Coast, and had complied with the laws of this state by filing its articles of incorporation here; that he was general manager of the Los Angeles branch, which was maintained for the purpose of making sales throughout Southern California; that the defendant purchased merchandise at said branch, for which he was rendered monthly statements, and given credit for payments on account. It also appears that the business in Southern California of the concern alternately mentioned throughout the record by both names, including the defendant's account was under the supervision and control of Belles.

The defendant testified that he received at Belles' place of business a statement of his account upon the stationery of Lee Tire & Rubber Company of New York, Inc., and that he there made payments to the Lee Tire & Rubber Company, for which he was given receipts by Belles on account of purchases made from time to time. It appears that the plaintiff merely signed his name to the assignment, and that his counsel wrote beneath it the corporate name in the abbreviated form. There is no evidence that appellant did business with any other merchant of a similar name, that Belles represented any other concern, or that his assignor had any other place of business in California. Since the defendant's creditor was generally recognized and understood in business transactions and in this suit, under its full name as well as the company name, as one and the same, the variance, if any, was of no prejudicial consequence to appellant.

[2] Nor do we consider the agent's authority to assign the account for collection doubtful. It is not questioned that he had general direction and control of the affairs of the corporation in the district where both parties apparently transacted all of their California business, and that he had full charge of all sales and collections for his superior, with whom appellant dealt and to whom he was found to have owed the obligation in controversy. Under the evidence before us we cannot say that appellant was misled or that the rendition of judgment in favor of the plaintiff upon the subject-matter of the suit could legally be held without prejudice to future litigation upon the same cause of action. *Commercial Security Co. v. Modesto Drug Co.*, 43 Cal. App. 162, 184 P. 964; *Simpson v. Malter*, 43 Cal. App. 662, 185 P. 675.

The judgment is affirmed.

We concur: WORKS, P. J.; IRA F. THOMPSON, J.

In re SCHLUTER'S ESTATE. ★

MOORE v. REYNOLDS.

Civ. 6511.

District Court of Appeal, Second District, Division 1, California.

Feb. 14, 1930.

Hearing Granted by Supreme Court March 17, 1930.

1. Guardian and ward ⇨22—Jurisdiction in guardianship proceeding after ward's death was limited to settlement of guardian's account and adjustment as to property in guardian's possession.

Jurisdiction of superior court in guardianship proceeding at time when guardian's account

was presented after death of ward was limited to matter of settlement of account of guardian and adjustment of rights and obligations with respect to property which had come into her possession or control, and for which she was legally obligated to make an accounting.

2. Guardian and ward ⇨22—Superior court, after death of ward, had power to subject to charge and lien for guardian's security only property within guardian's possession.

Superior court had power, in guardianship proceeding after death of ward, to subject to charge and lien given for guardian's security only that property of ward's estate which was actually or constructively within possession and control of guardian and accounted for by her, and court, in attempting to extend lien to property under control of superior court of another county administering ward's estate, exceeded its jurisdiction.

Houser, J., dissenting.

Appeal from Superior Court, Los Angeles County; Walter J. Desmond, Judge.

On petition for rehearing. Petition denied. For former opinion, see 284 P. 222.

George Acet, of Los Angeles, for appellant. Davis & Thorne, of Los Angeles, for respondent.

CONREY, P. J.

[1, 2] The jurisdiction of the superior court of Monterey county in the guardianship proceeding at the time when the guardian's account was presented to it after the death of the ward was limited to the matter of settlement of the account of the guardian and the adjustment of the rights and obligations of the guardian with respect to the property which had come into her possession or control, and for which she was legally obligated to make an accounting. The court had power to subject to the charge and lien given for the guardian's security only that property of the ward's estate which was actually or constructively within the possession and control of the guardian and accounted for by her. This did not include personal property of which the guardian had not obtained possession. It follows that, in attempting to extend the lien to other property then under the control of the superior court of Los Angeles county in the matter of the administration of the ward's estate after the ward's death, the superior court of Monterey county exceeded its jurisdiction. This being so, the superior court of Los Angeles county erred in making the order from which this appeal is taken. The error consisted in accepting said order of the superior court of Monterey county as the basis and authority for the imposition of the guardian's claim as a lien upon all the property of the decedent's estate. If the guardian desired to assert the right claimed by her to payment out of the general assets of the de-

cedent's estate, she should have presented her claim within the time and in the manner required for the presentation of creditors' claims against decedents' estates.

The petition for rehearing is denied.

I concur: YORK, J.

I dissent: HOUSER, J.

KENNEDY v. CITY OF GUSTINE et al ★
Civ. 3932.

District Court of Appeal, Third District, California.

Feb. 18, 1930.

Rehearing Denied March 20, 1930. Hearing Granted by Supreme Court April 17, 1930.

Mandamus (C187(7))—In proceeding to compel city to raise amount of judgment by tax levy representing services performed by plaintiff in supervising street improvement, judgment for defendant must be affirmed, absent contract from record (Improvement Act 1911, § 17; Const. art. 11, § 18).

In proceeding for writ of mandate to compel city to raise amount of judgment by tax levy representing reasonable value of services performed by plaintiff in supervising construction of certain street improvements based on Improvement Act 1911, § 17 (St. 1911, p. 737), providing that, where work is abandoned by city, incidental expenses incurred previous thereto shall be paid from city treasury, judgment for defendant must be affirmed where contract between parties was not contained in record, since, in absence thereof, it would be presumed to be such as to warrant judgment as by containing a direct promise to pay for services in event of abandonment of work, thereby establishing a contractual obligation to make such payment in violation of Const. art. 11, § 18, in that indebtedness incurred exceeded city's revenue for the year, and was incurred without assent of two-thirds of qualified electors.

Appeal from Superior Court, Merced County; Malcolm C. Glenn, Judge.

Application for a writ of mandate by C. C. Kennedy to compel the City of Gustine and its officers to raise the amount of a judgment by a tax levy. Judgment for defendants, and petitioner appeals.

Affirmed.

Nathan B. McVay, of Modesto, for appellant.

F. W. Henderson, of Merced, for respondents.

FINCH, P. J.

The defendant city of Gustine, which will be referred to herein as the defendant and

respondent, is a municipal corporation of the sixth class. In the year 1920 it employed the plaintiff to perform the engineering work and supervise the construction of certain street improvements under the Improvement Act of 1911 (St. 1911, p. 730). After the plaintiff had performed part of the services for which he was employed, and after the defendant had adopted a resolution of intention to make the improvements, it abandoned the proceedings and terminated the plaintiff's employment.

In an action against the defendant, the plaintiff recovered judgment for the reasonable value of the services he had performed. The judgment was affirmed on appeal. *Kennedy v. City of Gustine*, 199 Cal. 251, 248 P. 910. Thereafter the plaintiff instituted this proceeding for a writ of mandate to compel the defendant and its officers to raise the amount of the judgment by a tax levy. Judgment was entered in favor of the defendants, and the plaintiff has appealed.

It was stipulated at the trial that the defendant's indebtedness to the plaintiff "exceeded the income and revenue of said City of Gustine from all sources provided for the year in which said indebtedness and liability was incurred, and that said indebtedness and liability was so incurred without the assent of two-thirds of the qualified electors of said City of Gustine voting at an election for that purpose." The only question to be determined is whether the indebtedness was incurred in violation of section 18, art. 11, of the Constitution, which provides: "No * * * city * * * shall incur any indebtedness or liability in any manner or for any purpose exceeding in any year the income and revenue provided for such year, without the assent of two-thirds of the qualified electors thereof, voting at an election to be held for that purpose."

It is conceded that, if the liability in question is contractual, the judgment must be affirmed. *Arthur v. City of Petaluma*, 175 Cal. 216, 165 P. 698. On the other hand, it is conceded that, if such liability is one created by statute, the judgment must be reversed. The judgment which the plaintiff recovered against the defendant is based on the provisions of section 17 of the Improvement Act of 1911, which reads as follows:

"Before being entitled to a contract, the bidder to whom the award was made, or the owners who have elected to take the contract, must advance to the superintendent of streets, for payment by him, the cost of publication of the notices, resolutions, orders and matters required under the proceedings prescribed in this act, and of such other notices as may be deemed requisite by the city council, together with all other incidental expenses [incurred up to the time of entering into the contract]. And in case the work is abandoned by the

city * * * the incidental expenses incurred previous to such abandonment shall be paid out of the city treasury."

The contract between the plaintiff and the defendant is not contained in the record. In the absence thereof, it may be presumed to be such as to warrant the judgment. It may be presumed to contain the terms set forth in *Kennedy v. City of Gustine*, 199 Cal. 254, 248 P. 910, 911, one of which reads as follows: "In the event that any of said improvements are rescinded or postponed by the city, the party of the first part shall pay to the party of the second part as compensation the proper pro rata in accordance with the preceding schedule."

This language constitutes a direct promise to pay the plaintiff for his services in the event of the abandonment of the work by the defendant, and establishes a contractual obligation to make such payment. In the absence of any such provision in the contract, section 17 of the Improvement Act became a part thereof, and is binding upon the defendant as one of the terms thereof. "All applicable laws in existence when an agreement is made necessarily enter into it and form a part of it as fully as if they were expressly referred to and incorporated in its terms." 6 Cal. Jur. 310.

The judgment is affirmed.

We concur: PLUMMER, J.; R. L. THOMPSON, J.

104 Cal. App. 198

SCHAPIRO v. HILLIKER.
Civ. 5707.

District Court of Appeal, Second District,
Division 2, California.
Feb. 21, 1930.

1. Pleading ☞121(3)—Garnishee sued on account of judgment rendered against debtor could in answer deny on information and belief that there was any unpaid balance on judgment.

In action against garnishee to recover on account of judgment entered against debtor, it was permissible for defendant to deny on information and belief the existence of an unpaid balance on the judgment, where the complaint set up no privity between him and the judgment debtor.

2. Garnishment ☞7, 88—Debtor's nonpayment of all or portion of judgment is prerequisite to garnishee's liability to creditor, and must be alleged.

Nonpayment of all or portion of judgment against debtor is prerequisite to liability of garnishee in action by creditor to enforce pay-

ment by the garnishee, and such fact must be alleged by plaintiff to state a cause of action.

3. Garnishment ☞88—Judgment creditor's complaint against garnishee, merely alleging that sheriff after levies returned judgment against debtor unsatisfied, held insufficient for want of direct averment of nonpayment.

In action by judgment creditor against garnishee to recover on account of judgment entered against the debtor, complaint, which merely alleged collection of \$200 by levy, and that sheriff "had returned the judgment unsatisfied as to the unpaid balance thereof," and that subsequent to the levy third party levy was made by the sheriff on the defendant and returned unsatisfied, held insufficient for want of direct averment that the judgment had not been paid.

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Action by Mark Schapiro against Eston P. Hilliker. Judgment for plaintiff, and defendant appeals.

Reversed.

Hewitt, Ford, McCormick & Crump and J. F. Moroney, all of Los Angeles, for appellant.

Goldman & Lieberman and Alfred J. Smallberg, all of Los Angeles, for respondent.

BURNELL, Justice pro tem.

This appeal is from a judgment on the pleadings in an action against a garnishee. The following facts alleged in the complaint are not traversed by the answer: That on June 24, 1925, the plaintiff commenced an action against one Kathryn Hilliker for the recovery of \$1,100 and garnished all moneys in the hands of the defendant herein due from him to said Kathryn Hilliker; that on August 28, 1925, appellant answered the garnishment by stating that he was indebted to Kathryn Hilliker in the sum of \$5,800; that on March 19, 1926, "upon stipulation and by order of the court all moneys over and above the sum of \$1,500 was [sic] released from said attachment, and the said sum of \$1,500 remained in the hands of said defendant subject to said attachment"; that on October 15, 1926, a judgment was entered in favor of plaintiff and against Kathryn Hilliker in the aggregate sum of \$1,130.70; and that thereafter \$200 was collected by the sheriff on a levy and applied to the partial satisfaction of the judgment. It is next alleged that the sheriff "has returned the judgment unsatisfied as to the unpaid balance thereof, to-wit, the sum of \$930.70," and that subsequent to the levy above referred to "a third party levy" was made by the sheriff "and demand duly made upon the said defendant to pay the said judgment pursuant to his return of said attachment," that the defendant has failed and refused to pay the same, and that "the same was so returned by the sheriff * * * as

wholly unsatisfied." There follows an allegation that the defendant is indebted to the plaintiff in the sum of \$930.70, none of which has been paid. The answer denies on information and belief "that there is an unpaid balance upon said judgment in the sum of \$930.70 or in any sum at all," and denies the alleged indebtedness.

The only point discussed in the briefs of the respective parties is the sufficiency of the denial of the existence of an unpaid balance on the judgment. As to this it is argued by appellant that whether or not the judgment was unpaid was a material issue, the facts of which were not presumably within his knowledge; he not being a party to the original action, and that the payment or nonpayment was not a matter of public record, and hence that he could properly base his denial on a want of information or belief.

[1] Assuming that the complaint sufficiently alleged that the judgment was not paid, and that there was a balance due thereon of the amount involved in the action, we are of opinion that appellant's contention is correct. The complaint sets up no privity as between the appellant and the judgment debtor, and it might well be that he had, as he alleges, no information or belief as to whether or not, at the time he filed his answer, the full amount of the judgment had been received by the plaintiff. The fact of the sheriff's return would only apprise him of the failure of the efforts of that officer to collect.

[2, 3] The complaint, however, does not allege that there existed an unpaid balance on the original judgment. The sheriff's return on the first levy amounted to his statement that he had been able to collect but \$200 and that, so far as his efforts were concerned, the balance remained unpaid. The allegation as to the sheriff's return unsatisfied of the "judgment"—probably "execution" was meant—is not tantamount to an allegation that the judgment had not been paid at all. The allegation as to the "third party levy" made by the sheriff on the defendant and the latter's refusal to pay thereon and the sheriff's return of "the same" unsatisfied is again but a statement of the failure of the effort of the sheriff to collect from the defendant. This allegation, like the former, does not aver as a fact that the judgment had not been paid. Setting up the failure of the plaintiff to secure payment through the process of an execution levy does not negative the payment of the judgment by the judgment debtor directly to the plaintiff or in some other manner. The nonpayment of all or a portion of the judgment was of course a prerequisite to the liability of the garnishee in an action to enforce payment by him. It was a material fact which it was incumbent upon the plaintiff to allege in order to state a cause of action. An

allegation that the plaintiff has not been able to secure the payment of the judgment after efforts along a certain line, to wit, by means of the service of process by the sheriff, will not take the place of a direct averment that the judgment remains unpaid, by any one, in whole or in part.

As the complaint thus failed to state one of the facts material to a cause of action, judgment on the pleadings should not have been granted on the plaintiff's motion.

Judgment reversed.

We concur: WORKS, P. J.; CRAIG, J.

104 Cal. App. 181
In re CANFIELD'S ESTATE. ★

SECURITY TRUST & SAVINGS BANK v.
CANFIELD.

Civ. 6642.

District Court of Appeal, Second District, Division 1, California.

Feb. 20, 1930.

Rehearing Denied March 12, 1930. Hearing Denied by Supreme Court April 21, 1930.

Wills 684(3)—Profits from sale of part of bonds and stocks resulting solely from increased market value held part of corpus of testamentary trust.

Under will creating trust in certain bonds and corporate stock, profits realized by trustee on sale of part of bonds and stocks resulting solely from increased market value of property held to remain part of corpus of trust estate, and not accumulation of income to be distributed to beneficiaries.

Appeal from Superior Court, Los Angeles County; Walter Guerin, Judge.

Proceedings by the Security Trust & Savings Bank, trustee under the will of Charles A. Canfield, deceased, opposed by Charles O. Canfield, for settlement of trustee's account. From portion of order rendered, settling account, the trustee appeals.

Reversed in part, and affirmed in part.

Wilbert Morgrage and R. K. Barrows, both of Los Angeles, for appellant.

Joseph Musgrove and Fred O. McGirr, both of Los Angeles, for respondent.

CONREY, P. J.

Appellant is a trustee appointed pursuant to the terms of the will of Charles A. Canfield, deceased. The appeal is from that portion of an order settling an account, which determined that a certain sum of money, being a part of the proceeds of the sale of certain bonds and shares of stock, is not corpus of the estate, but constitutes an accumulation

of income in the hands of the trustee and should be credited to income and distributed to the life beneficiaries in accordance with the terms of the trust. The notice of appeal covers certain other details of the order, which items need not here be set forth at length.

In course of the administration of the decedent's estate a decree of partial distribution was made whereby, in accordance with the provisions of the will, certain bonds and corporate stocks of the appraised value of \$900,000 were distributed to the trustee to be held upon certain trusts which, in accordance with the terms of the will, were set forth in said decree. The trustee was authorized to receive the rents, issues, dividends, profits, and income of the trust estate, invest and reinvest the principal, and after paying taxes and lawful charges and expenses of the trust, pay the net income, under certain stated limitations and conditions to Charles O. Canfield, a son of the decedent, and for the support, maintenance, and education of two children of said Charles O. Canfield. Further provisions were made for continuance of the trust during the lifetime of Charles O. Canfield and of his said children, and for the ultimate distribution of the principal of the trust to certain described beneficiaries.

The aforesaid decree of partial distribution was entered on the 7th day of April, 1914. The trustee entered upon the administration of the trust and thereafter filed a first account and several subsequent accounts of and concerning the trust estate. The present controversy arises out of the seventh account current and the order of settlement thereof. In the first account current, which was approved by the court, it was shown that the trustee had made sale of certain bonds and stocks, whereby the trustee had realized a net gain in the aggregate sum of \$111,809.57 over and above the values at which said properties had been received into the trust estate, and that the amount so gained together with the original principal amount or value of said stocks and bonds had been reinvested as part of the principal funds of the trust estate. There was also received in evidence each of the subsequent accounts, whereby it appeared that said sum gained by said sale of said stocks and bonds had been carried forward as part of the principal of the trust estate down to and including the filing of the present account. After the said seventh account had been filed, the said Charles O. Canfield duly filed his objections thereto, in which he contended that the said sum of \$111,809.57 was accumulation of income of the estate, which the trustee should be required to credit to the income account and distribute and pay to said objecting beneficiary. The facts are substantially undisputed, and the appeal simply presents certain questions of law to which our attention must be addressed.

On behalf of appellant it is contended: First, that in this proceeding for the settlement of one of a series of accounts the court was without jurisdiction to inquire into or determine the nature or character of the fund not received by the trustee during the period of the account, but which had been received and accounted for in a previous account, which account had been theretofore settled and allowed; second, that the issue raised by the objections to the account had been determined by the order settling the trustee's first current account, and that the question is therefore *res judicata*; and, third, that the provisions of the trust are not such as to justify the conclusion that the excess amount so received by the trustee from the sale of the corporate securities, was income.

In view of the opinion which we entertain concerning the third question, we shall assume, without close investigation of the law on the subject, that in the proceeding now under review the court acted within its jurisdiction and was not concluded by the order settling the trustee's first account.

The trust estate was distributed to the trustee in accordance with the provisions of a will which gave and bequeathed to the trustee "\$1,000,000.00 worth of securities or cash, less \$100,000.00 in either cash or securities." It was explained in the will that said sum of \$100,000 was deducted from the sum of \$1,000,000, which otherwise would have been given, for certain reasons which need not be discussed at this time.

It is now contended by respondent that the will "definitely fixed the trust at the sum of \$900,000.00; and that any rents, issues, dividends, profits, income or increase belongs to the beneficiary Charles O. Canfield." We shall assume, as counsel have done in their briefs, that with regard to this contention we are called upon to determine only the question as to whether said sum of \$111,809.57 should be rated as income of the trust estate, or whether, on the other hand, said profit, upon its realization, remained a part of the principal.

In view of the decision rendered by the Supreme Court of California in *Estate of Gartenlaub*, 198 Cal. 204, 244 P. 348, 48 A. L. R. 677, it seems to be settled beyond further doubt that in an instance like that now before us, where the increase in assets realized upon a sale of stocks or bonds of the trust estate did not include any accumulation of income and resulted solely from increased market value of the property, a gain so realized remains a part of the corpus of the trust estate. While the particular application of this rule in the *Gartenlaub* Case was not identical with that presented in the case at bar, the views expressed by our Supreme Court fully cover the subject. In commenting upon the decision in the *Estate of Gartenlaub*, *supra*, counsel for respondent have re-

ferred to the citation there made of the case entitled *Matter of Graham's Estate*, 198 Pa. 216, 47 A. 1108, and suggest that said decision in the *Matter of Graham's Estate* is not in accord with several other Pennsylvania decisions. It does appear that in that state there are two lines of decision bearing on this question. It further appears, however, that in two recent decisions the rule declared in the *Matter of Graham's Estate* has been definitely reaffirmed. In *re Nirdlinger's Estate*, 290 Pa. 457, 139 A. 200, 208, 56 A. L. R. 1303; In *re Packer's Estate*, 291 Pa. 194, 139 A. 867.

That part of the order of the superior court settling the seventh account current of the trust entered in the above-entitled matter, which finds, adjudges, and determines that the sum of \$111,809.57, being a part of the proceeds of the sale of certain bonds and shares of stock, is not corpus of the trust estate, but constitutes an accumulation of income in the hands of the trustee and should be by said trustee credited to income and distributed to the life beneficiaries in accordance with the terms of the trust, is reversed.

That portion of said order which sustains the objections of Charles O. Canfield with respect to said sum of \$111,809.57, and which disallows the said seventh account current in so far as it shows the said item of \$111,809.57 to be a part of the corpus of the trust estate, and which orders the trustee to credit said sum to income of said trust estate, is reversed.

In respect to all other matters included in this appeal the order is affirmed.

We concur: HOUSER, J.; YORK, J.

104 Cal. App. 1

In re INGRAM'S ESTATE.

INGRAM et al. v. ADAMS et al.

Civ. 7039.

District of Appeal, Second District, Division 2,
California.

Feb. 10, 1930.

4. Wills Ⓒ671—Will authorizing appointment of trustee and requiring monthly payments of bequests held, as respected jurisdiction to appoint trustee, to create valid trust (Civ. Code, § 2221).

Will providing for appointment of trustee and for monthly payments of certain bequests during life of devisees, and for distribution of remainder after liquidation of obligations and bequests, held, as respected jurisdiction to appoint a trustee, to create a valid trust within Civ. Code, § 2221.

2. Trusts Ⓒ25(1)—Intention to create trust, though indispensable, need not be manifested by express terms.

While a disclosed intention to create a trust is indispensable, it is not essential that such intention be manifested by express terms, and it is immaterial that language used is inartificial, ungrammatical, and devoid of technical terms, provided intention is evident from reasonable construction of document.

3. Wills Ⓒ672(3)—Trust will be implied from express authorization to executor to pay certain annuities.

A trust will be implied from an express authorization to executor to pay certain annuities, as this would be impossible unless executor has trust estate in property, and same result follows from a provision giving directions to manage, dispose of, or distribute property for benefit of others.

4. Perpetuities Ⓒ9(2)—Will providing certain bequests and distributing remainder of estate and income to heirs and charitable purposes did not provide for unlawful accumulation of income (Civ. Code, §§ 723, 724).

Will providing for payment of bequests by monthly installments and disposing of remainder of estate and income to legal heirs and charitable purposes held not to have provided for accumulation of income in violation of Civ. Code, §§ 723, 724; it being reasonably apparent that testator intended segregation of income from corpus of estate and payment thereof to objects of his bounty.

5. Wills Ⓒ446—Will, if possible, should receive construction rendering it valid and enforceable.

Will should receive such construction as will render it valid and enforceable, if such construction is possible.

6. Trusts Ⓒ160(2)—Court determining that will created trust had duty, irrespective of request by interested parties, to appoint trustee (Code Civ. Proc. § 1664).

Where court after petition under Code Civ. Proc. § 1664, for determination of rights of heirs, had determined that will created a trust and hence that interests of certain of heirs were those of beneficiaries thereunder, it became its duty, irrespective of any request by interested parties, to appoint a trustee.

Appeal from Superior Court, Los Angeles County; Walter J. Desmond, Judge.

In the matter of the estate of Charles B. Ingram, deceased. From a judgment determining heirship and directing distribution pursuant to complaint by certain heirs, Esau A. Ingram and others appeal, opposed by George W. Adams, trustee, and another.

Affirmed.

G. R. Dexter, G. S. Pinney, and Howard B. Henshey, all of Los Angeles, for appellants.

John C. Hamm, of Los Angeles, for respondents Adams and Briggs.

Overton, Lyman & Plumb, of Los Angeles, for respondent Oneonta Park Chapter of the D. A. R.

BURNELL, Justice pro tem.

Charles B. Ingram died about July 24, 1924, leaving an olographic will which was admitted to probate September 19, 1924. While the word "executor" did not appear in the will, the instrument did contain the following language: "I hereby appoint George W. Adams of the firm of Adams, Adams and Binford my attorney for the purpose of seeing that my desires, requests and bequests are fully carried out, and that the court in consultation with my attorney appoint a competent Trustee to hold Title and distribute my estate as hereinafter set out, and for such other purposes as shall be necessary in carrying the intentions of my last will." Construing this as equivalent to the nomination of an executor, the court appointed Mr. Adams as such. Thereafter a petition was filed by one of the heirs under the provisions of section 1664 of the Code of Civil Procedure, "praying the court to ascertain and determine the rights of all persons to said estate and all interests therein, and to whom distribution thereof should be made," and following the entry of the decree establishing proof of the service of notice to all interested persons as by that section provided, certain of the heirs filed a pleading entitled "Complaint under section 1664, C. C. P." Upon the issues raised by this complaint and the various answers thereto, the court made its findings and caused to be entered the judgment and order from which this appeal is taken.

Appellants' first point is that the court had no jurisdiction to order distribution of the estate under proceedings had pursuant to the Code section referred to. Inasmuch as the distribution of the estate was the only relief prayed for in the complaint (and consented to by the heirs who filed answers), this point cannot be said to be urged with very good grace. However, it is disposed of by the statement that the court did not, by the judgment appealed from, attempt to order a distribution, but, on the contrary, distinctly refused to do so. One of the findings is "that no settlement of the final account of the executor has been made, and the estate of said decedent is not now ready for distribution," and the language of this finding is repeated in the judgment, immediately preceding the last paragraph, which reads: "The petition for distribution is denied. The stipulation for distribution is dismissed. * * *

[1] It is urged by appellants that no valid trust was created by the terms of the will and that the court had no jurisdiction to appoint a trustee. Omitting the first paragraph as irrelevant to the subject under discussion

and the second as having already been quoted ante, the will is as follows:

"That no distribution of my estate be made (except as hereinafter set out) for a period of Twenty years.

"Said Trustee is hereby directed and instructed to sell and dispose of my home and furnishings located at 1601 Fletcher Avenue South Pasadena California (except the bedding, clothing, china of all kinds useful or ornamental, pictures, oil paintings, fancy work, hand needlework, jewelry and silverware) said exceptions to be disposed of as hereinafter directed, that the proceeds therefrom, together with the proceeds from life insurance, and if necessary from the sale of stock now held in the Central Manchester Realty Company, a corporation a first mortgage note of Fifteen Hundred Dollars and a Trust Deed note of seventeen hundred dollars, both signed by M. Nannar a first mortgage note of Twelve Thousand Dollars signed by the Homeland In-Vestment Company, a Corporation and the proceeds to be used to liquidate any and all legal and outstanding indebtedness due or to become due or arising from time to time by or through the carrying out my last will and any cash bequests, and by cash bequests I mean there shall be paid to my brother Joseph M. Ingram, One hundred dollars monthly each and every month during his natural life until such time as the income from my Estate or his interest therein shall be sufficient to make such an amount, to John S. and Florence C. Boster the sum of Five Thousand Dollars each, to George H. Briggs the sum of Five Thousand Dollars in installments of One Hundred dollars monthly until said amount be paid in full unless death ensues prior to or during said period then said payments to cease.

"After the liquidation of my obligations, bequests, I desire that the remainder of my estate and the income therefrom be distributed as follows, Seventy-five per cent to my legal heirs and Twenty-five per cent to charitable purposes as hereinafter set out and directed.

"My legal heirs I mean Joseph M. Ingram and the heirs of the body of his late wife Ida B. Ingram but does not in any event include his daughter Arra A sands or heirs of her body. The heirs of Sister Sarah Ann Boster, my sister Mary E. Thrasher during her natural life and then to the heirs of her body. To Esau A. Ingram during his natural life and then to my natural heirs as herein set forth. And to the natural heirs of my sister Deborah M. Boster being the heirs of her body.

"In recognition of the many, many virtues and the high esteem in which I held my late wife, May B. Ingram and her faithfulness during life to every trust and her desire to aid the poor and needy, and after the payment to

all my legal obligations and cash bequests, I desire and do hereby direct that Twenty-five per cent of all my income and finally of the residue of my estate be directed to charitable purposes such as Childrens homes, childrens orphanages or hospitals and homes for the aged and shall be distributed under the direction of the Oneonta Chapter of the daughters of the American Revolution of south Pasadena California or their authorized board of trustees and that said organization or governing board be the sole judge as to how the distribution shall be make and the only report to be made to the court or trustee shall be to show that the money has been by them properly distributed by the Society or governing board in accordance with my direction.

"I desire and direct the personal property referred to in the exception clause as to bedding, clothing, china, pictures, paintings, fancy work, silverware and jewelry be turned over by the Court to John S. and Florence C. Boster as their separate, and exclusive property and that no accounting therefore shall be required.

"I further direct that should any of my heirs objecting too or commencing any action against the carrying out of my last Will and Testament shall be disinherited and shall receive no share of the income or residue of my estate and such portion or portions shall be distributed to the then remaining loyal heirs."

The essentials for the creation of a trust are thus set forth in section 2221 of the Civil Code: "Subject to the provisions of section eight hundred fifty-two, a voluntary trust is created, as to the trustor and beneficiary, by any words or acts of the trustor, indicating with reasonable certainty: (1) An intention on the part of the trustor to create a trust; and (2) the subject, purpose, and beneficiary of the trust." This statutory provision is but a restatement of the rule that to constitute a trust there must be a concurrence of: First, words sufficient to create it; second, a certain subject; and, third, a definite object, by which is meant "sufficient language to sever the legal from the equitable estate, to clearly identify the beneficiaries and the property out of which the trust is to take effect." Thompson on Wills, § 336; Dingwell v. Seymour, 91 Cal. App. 483, 508, 267 P. 327. "An express trust may be created in a will by any form of words which shows the testator's intention to give the legal interest in the property devised to one, and the equitable interest in the same property to another." 2 Page on Wills, § 1040; Meek v. Briggs, 87 Iowa, 610, 54 N. W. 456, 43 Am. St. Rep. 410.

[2] Tested by these rules, Mr. Ingram's will clearly indicates an intention to create a trust. This is manifest by his request for the appointment of a trustee, by the provision

that no distribution (with certain exceptions) be had for twenty years, by the direction to the trustee who should be appointed to sell the home and its furnishings (again with certain reservations) and to use the proceeds of such sale, together with those from the testator's life insurance, and, if necessary those from the sale of certain securities for the liquidation of "any and all legal and outstanding indebtedness due or to become due or arising from time to time by or through the carrying out my last will and any cash bequests," by the direction for the payment of certain legacies in monthly payments during the life of the legatees and by the provision for direction of twenty-five per cent. of the income of the estate "and finally of the residue" thereof to charitable purposes. (Italics ours.) The subject of the trust is of course the property left by the testator at his death, and the beneficiaries are those whom he names as his heirs, together with all of those persons coming within the class designated as "heirs of the bodies" of certain named beneficiaries and including as well those charities which should be designated by the board of trustees of the Oneonta Park Chapter of the Daughters of the American Revolution. It is true that the testator did not always make use of the terminology which a lawyer would have employed in drafting a will. For example, he uses the word "distributed" in the third of the paragraphs last above quoted where "apportioned" or "devised" would have better expressed his apparent meaning, but while a disclosed intention to create a trust is indispensable it is not essential that such intention be manifested by express terms. 25 Cal. Jur. 280, 286; Estate of Haines, 150 Cal. 640, 89 P. 606; In re Shaw's Estate, 198 Cal. 352, 246 P. 48. It is immaterial that the language used is inartificial, ungrammatical, and devoid of technical terms (Id., and see, also, Estate of Dunphy, 147 Cal. 95, 81 P. 315), provided the intention is evident from a reasonable construction of the document as a whole (Estate of Heywood, 148 Cal. 184, 82 P. 755, 757).

[3] If Mr. Ingram did not contemplate the creation of a trust, why the request for the appointment of a trustee "*to hold title*"? (Italics ours.) "Without doubt a valid and effectual trust is created where property is conveyed by an instrument which expressly discloses that the grantee shall hold title for the benefit of another." 25 Cal. Jur. 284. Again, the provision for payment to Joseph M. Ingram of "one hundred dollars monthly during his natural life," and for the payment to George H. Briggs of "the sum of five thousand dollars in installments of one hundred dollars monthly until said amount be paid in full unless death ensues prior to or during said period then said payments to cease," brings the will within the rule that: "A trust

will be implied from an express authorization to the executor to pay certain annuities, as this would be impossible unless the executor has a trust estate in the property. The same result will follow from a provision giving directions to manage, dispose of or distribute property for the benefit of others." *Thompson on Wills*, § 341.

[4, 5] On this branch of the argument appellants devote most of their brief to an attempt to show that no trust at all was created by the will; they do not, with one exception, attack the validity of the trust as such. The exception referred to is the argument that if the decedent intended to create a trust he also intended to provide therein that there should be an accumulation of income in violation of section 723 and 724 of the Civil Code. In this connection it is to be noted that they do not claim that the court below so construed the will as to impute to the testator an illegal attempt to provide for accumulation of income or that by its decree it provided for such accumulation. The language of the will does not require the construction which appellants place upon it. In at least three instances it is reasonably apparent that the testator intended a segregation of the income from the corpus of his estate and the payment thereof to the objects of his bounty. We refer to the provision for the monthly payments to his brother Joseph "during his natural life until such time as the income from my estate or his interest therein shall be sufficient to make such an amount," to the direction that twenty-five per cent. "of all my income" be devoted to charitable purposes and to the clause depriving any heir who should contest the will of his share "of the income or residue of my estate." It is a well-settled rule of law that a will should receive such construction as will render it valid and enforceable if such construction is possible. In the case of *Toland v. Toland*, 123 Cal. 140, 55 P. 681, it is said: "In the will of Mrs. Toland there are no terms which forbid a sale or place the land beyond the power of those having interests therein to unite and convey an absolute interest in possession. The testatrix does not give any such direction, and the language used by her is susceptible of a different construction; and it is one of the cardinal rules of interpreting an instrument to give it such construction as will make it effective, rather than void." Again, in *Estate of Heywood*, supra, the court says: "The intent of the testator is the matter for primary consideration, and it is immaterial what method of expression is employed, as long as that intention can be ascertained. As said in *Hill on Trustees*, p. 101, 'It is one of the fixed rules of equitable construction that there is no magic in particular words;' and this court has said that: 'Of course, it is a fundamental prin-

ciple that a construction of a will favorable to testacy will always obtain when the language used reasonably admits of such construction, and that it will not be held to contain a void trust, unless the invalidity of the trust is beyond question * * * and cannot be reasonably construed otherwise.' *Estate of Dunphy*, 147 Cal. 95, 81 P. 315." See, also, *Estate of Wellings*, 197 Cal. 189, 240 P. 21.

[6] The contention that the court was without jurisdiction to appoint a trustee is based in part upon the premise that the matter of such appointment was not within the issues. Appellants urge that "neither at the time of the filing of the petition under section 1664, nor at the time of the hearing thereon on the 17th day of February, 1928, was it considered by either the heirs or their attorneys that the question of the jurisdiction or right of the court to declare a trust or appoint a trustee, in any event, would be before the court as an issue. * * *". Apart from the fact that the answer of one of the defendants, Oneonta Park Chapter of the Daughters of the American Revolution, specifically presented this point by requesting the appointment of a trustee, the provisions of section 1664 required the court, in a proceeding brought thereunder, to "determine the heirship to said deceased, the ownership of his estate, and the interest of each respective claimant thereto or therein, and persons entitled to distribution thereof." As said in *Whalen v. Smith*, 163 Cal. 360, 125 P. 904, 905, Ann. Cas. 1913E, 1319, referring to a proceeding under this section of the code: "It is a determination, first of the persons entitled as heirs, devisees, or legatees, or as their successors, if any have died; and, second, the interest of each one in the estate of the decedent." To the same effect is *Estate of Ross*, 180 Cal. 643, 182 P. 755. The court having determined that the will created a trust and hence that the interests of certain of the heirs were those of beneficiaries thereunder, it became its duty, irrespective of any request by the interested parties or any of them, to appoint a trustee. "The superior court, while sitting in matters of probate, is the same as it is while sitting in cases in equity, in cases at law, or in special proceedings; and, when it has jurisdiction of the subject-matter of a case falling within either of these classes, it has power to hear and determine, in the mode provided by law, all questions of law and fact, the determination of which is ancillary to a proper judgment in such case." In *re Burton*, 93 Cal. 459, 29 P. 36, 37. "Where a trust has been created by will, the validity of the trust is necessarily involved in the question of distribution; for, if invalid, the bequest fails. *Estate of Walkerly*, 108 Cal. 660, 41 P. 772 [49 Am. St. Rep. 97]. Hence, as necessary to distribution, "it is within the

province of the probate court to define the rights of all who have legally or equitably any interest in the property of the estate derived from the will." *More v. More*, 133 Cal. 489, 65 P. 1044, 1046, 66 P. 76. As held in *Estate of Crooks*, *Myrick's Probate Reports*, 247: "If a trust is attempted to be created, this court must determine how far the attempt is successful, what is the trust, who is the trustee, and who are the beneficiaries. * * *" When a trust is created but no trustee has been appointed or when there exists a vacancy in the trusteeship, it is the duty of the superior court to make such appointment. Civ. Code, §§ 2288, 2289. This the court did in the case before us.

The judgment is affirmed.

We concur: WORKS, P. J.; IRA F. THOMPSON, J.

MAUTINO v. SUTTER HOSPITAL ASS'N.★
Civ. 4016.

District Court of Appeal, Third District,
California.

Feb. 15, 1930.

As Modified on Denial of Rehearing March 17,
1930. Hearing Granted by Supreme
Court April 14, 1930.

1. Hospitals ⇨7—Private nurse working in
hospital in employ of patient therein was in-
vitee of hospital when injured.

Private nurse engaged in work in hospital
in employ of patient, but not in employ of hos-
pital itself, was an invitee of the hospital, as
regards liability of hospital association for in-
juries sustained by nurse slipping on floor.

2. Hospitals ⇨7—If hospital was negligent in
permitting floors to remain in slippery condi-
tion, private nurse, employed by patient, who
continued to use floors with full knowledge of
such condition, was guilty of contributory neg-
ligence.

If hospital was negligent in maintaining
floor covered with battleship linoleum in slip-
pery condition, and private nurse employed by
patient continued to use floors with knowledge
of such condition, nurse was herself guilty of
negligence contributing to injury from fall.

3. Negligence ⇨32(1)—Invitee cannot recover
from owner of premises for injuries resulting
from dangers which are obvious or as well
known to invitee as to owner.

Owner of premises is not an insurer of per-
sons whom he invites to enter, but true ground
of owner's liability is his superior knowledge
of perilous instrumentality or condition un-
known to the invitee, and invitee cannot re-
cover from owner of premises for injuries from
dangers which are obvious, or equally well
known to the person injured.

4. Trial ⇨191(7)—Instruction that private
nurse in hospital was not negligent in working
there was erroneous as assuming slippery con-
dition of floor.

In action by private nurse against hospital
association for injuries sustained in slipping on
floor, instruction that plaintiff continuing to
work in hospital after having knowledge of
slippery condition of floor was not negligent
was erroneous as assuming slippery condition
of floor as well as incorrectly stating law.

5. Negligence ⇨32(1)—Owner of premises
merely owes invitee duty to exercise reason-
able care to keep premises in safe condition.

Owner of premises is not under absolute
duty to keep premises in reasonably safe condi-
tion for safety of person whom he invites to
come on the premises, but is only required to
exercise reasonable care to keep them safe.

6. Negligence ⇨119(6) — Defense of contribu-
tory negligence was available without being
pleaded, where contributory negligence was
disclosed by plaintiff's own testimony.

Where evidence introduced by plaintiff in
action for injuries showed plaintiff was guilty
of contributory negligence, defense could be
availed of by defendant, even though not set up
in defendant's answer.

Appeal from Superior Court, Sacramento
County; J. R. Hughes, Judge.

Action by Ruth Mautino against the Sut-
ter Hospital Association. Judgment for
plaintiff, and defendant appeals.

Reversed.

Evan J. Hughes and J. W. S. Butler, both
of Sacramento, for appellant.

Charles L. Gilmore, of Sacramento, for re-
spondent.

FINCH, P. J.

This is an action to recover damages
for personal injuries suffered by the plain-
tiff when she fell on the floor of one of the
rooms in defendant's hospital in which
she was employed as a private nurse by the
patient occupying the room. The verdict
of the jury was in favor of the plaintiff
for damages in the sum of \$10,000. This
amount was reduced by the trial court, with
plaintiff's consent, to \$6,235, and judgment
was entered in favor of the plaintiff for that
sum. The defendant has appealed from the
judgment.

The floors of all the rooms in the hospital
are covered with battleship linoleum. When-
ever a room is vacated and before another
patient is placed therein "a thin coat of
paste wax is applied over the surface of the
dusted floor, and a large revolving motor
with a brush attached to it is used for polish-
ing or rubbing that wax into the surface."

The evidence shows without conflict that battleship linoleum is the standard floor covering in general use in hospitals, and that the above-described treatment of the same is in accordance with usual and approved methods. The linoleum in the room in question had been so treated shortly before the patient was placed therein. The plaintiff is a graduate nurse with several years' experience. She had been employed frequently as a private nurse by patients in the defendant's hospital and was familiar with the floor coverings therein and the condition in which they were maintained. She was not in the employ of the defendant at the time of the accident, but in that of the patient who occupied the room. No witness but the plaintiff testified directly as to the manner in which the accident occurred. Other witnesses gave testimony tending to discredit that of the plaintiff, but it may be presumed in support of the judgment that her testimony is all true. She testified on direct examination as follows:

"I went to duty at noon September 28th and was relieved at 7 o'clock that night by the night nurse." The next morning "I came on duty at 7 o'clock and relieved the night nurse." About 9 o'clock "I slipped and fell. * * * I had taken care of the patient, * * * and I thought the man would sleep, so I sat in the chair by him in the corner, * * * I got up to go * * * outside of the room, and when I got just past the foot of his bed going toward the door, before I knew what had happened or anything, I was on the floor. I had slipped in some way, * * * and I couldn't get up. * * * September 28th, when I went to duty, I told the nurse that the floor was so slippery, * * * the head nurse on that floor. * * * It was slick, and I couldn't keep my feet, the day of September the 28th. It was equally as bad on September the 29th, if not worse. * * * It was highly polished and I couldn't really keep my feet, it was so slick. * * * I told them I would slip and fall—the head nurse."

On cross-examination she testified that she noticed that the floors "were slick * * * from the time" she "first went into the room" and continued to notice it "throughout the day"; that on account thereof "I walked flat footed"; that the floor was as slick on the morning of the 29th as on the previous day, "maybe a little more so."

Other witnesses testified that immediately after the accident the plaintiff said that something had been "spilled on the floor in the room, that she had slipped on it and fallen and hurt herself," but the plaintiff denied that she had made such statement. One of the witnesses for the defendant testified that, about an hour after the accident she

"saw white spots on the floor where something had spilled on the wax" at about the place where the plaintiff fell. The plaintiff testified that the "white spot * * * on the floor was part of the dressing that came off my shoes" at the time of the fall.

[1-3] The court properly instructed the jury, at the plaintiff's request, that at the time of the accident she was "an invitee of the defendant." It is clear from the plaintiff's testimony that she had full knowledge of the condition of the floor during all the afternoon of September 28th and for two hours in the forenoon of the next day. It does not appear that the defendant's knowledge thereof was superior to that of the plaintiff. If it was negligence for the defendant to maintain the floor in the condition described by the plaintiff, there appears to be no escape from the conclusion that it was negligence for the plaintiff, with full knowledge of such condition, to continue in the use thereof.

"The authorities are entirely agreed upon the proposition that an owner or occupant of lands or buildings who directly or by implication invites or induces others to go thereon or therein owes to such persons a duty to have his premises in a reasonably safe condition and to give warning of latent or concealed perils. In the language of a recent opinion: 'The law is well settled that an owner or occupant of land who by invitation, express or implied, induces or leads others to go upon premises for any lawful purpose is liable for injuries occasioned by the unsafe condition of the land or its approaches, if such condition was known to him and not to them.' * * * The owner is not an insurer of such persons, even when he has invited them to enter. Nor is there any presumption of negligence on the part of an owner or occupier merely upon a showing that an injury has been sustained by one while rightfully upon the premises. The true ground of liability is the proprietor's superior knowledge of the perilous instrumentality and the danger therefrom to persons going upon the property. It is when the perilous instrumentality is known to the owner or occupant and not to the person injured that a recovery is permitted. * * * There is no liability for injuries from dangers that are obvious, or as well known to the person injured as to the owner or occupant." 20 R. C. L., pp. 55-57; *Goldstein v. Healy*, 187 Cal. 206, 211, 201 P. 462; *Shanley v. American Olive Co.*, 185 Cal. 552, 555, 197 P. 793.

Some of the instructions were in conflict with the foregoing statement of the law among them the following:

"The court instructs you that the plaintiff's continuing to work in the room at defend-

ant's hospital after having had knowledge of the slippery condition of the floor was not an act of negligence on her part, nor was she guilty of negligence by reason of continuing her work as a nurse in the room where the patient was confined, even after she had knowledge of the slippery condition of the floor. * * *

"If you find that the floor was so slippery that a prudent and reasonable person, complying with the regulations of the defendant, would, under the same circumstances, slip and fall to the floor, then the defendant would be negligent and your verdict must be for the plaintiff."

[4] The first of these instructions incorrectly states the law and assumes as a fact that the floor was slippery. The second would require a verdict in favor of the plaintiff, regardless of contributory negligence on her part, if the floor was in such condition that a prudent and reasonable person would slip and fall on it. Even if the plaintiff were free from contributory negligence, "not every accident that occurs gives rise to a cause of action upon which the party injured may recover damages from some one. Thousands of accidents occur every day for which no one is liable in damages, and often no one is to blame, not even the ones who are injured." *S. S. Kresge Co. v. Fader*, 116 Ohio St. 718, 158 N. E. 174, 175, 58 A. L. R. 132.

[5] The court instructed the jury that "it was the duty of the defendant to provide a reasonably safe place for her (plaintiff) to work and discharge her duties." While this instruction may not have misled the jury, it is not an accurate statement of the law. It is not the duty of an owner in such a case to keep his premises absolutely in a reasonably safe condition, but only to exercise reasonable care to keep them in a safe condition. "The responsibility of such owner for the safety of such person in such a case is not absolute; he is only required to use ordinary care for the safety of the persons he invites to come upon the premises." *Shanley v. American Olive Co.*, 185 Cal. 552, 555, 197 P. 793, 794. "The owner of premises is not an insurer of the safety of an invitee, but he owes him the duty to exercise ordinary care in seeing that the premises are in a safe condition." *Dobbie v. Pacific Gas & Electric Co.* (Cal. App.) 273 P. 630, 633.

In respondent's brief it is said that the plaintiff occupied "a status enabling her to claim the same degree of protection as an employee in her place of employment," and that "the employer is bound to provide a reasonably safe place for his employee to work in." It clearly appears that the plaintiff's status was that of invitee, as the court

instructed the jury at her request, and that she was in no sense an employee of the defendant.

[6] Respondent urges that the defendant did not plead contributory negligence. The answer alleges that plaintiff's injuries "were entirely and solely caused by negligence of the plaintiff herself and not by any negligence on the part of the defendant." It is not necessary to decide whether that allegation sufficiently avers contributory negligence, because, "where the evidence introduced by the plaintiff shows that he has been guilty of contributory negligence, 'the defense may be availed of, even though not set up by defendant.'" *Hoy v. Tornich*, 199 Cal. 545, 551, 250 P. 565, 568.

The judgment is reversed.

We concur: R. L. THOMPSON, J.;
PLUMMER, J.

104 Cal. App. 24
JONAS v. AMERICAN GRINDER MFG. CO.
et al.*
Civ. 7273.

District Court of Appeal, First District, Division 2, California.
Feb. 13, 1930.

Rehearing Denied March 15, 1930.

1. Appeal and error ⇨1011(1)—Conflict in evidence was for trial court.

Conflict in evidence presented a question for determination of trial court.

2. Corporations ⇨83—Offer to restore corporate stock was unnecessary before claiming rescission of contract for purchase in case stock was never delivered.

An offer to restore corporate stock was unnecessary in order to claim rescission of contract for purchase thereof in case corporate stock was never delivered, so that there was nothing to restore.

3. Bills and notes ⇨530—Executory agreement to surrender note for stock did not prevent recovery of interest after agreement until date of rescission.

Executory agreement to surrender note in exchange for stock did not prevent recovery of interest on note during period intervening between execution of agreement and time of rescission thereof.

4. Parties $\S$ 75(8)—Defendant, failing to interpose demurrer or plead facts in answer, waived point relative to action being brought in name of copartnership.

Where defendant, claiming that action should have been brought in name of copartnership, interposed no demurrer, and did not plead any such facts as defense in answer, the point was waived.

5. Appeal and error $\S$ 761—Point made on appeal will not be considered, where no authorities are cited and no part of record quoted.

Where no authorities are cited relative to point made on appeal, and no part of record is quoted, the point will not be considered by appellate court.

Appeal from Superior Court, Los Angeles County; J. A. Smith, Judge.

Action by F. W. Jones against the American Grinder Manufacturing Company and another. Judgment for plaintiff, and defendants appeal.

Affirmed.

Arthur A. Mueller, of Milwaukee, Wis., and J. B. Yakey, of Los Angeles (Walker R. Flint, of Los Angeles, of counsel), for appellants.

R. M. Wiley, of Silver City, N. M., and Lyle Pendegast, of Los Angeles, for respondent.

STURTEVANT, J.

From a judgment in favor of the plaintiff for moneys due, the defendants have appealed, and have brought up a typewritten record. The names of the defendants are but different names for one entity which will hereinafter be designated as the defendant.

Commencing in 1920, F. W. and C. N. Jonas, copartners, were the agents, on this coast, of the defendant. The latter is a corporation, and was engaged in manufacturing at Milwaukee, Wis. Acting on the request of the copartners, the defendant commenced the manufacture of wrenches. The copartners represented the defendant on this coast in the sale of wrenches and other products manufactured by the defendant. As early as 1920, for the purpose of protecting itself against damage suits in the manufacture of wrenches, the defendant caused certain covenants to be inserted in one of its contracts with the copartners. Toward the end of the year 1924, the relations between the parties were terminated by the defendant. Thereupon C. N. Jonas entered into a contract of employment with the defendant, but F. W. Jonas completely severed his relations with the defendant, dissolved the partnership, and commenced to liquidate its affairs. Later he commenced this action.

The plaintiff claimed the amount due on a promissory note which was given for the principal sum of \$12,000, and he claimed a

balance due on an account for commissions earned. The defendant controverted those items, and claimed there was owing to it \$12,000, the purchase price of 120 shares of its corporate stock alleged to have been sold and delivered. It also claimed a sum slightly less than \$12,000 alleged to be due under a covenant of the contract of agency.

[1] One of the claims set forth by the defendant in this litigation was for costs and expenses of litigation. The plaintiff replies that the litigation in question was not for the infringement of a patent, and therefore that it did not come within the purview of the plaintiff's contract. He further contends that the original contract of 1920 was superseded by a contract entered into in 1924. In this connection the plaintiff sets forth a certain covenant on the part of the copartners to pay a part of the costs of the litigation, but that said payments were to be deducted from commissions earned by the copartners. Continuing, the plaintiff contends that the defendant waived its right to deduct the payment from the commissions which were earned during the life of the contract and furthermore, that the defendant discharged the copartners as agents, and rendered it impossible for the payments to be made out of commissions thereafter to be earned. The trial court made findings in favor of the copartners on these matters, and there is evidence in the record supporting the findings. The very most that can be said is that there is a conflict in the evidence, but it was for the trial court to determine conflicts.

At one time during the transactions entered into by the parties the copartners agreed to buy from the defendant seventy shares of the defendant's capital stock, and agreed to pay therefor \$12,000. The plaintiff contends that the copartners demanded delivery of the stock, but that it was never delivered. The defendant, on the other hand, contends that the stock was delivered to C. N. Jonas. The plaintiff replies that, at the time of the purported delivery to C. N. Jonas, the latter had ceased to be a partner of the plaintiff, that he was not the plaintiff's agent, and that his act was wholly unauthorized. Going further, the plaintiff sets forth that at the time of the purported delivery to C. N. Jonas the latter was one of the employees of the defendant. In this same connection it is clear that at the time of the alleged purchase by the copartners of stock in the defendant corporation the copartners held the promissory note of the defendant corporation in the sum of \$12,000. The stock was to be taken in liquidation of that note. There was a side agreement that the corporation would, on demand, within a stated time, take back seventy shares and pay the

copartners \$7,000. The plaintiff quotes the record, showing that the copartners made a demand on the defendant to comply with these provisions of its contract and that the defendant neglected to do so. The trial court made findings against the defendant on all of these contentions, and there is an abundance of evidence in the record to support each finding. If the defendant was making a claim in good faith that it had sold the copartners stock in the sum of \$12,000, we would expect they would have tendered the certificates at least at the time of the trial. But we find nothing in the nature of a tender by the defendant at that time or at any other time.

[2] Addressing itself to the facts last mentioned, the defendant claims that in effect the plaintiff is claiming a rescission by the copartners, and that the facts do not constitute a rescission, because the copartners did not act promptly, and they did not offer to restore. In reply, the plaintiff asserts that under the facts the corporate stock was never delivered, and that no offer to restore was necessary, as there was nothing to restore. *San Diego Const. Co. v. Mannix*, 175 Cal. 548, 558, 166 P. 325. The reply is entirely sufficient. As stated above, the defendant claimed the certificates of capital stock were delivered to the plaintiff by handing them to C. N. Jonas, but the plaintiff claimed that at the time of the purported delivery C. N. Jonas was no longer a partner, because the partnership had been dissolved. In this connection the defendant asserts that, if the copartnership was dissolved, the defendant had no notice thereof. This statement of the defendant the plaintiff controverts, and, furthermore, he claims that finding No. 10 finds the facts in favor of the plaintiff and against the defendant. In its reply brief the defendant claimed that there was no evidence on the subject. In this behalf we think that the defendant's claim is overstated. One cannot read the exhibits and the testimony of F. W. Jonas without reaching the conclusion that there was evidence before the trial court which justified it in making the finding.

The defendant asserts that the liquidation of the copartnership was never committed by the consent of the two partners to this plaintiff. In this connection it quotes the testimony of C. N. Jonas as contained in his deposition. The statements of that witness are silent on the subject. If we turn to the testimony given by F. W. Jonas, the matter is entirely cleared up, and there is nothing in the point.

On the 18th day of November, 1924, the contract between the parties was canceled by mutual consent, the said cancellation to take effect as of October 11, 1924. Immediately thereafter C. N. Jonas became, and continued to be, an employee of the defendant. From

the 18th day of November, 1924, the plaintiff commenced to act, and did act, in liquidation of the partnership affairs. Nevertheless, on the 16th day of February, 1926, C. N. Jonas assumed to act in behalf of C. N. and F. W. Jonas, and entered into an accord and satisfaction with the defendant. The defendant pleaded the act as a defense. The trial court found the facts against the defendant. The evidence supports those findings, and it is not even conflicting.

In presenting its case, the defendant took the position that it owed the plaintiff nothing, and that the plaintiff owed the defendant \$11,620.42, one-half of the costs of the litigation hereinabove mentioned and referred to, and which litigation was brought against the defendant by the Walden-Worcester Company of Worcester, Mass. This claim as an entity is not supported by any evidence. Under the clear terms of the written instruments, the copartners covenanted to pay out of commissions not more than \$500 per month on that claim. Those payments were to commence with the month of May, 1924. The contract was terminated October 11, 1924. Six installments only ever matured; that is, \$3,000. From the latter sum \$100 must be deducted as paid. The maximum amount of the claim of the defendant on this item was therefore \$2,900, and no more. It was this amount which the court held the defendant waived.

[3] The promissory note hereinabove mentioned was dated June 3, 1923. By its terms, it carried interest at the rate of 7 per cent. per annum. The trial court ordered judgment in favor of the plaintiff for interest at 7 per cent. per annum from the 7th day of January, 1924. The defendant calls attention to an executory agreement of February 2, 1924, that the note was to be surrendered in exchange for stock, and that said executory agreement was not terminated until the notice of rescission, which was given February 18, 1926, and thereupon the defendant bases the assertion that it should not have been charged with interest from February 2, 1924, the date the executory agreement was made, until the date of the rescission. It does not favor us with any authorities supporting such a contention. We know of none.

[4] The defendant claims that the action should have been brought in the name of the copartnership. No demurrer was interposed. In its answer the defendant did not plead any such facts as a defense; therefore the point has been waived. *Williams v. Southern Pacific R. R. Co.*, 110 Cal. 457, 42 P. 974.

[5] Other points are made by the defendant, but no authorities are cited. Moreover, no part of the record is quoted. Under these circumstances, we do not feel ourselves called upon to go into the record any further.

We find no error in the record. The judgment is affirmed.

We concur: NOURSE, Acting P. J.; DOOLING, Justice pro tem.

103 Cal. App. 664

SOUTHERN PAC. R. CO. v. STIBBENS,
County Tax Collector.*
Civ. 48.

District Court of Appeal, Fourth District.
California.

Feb. 3, 1930.

Rehearing Denied Feb. 24, 1930. Hearing Denied by Supreme Court March 31, 1930.

1. Levees and flood control ☞25—Assessments for local improvements were not void merely because county assessor made new assessment roll each year (Storm Water District Act 1909, as added to by St. 1917, pp. 218, 220).

Under Storm Water District Act 1909 (St. 1909, p. 339), as added to by St. 1917, pp. 218, 220, requiring district board of trustees to make annual estimates of money needed, and send their report to county board of supervisors, who shall cause assessments to be levied, entered upon assessment rolls, and collected like state and county taxes, assessments were not invalid merely because assessor made new assessment roll each year, although better practice might have been to prepare permanent record when original report of board of trustees was submitted.

2. Constitutional law ☞48—Every presumption in favor of constitutionality of statute should be indulged with view to giving it full effect.

It is duty of court in construing statute to view it in light of every presumption favorable to its constitutionality, regard being had to Civ. Code § 3541.

3. Levees and flood control ☞23—Assessor had implied authority under statute to levy local assessments on interstate railway right of way, though exempt from general county taxes (Storm Water District Act 1909, § 11).

Storm Water District Act 1909, § 11 (St. 1909, p. 343), authorized local improvement assessments upon all land in district, including railroad property, to be collected, under section 26e, as added by St. 1917, p. 220, § 11, by machinery provided for collection of county taxes. *Held*, in action by intercounty and interstate railroad to enjoin sale of right of way for unpaid assessments, assessor had implied authority to enter on county tax rolls the assessments upon right of way, notwithstanding it was exempt from general county taxes, in view of fact that Const. art. 13, § 14, has not exempted operative property of public service corporations from taxation.

4. Officers ☞110—Public officer's duties, besides those directly given, include those essential to fulfill purpose of office when they aid in law enforcement.

Duties of public officer include those necessary to accomplishment of purpose of his office, even though merely incidental to express duties, when they promote execution of statutory mandate.

5. Constitutional law ☞70(3)—Courts do not create public policy, although they may declare it as indicated by Constitution and laws.

Public policy is not created by judiciary, and can be ascertained only by reference to Constitution and statutes.

6. Levees and flood control ☞28—Sale of interstate railroad right of way for delinquent local assessments levied under express statutory authority was not contrary to public policy (Storm Water District Act 1909, § 11).

Public policy of California, as determined by Legislature, did not forbid dismemberment of interstate railroad by sale of right of way for delinquent assessments lawfully levied under Storm Water District Act 1909, § 11 (St. 1909, p. 343), expressly authorizing assessment of railroad property; only way to collect unpaid assessments being by sale of land.

7. Levees and flood control ☞25—Assessment apparently only on land used for railroad right of way could not be construed to include franchise, roadway, roadbed, rails, and rolling stock.

Assessment appearing to be merely on land used by railroad for right of way could not be construed, as contended by railroad, to be assessment on franchise, roadway, roadbed, rails, and rolling stock.

8. Levees and flood control ☞29—Decision of county board that railroad's land was benefited by local assessments was not open to collateral attack in action to enjoin sale of land for delinquent assessments.

Where county board of supervisors had duly determined benefit to land assessed by local improvement district for protection against storm waters, their decision could not be collaterally attacked by railroad in action to enjoin sale of right of way for delinquent assessments.

Appeal from Superior Court, Riverside County; G. R. Freeman, Judge.

Action by the Southern Pacific Railroad Company against C. R. Stibbens, County Tax Collector, to enjoin sale of plaintiff's right of way for unpaid local improvement assessment. From a judgment for defendant, plaintiff appeals.

Affirmed.

W. I. Gilbert, of Los Angeles, and H. W. Hobbs, of San Francisco, for appellant.

Albert Ford, of Riverside, and Thomas C. Yager, of Indio, for respondent.

Everett W. Mattoon, Co. Counsel, and W. Sumner Holbrook, Jr., Deputy Co. Counsel, both of Los Angeles, amici curiæ.

MARKS, J.

The appellant is a railway corporation owning a right of way over which it operates freight and passenger trains as a common carrier from the city of Los Angeles easterly through portions of Los Angeles, Riverside, and Imperial counties in the state of California to Yuma, in the state of Arizona, and points east. Respondent is county tax collector of Riverside county, and, as such, took steps to sell the land composing 45.626 miles of appellant's main line roadbed, one hundred sixty-five feet in width, in Riverside county, because of an unpaid assessment levied for the benefit of the Coachella Valley storm water district. The assessment here involved was levied in the year 1921 in the amount of \$3,193.68. Subsequent assessments, with charges, penalties, and interest brought the total levy against appellant's right of way to the sum of \$20,924.32 on April 30, 1927, no part of which has been paid. After the lapse of a period of five years respondent was proceeding to publish notice and offer for sale to the highest bidder the lands assessed. Appellant secured a temporary restraining order against the proposed sale. At the trial of the action judgment was rendered in favor of respondent and this appeal was taken.

The Coachella Valley storm water district is a storm water protection district duly organized and existing under the Storm Water District Act of 1909, being act of March 13, 1909 (Stats. 1909, p. 339), as amended. The district lies within the county of Riverside and is crossed by the land composing the right of way of appellant. This district was organized some time prior to 1921, and at that time had issued, sold, and had outstanding bonds to the amount of \$300,000, which sum was to be used in the construction of various works for the protection of lands, within the boundaries of the district, from the storm waters of the Whitewater river, an unnavigable stream, and from the storm waters from numerous canyons and washes, all within the boundaries of the district.

This case was originally appealed to the Supreme Court and has been transferred to this court for decision. The Supreme Court permitted the county counsel of Los Angeles county and his deputy to appear and file a brief herein as amici curiæ on behalf of several local improvement districts in that county which will be directly affected by the decision in this case, there being over eight hundred miles of land used as rights of way by various railroads assessed in these districts.

The case has been ably and clearly briefed by the various counsel appearing herein, and

in the last analysis the controlling issues have been reduced to two. Appellant maintains that the judgment cannot be affirmed because: First, the general revenue laws of California do not confer upon the county assessor of Riverside county the authority to assess and value the land composing the right of way of an intercounty railroad assessed by the state board of equalization, neither do the provisions of the Storm Water District Act confer such authority, and, therefore, that this attempted exercise of such power is without effect, and is invalid; and, second, that public policy forbids the dismemberment of railroads in enforcement of local improvement assessments. To the first contention of appellant may be added his secondary contention that, as the land used as its right of way did not appear upon the regular assessment roll of the county, the assessor had neither the authority to enter this land upon the assessment roll nor the authority to place any value upon it, nor the authority to perform any other duty under the act; and that, therefore, the assessment levied could not become a lien upon the land in question here, but only upon lands within the district regularly upon the assessment rolls of the county placed there by the assessor in the performance of his usual duties. However, it does not appear from the record that the assessor did place any value upon the land of appellant, speaking now in terms of the common usage of valuing land for assessment purposes.

We have been cited to no case construing the Storm Water District Act of 1909, so we will have to look to decisions upon somewhat similar acts to assist us in our conclusions in this case. Appellant admits that the assessment levied in this case was not a tax, and that it was properly levied and constituted a legal lien upon its operative lands other than the land used as its right of way in question. It is admitted by the respondent that the land assessed and involved in this action was assessed by the state board of equalization for the purposes of state taxation, and was not assessed by the county assessor of Riverside county for the purposes of general taxation for county purposes, and should not have appeared upon such assessment roll for the purpose of local assessment of the district unless the assessor was authorized to place it there under authority of the Storm Water District Act of 1909 and of section 3650 of the Political Code.

We will consider the two grounds upon which appellant seeks a reversal of the judgment of the court below in the order in which we have stated them, namely, first, the authority of the assessor of Riverside county to place the property involved, together with the assessment against it, on the assessment roll, and, second, the question of public policy involved in the sale of a portion of the

land used by a railroad company doing an intercounty and an interstate business.

Respondent and amici curiæ rest their case in reply to appellant's first argument upon two grounds, namely, first, that while section 3628 of the Political Code requires the assessor each year to assess and place on the assessment roll all taxable property within his county "except such as is required to be assessed by the State Board of Equalization," still the broad provisions of section 3650 of the Political Code were sufficient to enable him to place upon the assessment roll a description of the property in question with the amount assessed against it, and, second, that, if a tax or special assessment is imposed by statute, the necessary machinery for its collection is implied.

While respondent urges with great force the argument that section 3650 of the Political Code directs the assessor to assess all taxable property within the county and place such assessment on his rolls, we do not desire to adopt this theory as the basis of this decision. The fact remains that, under the provisions of section 3628 of the Political Code, the land in question here comes within the exception contained in that section which we have heretofore quoted, and is assessed by the state board of equalization, together with other operative property of railroad companies. The two sections of the code must be construed together, and we think amply justify the methods of assessment of this class of property, in use for many years, to raise revenue for state purposes, and to retire bonds issued by counties, cities and other public agencies.

There is much more force in the argument of respondent and amici curiæ that, if a tax or special assessment is imposed by statute, the necessary machinery for its collection is implied, though we think that this statement is entirely too broad to be a correct statement of the law, and is not required by the facts of this case. They cite and rely upon the cases of *State v. Poulterer*, 16 Cal. 514; *Koontz v. Burgess*, etc., of Hancock, 64 Md. 134, 20 A. 1039, and *State ex rel. Southern Railway Co. v. Talley et al.*, 50 S. C. 374, 27 S. E. 803. These cases, to an extent, seem to support the contention of counsel citing them. However, we seriously doubt the power to collect a tax imposed upon land without any machinery whatsoever being provided by law for its assessment and collection, but, under the facts of this case, such a condition is not presented. In this case we have all of the machinery provided by law for the collection of county taxes adopted by section 26e of the Storm Water District Act of 1909 as added (St. 1917, p. 220, § 11) for the collection of its assessments. The only question presented under this phase of the case is the right of the county assessor to place on the assessment roll of the county the description

of appellant's property involved, together with the amount assessed against it to pay its proportion of the cost of the improvements constructed by the district. If he had such authority, either express or implied, the assessment must be upheld, if not, it must fail. The machinery for making an assessment of lands in his county is elaborately set forth in the Political Code, so the question is not lack of machinery to make the assessment or to collect the same, but the right of the assessor to use a small portion of this machinery and put it in motion in this particular case. The authority is not directly given, so, if it exists, it must be implied.

The Storm Water District Act of 1909, as originally enacted, provided for the organization of the district, the election of a board of trustees to govern its affairs, and the appointment of employees to carry on the protection work. After organization, the board of trustees is empowered to have a survey of the district made in order to determine what improvements shall be constructed, and shall have prepared plans and specifications of the improvements proposed. The board of trustees must appoint three commissioners to estimate the total cost of making these improvements, including all incidental expenses, and to assess the benefits and damages arising therefrom. The assessment, which is composed of the cost of the improvements, including any damages that may be awarded, "shall be made upon the lands in said district in proportion to the benefits to be derived by such lands from said improvements, including in said assessment the property of any railroad company within said district, if such there be." Section 11, Storm Water District Act of 1909. The word "property," as used in this quotation, must be held to refer to, and include only, "land," as it is clear from the act that no property other than land is to be assessed under its terms. The commissioners must file their detailed report with the board of trustees. The act provides for a notice of hearing of the report, objections, and a hearing of the same, if any, the rejection or correction of the report or assessment, and the confirmation of the same, or of an amended or corrected report. After the adoption of the report the board of trustees may, if the assessment be too great to be paid in one year, extend the payments in equal installments over a period of years not exceeding ten. Certified copies of the necessary portions of the proceedings are then to be filed with the county tax collector and the assessments spread upon the tax rolls of the county, after which they become liens upon the land assessed and are to be collected by the tax collector. Provision was also made for an annual assessment to provide money for the current year for defraying the ordinary expenses of the district and maintaining and repairing the works and improve-

ments thereof. The levy of an assessment for these purposes does not seem to be involved in this case. In 1917 the Legislature added to the act provisions authorizing the district to issue bonds to pay the costs of the improvements. Stats. 1917, p. 218. This formed an alternative method for the raising of money to pay the cost of improvements within the district. The deferred assessment plan we have outlined was left in full force and effect. It will be observed that the bonds, if the bond plan be adopted, are in lieu of the plan of spreading the payment and collection of the assessments over a period of years, and do not affect the prior proceedings. Under the bond plan the board of trustees of the district is required annually to estimate the amount of money necessary to pay the principal and interest on the bonds accruing each year and certify such amount to the board of supervisors of the county, who shall levy an assessment on the lands in the district sufficient to raise the money. "Said tax, when levied, shall be entered upon the assessment roll and collected in the same manner as the state and county taxes." Stats. 1917, p. 220. In the case before us the estimate was made by the board of trustees and submitted to the board of supervisors, which levied a tax of \$1.40 on each \$100 valuation on the land assessed within the district. The county assessor entered the assessment on the roll for the year 1921-1922 and succeeding years, during which the same proceedings were seemingly taken. The agreed statement of facts in the record and the findings of fact of the trial court contain the following recital in this connection: "That in the year 1921, the county assessor of Riverside County entered upon the operative rolls the following assessments of the right of way of the Southern Pacific Railroad Company," followed by a description of the various parcels of the land assessed with the charges against them. The board of supervisors fixed the rate to be paid on the assessment upon the lands within the district, and the county auditor computed the amounts of the several collections to be made for the year.

[1] The amounts of the assessments, and the fairness of the amounts charged against its lands, are not questioned by appellant, but only the fact that the entries were made by the assessor. It must be admitted that it might have been better practice to have had prepared at the time the original report was submitted by the board of trustees of the district to the board of supervisors, under section 16 of the Storm Water District Act of 1909, a permanent record in which the descriptions of the lands to be assessed, together with the amounts of the assessments, might be entered with extensions for the entry of the various annual installments during the life of the bonds, which would have left nothing to be entered except the annual computa-

tions of the installments to become due. Because this was not done, and because the assessor seemingly made up a new assessment roll each year, must the assessments fail? The transcription of the roll was only a manual act, and we cannot see why the writing up of a new roll each year should give appellant cause for complaint if the assessor had the implied authority to do this work. It would seem to us to make no difference in principle whether the assessments were entered in one continuous roll, or were separately entered. This is a question of form and not of substance affecting the rights of the landowners.

[2] It is very evident from the terms of the Storm Water District Act of 1909, both in its original form and as amended, that the Legislature intended to place the burdens of the cost of the improvements upon the lands within the district that were benefited by them. That none of the lands benefited should escape is very evident, and especial mention is made of lands belonging to railroad companies. In construing a statute it is a duty of the courts to construe it and to view it "in the light of every presumption and intendment favorable to its constitutionality" (Los Angeles County Flood Control District v. Hamilton, 177 Cal. 119, 169 P. 1028, 1030), so that it may be vitalized and given life and full force and effect (section 3541, Civ. Code; Kydd v. City and County of San Francisco, 37 Cal. App. 598, 174 P. 88; Hunt v. Manning, 24 Cal. App. 44, 140 P. 39; Glassell Development Co. v. Citizens' National Bank, 191 Cal. 375, 216 P. 1012, 28 A. L. R. 1427). If we should hold that some officer did not have the authority, either express or implied, to enter upon an assessment roll the lands of appellant with the amounts assessed so that they would thereby escape the payment of their share of the cost of the improvements made in the district, grave doubts would immediately arise as to the constitutionality of the entire act, and others under which similar modes of assessment were adopted. Such a construction might furnish the avenue of escape from the assessment of large tracts of land benefited by the improvements. This is a result that should be avoided if it can be done without doing violence to the established principles of law in this state.

[3] Under the broad provisions of the law of California the assessor of a county is given the duty, and upon him rests the burden, of assessing all taxable property within his county, with certain definite exceptions, for the purpose of the levy and collection of taxes for county purposes. The right is given him to assess all taxable property, but this right, together with the duty following, is suspended by other sections of the Political Code, where the assessment is made by certain officials of the state. Operative property of public service corporations has not been

exempted from taxation by the terms of the Constitution (Const. of Cal., art. 13, § 14), but rather a substituted form of assessment and collection of taxes was adopted. In the case of *McHenry v. Alford*, 168 U. S. 651, 18 S. Ct. 242, 250, 42 L. Ed. 614, in discussing similar methods of levy and collection of taxes for state purposes to those adopted by the constitutional amendment, the following apt language was used: "When it is said, as it is in this act, that the tax collected by this method shall be in lieu of all other taxes whatever, it would seem that it might be claimed with great plausibility that a tax levied under such circumstances and by such methods was not in reality a tax upon the gross earnings, but was a tax upon the lands and other property of the company, and that the method adopted of arriving at the sum which the company should pay as taxes upon its property was by taking a percentage of its gross earnings." *San Francisco v. Pac. Tel. & Tel. Co.*, 166 Cal. 244, 135 P. 971; *Pac. Gas & Electric Co. v. Roberts*, 168 Cal. 420, 143 P. 700; *Southern Pacific Co. v. Levee District No. 1*, 172 Cal. 345, 156 P. 502. In fact, instead of exempting operative property from taxation, it affirmatively appears from the Constitution that the Legislature might, under proper circumstances, resort to an ad valorem tax upon this and other property to furnish revenue for state purposes. Const. of Cal., art. 13, § 14, subd. e. It must also be borne in mind that in the case before us we are not dealing with a tax, but with a local benefit assessment to pay the cost of local improvements within the district organized under the Storm Water District Act of 1909.

Bearing in mind that an assessor is given the broad duty of assessing the property within his county subject to taxation for county purposes, and that it is clear that the Legislature intended that the property of appellant involved in this action be assessed to pay its just share of the costs of the improvements within the district, and bearing in mind further that the amendments of 1917 to the Storm Water District Act of 1909 contain no direct mandate to enter the description of this property, together with the assessment upon it, on the tax rolls of Riverside county, we must proceed to the question of whether or not the respondent had the implied power to make the entries that he did in his records. While we have not been referred to, nor have we found a case directly in point, there are, however, many cases construing the implied powers granted to officers and boards within the state that furnish us with the general principles to be applied here. In the case of *Laurelle v. Bush*, 17 Cal. App. 409, 119 P. 953, 956, the following language was used: "It is a well-recognized rule of statutory construction that a general grant of power, unaccompanied by specific directions as to the manner in which the power is to be exercised,

implies the right and duty to adopt and employ such means and methods as may be reasonably necessary to a proper exercise of the power." 2 Lewis' *Sutherland, Statutory Construction*, § 508; *Du Page County v. Jenks*, 65 Ill. 275; *Ex parte McManus*, 151 Cal. 331, 90 P. 702." In the case of *Watt v. Smith*, 89 Cal. 602, 26 P. 1071, 1072, the Supreme Court spoke as follows: "Authorities may be found to the effect that all public officers have an implied power to take all legal measures in their official character which may be requisite to enable them to execute the trust or discharge the duty imposed upon them by law, where there is no statute prescribing the means by which such trust shall be executed; and therefore, if to accomplish their official duty, or to discharge their trust, it is necessary to sue, power to do so is implied. *Cornell v. Town of Guilford*, 1 Denio [N. Y.] 510, and authorities cited. This seems a rational conclusion, and logically follows from the fact of the trust or duty imposed, which can be performed in no other way." Again, in the case of *Lewis v. Colgan*, 115 Cal. 529, 47 P. 357, 358, in discussing implied power from a different angle, the following language was used: "The principle recognized in that case, and applied in the decision, is stated in *Throop, Pub. Off.* § 542, as follows: 'The rule respecting such powers is that, in addition to the powers expressly given by statute to an officer or a board of officers, he or it has, by implication, such additional powers as are necessary for the due and efficient exercise of the powers expressly granted, or as may be fairly implied from the statute granting the powers.' This statement of the doctrine is abundantly sustained by the decided cases everywhere, and is so universal and undisputed that we deem it unnecessary to cite authorities." The cases of *Willmon v. Powell*, 91 Cal. App. 1, 266 P. 1029; *Skidmore v. West*, 186 Cal. 212, 199 P. 497; *Haley & Co. v. McVay*, 70 Cal. App. 438, 233 P. 409; *Harter v. Barkley*, 158 Cal. 742, 112 P. 556; *City of Woodland v. Leech*, 20 Cal. App. 15, 127 P. 1040, and the numerous cases cited in these decisions furnish other apt illustrations of rulings on the question of implied powers.

The act of the Legislature creating the Los Angeles county flood control district (Stats. 1915, p. 1502) contains many provisions as to the assessment of the lands of the district similar to the Storm Water District Act of 1909. The same questions which we are considering under the Storm Water District Act of 1909 were considered and passed upon under the Los Angeles Flood Control District Act in the case of *Los Angeles Railway Corporation v. Los Angeles County Flood Control District*, 78 Cal. App. 173, 248 P. 532, 535. With the similar provisions of the two acts in mind the opinion of Mr. Justice Nourse in this case is particularly helpful. In passing upon the point we are considering it was

held as follows: "It is unnecessary to cite authorities to the rule that when a statute is general in its terms any exemption or exception from its operation must be specific. Thus, when the Legislature declared that the tax should be levied upon all the taxable real property in the district it included every class of real property in the district which was not by the Constitution or statutes expressly exempted from that character of taxation. Now the operative real property of the public utilities within the district, though exempt under section 14 of article 13 from general taxation by the district, but not being expressly exempted from local assessments, comes within the general classification of 'taxable real property,' and as such is subject to the assessments for the purposes of the act. This conclusion follows all the more naturally because it is a matter of common knowledge that the purposes of the act were to protect from damage the public highways and other property in the district, and that the demand for its enactment resulted from the great loss to property from destructive floods which had, for a long period of years, interrupted traffic within the district, washed away railroad bridges, and damaged railroad tracks and rights of way and had caused enormous damage to the property owned by the various public utilities operating in the district. Counsel for the Los Angeles Gas and Electric Corporation, a public utility owning operative property in the flood control district, have filed a brief as 'amici curiae,' in which they advance the point that such property is not subject to taxation under the act because the only machinery provided in the act for the levy and collection of a tax is that provided for the levy and collection of the 'general tax levied for county purposes' from which the operative property of these utilities is exempted by section 14 of article 13 of the Constitution. The argument is that, as this operative property is exempted from county general taxes, the fact that the Flood Control Act adopted the county tax machinery as the only method of levying and collecting the 'tax' for flood control purposes discloses an intention on the part of the Legislature to exempt such operative property from the burdens of the act. The answer to the point raised is a simple one, and is found in the comprehensive opinion written by Mr. Justice Sloss in the Hamilton Case, 177 Cal. 119, 128, 129, 169 P. 1028. In that case it was held that, though the word 'tax' was used throughout the act, the Legislature in fact meant an assessment, and that, accordingly, all the 'taxing' provisions of the act were to be read as authorizing the imposition of a special assessment on the basis of benefits to the real property of the district. Reading the act in the light of this decision, we find that the power was conferred upon the supervisors to impose a special assessment upon all the real property in the district to

pay the interest and principal on the bonds of the district, and, to a limited extent, to raise a special fund for the general purposes of the district. This power to assess goes to all the real property in the district. No real property in the district is expressly exempted, and we have seen that the operative real property of public utilities is not exempted from special assessment for benefits by reason of section 14 of article 13 or any other provision of the Constitution. This, in fact, is conceded by the appellant, as indeed it must under the decisions. *Southern Pac. Co. v. Levee Dist. No. 1*, 172 Cal. 345, 349, 156 P. 502; *Los Angeles Co. F. C. Dist. v. Hamilton*, supra."

[4] As far as the particular entry on the assessment roll by the assessor of Riverside county of the lands of appellant goes, much the same situation arose in so far as the assessor was concerned, as when property in a new form comes into existence and must be assessed. Not so many years ago there were no motor vehicles to be assessed. Later the radio, the airplane, and other new forms of personal property came into being, and all were assessed. When the inventive mind of man has produced property in a new form, no one could question, not only the right, but the duty of the assessor to enter it upon the assessment roll so that it may bear its just portion of the cost of government. When the inventive mind of the Legislature finds a new class of property upon which it directs shall rest a portion of the burden of a public improvement, we do not believe that the implied power of the assessor to so complete his assessment rolls that this property shall not escape an assessment to pay its just proportion of the benefit it receives should be questioned. No other means of collecting the assessment is provided by law (*Atchison, Topeka & Santa Fe Railway Co. v. Reclamation District No. 404*, 173 Cal. 91, 159 P. 430), and therefore we hold that the assessor had the implied power and authority to enter upon the rolls of Riverside county the assessment complained of by appellant in this case. The duties of a public officer include, not only those which lie within the direct definition of the statute, but also those which are necessary to the accomplishment of the purpose of his office, even though they may be an incident of his main duties, where they promote the execution of a mandate of law.

[5] What is, or what is not, against public policy is a question upon which courts in various jurisdictions do not always agree. "Some courts, speaking upon this subject, have said that the immediate representatives of the people, in legislature assembled, would seem to be the fairest exponents of what public policy requires, as being most familiar with the habits and fashions of the day, and with the actual condition of commerce and trade, their consequent wants and weaknesses, and

what legislation is least objectionable, because it operates prospectively, as a guide in future negotiations, and does not, like a judgment of the court, annul a contract already concluded. There can be no doubt that primarily it is the prerogative of the legislature to declare what contracts and acts are contrary to public policy, and to forbid them; hence public policy is what a statute enacts. Therefore it is the duty of the judiciary to refuse to sustain that which is against the public policy of the state, when such public policy is manifested by the legislation or fundamental law of the state. Nor can courts declare contracts or acts authorized by statute to be contrary to public policy; but in the absence of a statute they may declare void, as against public policy, contracts which are clearly injurious to the interests of the public." 6 R. C. L. p. 709. This rule seems to have been adopted in California in the case of *Lux v. Haggin*, 69 Cal. 255, 4 P. 919, 10 P. 674, 702, in which it was held as follows: "The policy of the state is not created by the judicial department, although the judicial department may be called upon at times to declare it. It can be ascertained only by reference to the constitution and laws passed under it, or (which is the same thing) to the principles underlying and recognized by the constitution and laws." The recent case of *Maryland Casualty Co. v. Fidelity & Casualty Co.*, 71 Cal. App. 492, 236 P. 210, 212, has enlarged upon but not departed from this rule. In this case the court said: "An exact definition of public policy would be difficult to formulate. One that has been frequently approved is that adopted by Lord Brougham, namely, that no one can lawfully do anything which has a tendency to be injurious to the public welfare. The application of the principle to a given state of facts is not always easy, though it admits of some degree of latitude. Public policy often changes as the law changes. It is manifest, therefore, that there can be no single or fixed standard governing it. The question, what is public policy in a given case, is as broad as the question of what is fraud. It is primarily the prerogative of the Legislature to declare what contracts and acts shall be unlawful; but courts, following the spirit and genius of the law, written and unwritten, of a state, may declare void as against public policy contracts, which, though not in terms specifically forbidden by legislation, are clearly injurious to the interests of society. When the fact is called to the attention of a court that a contract sought to be enforced is illegal, it will refuse the plaintiff any relief, and will generally leave the parties where it finds them. In determining what is public policy in a given jurisdiction, recourse may be had, not only to enacted law, but also to the decisions of the courts of last resort. In considering this question, many courts have cautioned against recklessness in condemning

contracts as being against public policy. Thus, it has been said by an English judge that public policy is an unruly horse astride of which one may be carried into unknown paths. A similar caution is one to the effect that, before a court refuses to recognize a contract which is made in good faith, and which stipulates for nothing which is *malum in se* or *malum prohibitum*, it should be satisfied that the advantage to accrue to the public from its holding is certain and substantial, not theoretical or problematical, and based upon certain economic or sociological problems. The power to invalidate agreements on the ground of public policy is so far reaching and so easily abused that it should be called into action only in case where the dangerous tendency clearly and unequivocally appears from the contract itself. Courts are reluctant, therefore, to declare a contract void as against public policy, and will refuse to do so, if by any reasonable construction it may be upheld." Again: "As said by Chase, C. J., in the *License Tax Cases*, 5 Wall. 469 [18 L. Ed. 497]: 'This court can know nothing of public policy except from the constitution and the laws, and the course of administration and decision.' The policy of the state 'can be ascertained only by reference to the constitution and laws passed under it, or, which is the same thing, to the principles underlying and recognized by the constitution and laws.'" *Alpers v. Hunt*, 86 Cal. 78, 24 P. 846, 848, 9 L. R. A. 483, 21 Am. St. Rep. 17.

In the cases cited by appellant in support of its contention that public policy in California would not permit the dismemberment of a railroad doing an intercounty or an interstate business, the question of the declaration by the Legislature upon such policy was not involved. The cases of *Southern California Railway Co. v. Workman*, 146 Cal. 80, 79 P. 586, 82 P. 79, 2 Ann. Cas. 583; *Fox v. Workman*, 155 Cal. 201, 100 P. 246, and *Schaffer v. Smith*, 169 Cal. 764, 147 P. 976, were decided under the terms of the *Vrooman Act*. The case of *San Pedro, etc., Railroad Co. v. Pillsbury*, 23 Cal. App. 675, 139 P. 669, 671, involved proceedings under the *Local Improvement Act of 1901* (Stats. 1901, p. 34). The case of *Wilson v. Pacific Electric Railway Co.*, 176 Cal. 248, 168 P. 128, involved a proceeding under the *Improvement Act of 1911* (St. 1911, p. 730), arising prior to the amendment of the street laws expressly authorizing the assessment of rights of way of railway companies. None of these cases involved a direction by the Legislature to assess lands used by a railroad as part of its right of way to pay the cost of the improvement. In the case of *Wilson v. Pacific Electric Railway Co.*, supra, the court was particular to call attention to the fact that the assessment involved was levied prior to such an amendment to the street laws authorizing the assessment of such rights of way.

Section 16 of the Street Opening Act of 1903 (Stats. 1903, p. 376) provided that the cost of an improvement must be assessed "upon and against the lands, including the property of any railroad, within said assessment district." In the case of the Los Angeles Pacific Co. v. Hubbard, 17 Cal. App. 646, 121 P. 306, 309, in construing this act, the court said that: "We perceive no constitutional objection to an act of the Legislature providing for the assessment of all or a part of the right of way, whether owned in fee by the railroad, or consisting merely of an easement, to cover benefits received as a result of the widening of a street; and, since the words inserted in the act constitute express authority and direction to the street superintendent to assess the property of railroads or street railroads within the district, and inasmuch as all land other than rights of way in the district owned by a railroad is clearly subject to assessment under the general language used, it must have been the intent of the Legislature to provide for the assessing of such rights of way, whether the same consisted of an easement or title in fee, where the property would be benefited by the widening of the street. We are therefore of the opinion that the right of plaintiff to the use of the street for the purposes specified in the grant of its franchise constituted a piece or parcel of land within the meaning of the term as used in the street-opening act of 1903, and that such property was subject to assessment for benefits accruing to it by reason of the opening of the street." In the case of Los Angeles Railway Corporation v. Los Angeles County Flood Control District, *supra*, the question of public policy was presented in connection with the assessment of the land used as a right of way by a street railroad operating within the district and within Los Angeles county. The court held that, inasmuch as the Legislature had directed the assessment of all land within the district, it had declared the public policy of the state to be to permit such assessments, as the word "land" certainly included railroad land used as a right of way. The Los Angeles Flood Control Act contained no specific direction to assess the lands of railroad companies.

[6] In the case before us, section 11 of the Storm Water District Act of 1909 contains an explicit direction that with the lands to be assessed to pay the costs of the improvements shall be included "the property of any railroad company within said district." We believe that, when the Legislature directed the

assessment of any land belonging to a railroad company within the district, it intended that the assessment should be paid or collected according to law. In this case the only way to collect a delinquent assessment is by sale of the lands. Atchison, Topeka & Santa Fe Railway Co. v. Reclamation Dist. No. 404, *supra*. We believe the Legislature did not intend to direct the making of a useless assessment and that it has determined the public policy of California to be that lands used as a railroad right of way may be sold to pay a delinquent assessment lawfully levied under the provisions of the Storm Water District Act of 1909.

[7] Appellant further complains of the assessment levied because it insists that it includes the franchise, roadway, roadbed, rails, and rolling stock of the company. We do not so read the assessment in the record before us. The assessment is copied in full and shows only a strip of land 165 feet wide through various sections described, with an amount in money following each of the several parcels described. We cannot construe this to be an assessment on anything more than it shows. From all that appears in the records, the amounts entered are the benefits charged against the lands described in the report of the commissioners and approved by the trustees of the district.

[8] Appellant further complains of a ruling of the trial court refusing to strike out a portion of an agreed statement of facts used at the trial, to the effect that the railroad right of way was benefited by the protection works of the district. This ruling cannot be complained of by appellant in this action. The question of what property was benefited by the improvements was submitted to the board of supervisors of Riverside county during the proceedings leading up to the organization of the district. The findings and decision of the board of supervisors on this question cannot be collaterally attacked in this proceeding. The other questions presented by appellant are not material to the conclusions we have reached and do not need to be separately discussed in this opinion as we have assumed without deciding that its position on these exceptions and assignments of error was correct.

Judgment affirmed.

We concur: SLOANE, P. J.; BARNARD, J.

104 Cal. App. 99

LONG BEACH BRICK CO. v. DE DODSON
et al.★**SAME v. DODSON et al.**

Civ. 7266, 7267.

District Court of Appeal, First District, Division 2, California.

Feb. 17, 1930.

Rehearing Denied March 19, 1930. Hearing Denied by Supreme Court April 17, 1930.

1. Appeal and error ⇨1011(1)—Appellate court cannot interfere with finding supported by conflicting testimony.

Appellate court was powerless to interfere with a finding of trial court supported by conflicting testimony.

2. Evidence ⇨591—Party introducing books of account containing entry shown to have been made without authorization and knowledge of corporate officers was not bound by recitals.

Party introducing books of account was not bound by recitals therein, particularly where it was shown that adverse party, after ceasing to be stockholder in and officer of corporation, had caused entry to be made in books without authorization or knowledge of any one then an officer or stockholder of company, since very fact that entry was made without knowledge and authority of qualified representatives of corporation was material.

3. Appeal and error ⇨931(1)—Appellate court is obliged to take evidence most favorable to respondent.

The appellate court in considering evidence on appeal is obliged to take evidence most favorable to respondent.

4. Corporations ⇨289—Evidence did not establish that former stockholder was officer de facto at time of causing entry to be made on corporate books.

Evidence held insufficient to establish that former stockholder and officer of corporation was an officer de facto at time he caused an entry to be made on books of corporation.

5. Evidence ⇨265(2)—Conduct of stockholder held admission as to proportion of liability sufficient to support finding.

Conduct of stockholder at time of transfer of stock in paying proportionate share of corporate indebtedness constituted an admission as to his proportion of stockholder's liability sufficient to support a finding of that fact.

6. Corporations ⇨215—Stockholder paying liability is not entitled to reimbursement from corporation.

A stockholder paying his stockholder's liability is not entitled to reimbursement from corporation.

7. Appeal and error ⇨1061(3)—Alleged error in denying nonsuit becomes of no consequence, where evidence on conclusion of case is sufficient to support judgment.

Question as to whether or not the court erred in denying a nonsuit becomes of no consequence.

sequence if, upon conclusion of the whole case, there is evidence sufficient to support a judgment.

Appeals from Superior Court, Los Angeles County; Wilber F. Downs, Judge.

Separate actions by the Long Beach Brick Company against Rudecinda F. S. de Dodson and others and against J. H. Dodson, Jr., and others. Judgment for plaintiff, and defendants appeal; the cases being argued and presented together by stipulation of parties.

Affirmed.

R. P. Stewart and V. P. Lucas, both of Los Angeles, for appellants.

Knight & Goddard and P. H. Goddard, all of Long Beach, for respondent.

DOOLING, Justice pro tem.

These are companion cases and by stipulation of the parties have been argued and presented together. Defendant and appellant in No. 7266, Rudecinda F. S. de Dodson, is the mother of defendant, and appellant in No. 7267, J. H. Dodson, Jr. Prior to May 13, 1924, J. H. Dodson, Jr., was a stockholder in Triangle Construction Company, a corporation. While he was such stockholder that corporation became indebted to respondent Long Beach Brick Company. On May 13, 1924, Dodson, Jr., sold and transferred all of his stock in the Triangle Company, and on May 31, 1924, his resignation as secretary and treasurer was accepted by the directors of that company, effective June 1, 1924.

Prior to November 13, 1923, Dodson, Jr., was the owner of one-third of the subscribed capital stock of the Triangle Company, and between that date and May 13, 1924, he was the owner of two-thirds of such stock. On June 2, 1924, Dodson, Jr., gave a check for \$16,000, drawn upon an account carried jointly by his mother and himself, to respondent Long Beach Brick Company. To this check he signed his mother's name and his own. At the same time he received a receipt from respondent acknowledging receipt from James H. Dodson, Jr., of this check for \$16,000, "being in full to date for all of his proportion of the obligation of indebtedness of the Triangle Construction Company to the Long Beach Brick Company."

Subsequently, on May 12, 1926, respondent Brick Company recovered judgment against the Triangle Construction Company in the aggregate sum of \$8,958.46 principal, interest, and costs. Execution having been returned unsatisfied, these suits were brought to reach and apply claimed indebtednesses of appellants to the Triangle Construction Company in satisfaction of respondent's judgment. Judgment followed against Rudecinda F. S. de Dodson for \$5,216.43 and against J. H. Dodson, Jr., for \$4,578.16. These are the judgments here appealed from.

In both cases the issue between the parties was a narrow one. It was admitted by Rudecinda F. S. de Dodson that prior to June 2, 1924, she was indebted to the Triangle Construction Company in the sum of \$5,216.43, but it was claimed that as a part of the transaction by which the \$16,000 check was given to respondent on June 2, 1924, it was agreed that that check should be applied to the extent of \$5,216.43 to extinguish her indebtedness to the Triangle Company and that the balance after deducting that amount was received in full payment of J. H. Dodson, Jr.'s, proportion of the stockholder's liability to respondent. This was flatly contradicted by two witnesses for respondent Armstrong, who was the agent for the Brick Company in the transaction, and Weldon, president and general manager of the Triangle Company. According to their testimony, on June 2, 1924, the Triangle Company was found to be indebted to the Brick Company in the total sum of \$24,623.47. At that time the Triangle Company paid \$623.47 to the Brick Company to reduce its indebtedness to an even \$24,000 and the check for \$16,000 was given as full payment of Dodson, Jr.'s, proportion of the stockholder's liability. Both witnesses testified that it was never suggested that Rudecinda de Dodson's debt to the Triangle Company should be canceled as a part of this transaction.

[1, 2] In this state of the evidence we have the familiar case of a conflict in the testimony which has been resolved by the trial court in favor of respondent. With a finding so supported this court is powerless to interfere. Appellants claim, however, that because respondent introduced a part of the journal of the Triangle Company which contained an entry giving Rudecinda de Dodson a credit of \$5,216.43, thus balancing her account, it made such journal entry its evidence and could not contradict this entry by other evidence. In this connection appellants argue that while books of account are ordinarily only prima facie evidence of the facts recited therein, and may be contradicted by other evidence, nevertheless when they are introduced by a party as a part of his case he is bound by their recitals and cannot contradict them. Appellants cite in support of this contention only one case claimed to be in point, *Cummins v. Hull*, 35 Iowa, 253, and admit that they can find no others. If the case of *Cummins v. Hull* goes to the extent that appellants claim, we do not feel bound by it.

[3] Taking the evidence most favorable to respondent, as we are obliged to do, it appears that after Dodson, Jr., had ceased to be a stockholder in and officer of the Triangle Company he caused this entry to be made in the books without the authorization or knowledge of anyone then an officer or stockholder of the company. It would be strange under

such circumstances if respondent by proving the entry would thereby be deprived of the right to show how and by whom it was made. The very fact that the entry was made without the knowledge and authority of the qualified representatives of the corporation was material for respondent to prove. Yet how could it be proved without proving the entry itself? We are content on this phase of the case to point out that in *Bank of British Columbia v. Frese*, 116 Cal. 9, 47 P. 783, the defendant after putting into evidence books of account was permitted to contradict certain of the entries therein by other testimony. It may be remarked also that the journal in this case was not introduced to prove the item in question, but only to prove that it was entered long after June 2, the date when appellants claim the credit was given.

[4] Appellants argue further that the entry binds the Triangle Company and hence respondent, because, as they claim, Dodson, Jr., was an officer de facto on June 2, 1924. It is a sufficient answer to this contention that he had ceased to be a stockholder and officer de jure before that date and there is no showing of any facts sufficient to constitute him an officer de facto. The fact that he signed a check for the corporation after that date is fully explained by a resolution of the board of directors providing that funds received for work done prior to June 1, 1924, should be placed in a special account to be paid on the indebtedness of the corporation incurred prior to that date subject to checks signed by Dodson, Jr., and countersigned by Weldon. After June 1, 1924, this is the extent of the authority of Dodson, Jr., to act for the company as shown by the evidence.

Appellants' claims of estoppel and laches depend on their construction of the evidence, but under the facts testified to by respondent's witnesses and found by the court there is no substance to such claims.

[5, 6] On behalf of appellant Dodson, Jr., it is argued that a \$16,000 credit which appears on the books as of June 2, 1924, balanced his account with the Triangle Company. This represents the check for \$16,000 given to respondent on that date. Counsel for appellants do not dispute that a stockholder paying his stockholder's liability is not entitled to reimbursement from the corporation (6 Cal. Jur. pp. 1036, 1037, § 413; *Trindade v. Atwater Canning Company* [Cal. App.] 128 P. 756, and cases therein cited), but they insist that since prior to November 13, 1923, Dodson, Jr., owned only one-third of the subscribed stock of the Triangle Company, and since the evidence does not affirmatively show when the indebtedness to respondent accrued, it cannot be said that Dodson, Jr., owed the entire \$16,000 as his share of the liability as a stockholder. This conduct on June 2, 1924, as related by Armstrong and Weldon,

was an admission that \$16,000 was his proportion of the stockholder's liability sufficient to support a finding of that fact.

[7] The denial of the motion for nonsuit at the close of respondent's case need not be considered because the question of whether or not the court erred in denying a nonsuit becomes of no consequence if, upon the conclusion of the whole case, there is evidence sufficient to support a judgment. *Peters v. S. P. Co.*, 160 Cal. 48, 52, 53, 116 P. 400; *Cosby v. Cline*, 186 Cal. 698, 702, 200 P. 801; *County of Los Angeles v. Rindge Co.*, 53 Cal. App. 166, 175, 200 P. 27; *Raddant v. Watson*, 89 Cal. App. 103, 106, 264 P. 589. What has been said disposes of the alleged error in denying a nonsuit at the close of all the evidence.

Judgments affirmed.

We concur: NOURSE, Acting P. J.; STURTEVANT, J.

104 Cal. App. 117

DUGAN v. FORSTER et al. (two cases).★
Civ. 6634, 6901.

District Court of Appeal, First District,
Division 1, California.
Feb. 18, 1930.

Rehearing Denied March 20, 1930.

1. **Contracts** §170(1)—Parties' practical construction of contract is strong evidence of their intention.

The practical construction placed on a contract by the parties thereto is strong evidence of their intention.

2. **Partnership** §328(3)—Evidence held to support trial court's conclusion that amounts drawn by partner were chargeable to expense of conducting business, whether profitable or not.

In action for dissolution of partnership and accounting, evidence held sufficient to support trial court's conclusion that amounts drawn by plaintiff pursuant to contract were properly chargeable to expense of conducting business, whether it showed a profit or loss.

3. **Partnership** §83—Agreement to compensate partner for services to partnership may be made by partners or implied (Civ. Code, § 2413, see Civ. Code 1929, § 2412(f)).

While a partner generally is not entitled to any compensation for services rendered to partnership, under Civ. Code, § 2413 (see Civ. Code 1929, § 2412(f)), partners may agree that one of them shall receive compensation or such agreement may be implied.

4. **Partnership** §329—Existence of contract to compensate partner for services to partnership is for court to determine from facts and circumstances.

Existence or nonexistence of partners' contract to pay compensation to one of them for

services to partnership is a question for court to determine from facts and circumstances of case.

5. **Appeal and error** §996—Fact inferences supporting trial court's conclusions as to existence of contract to pay partner for services rendered to partnership will not be disturbed on appeal.

Inferences of fact supporting trial court's conclusions as to existence or nonexistence of partners' contract to pay one of them compensation for services rendered to partnership will not be disturbed on appeal, though court might have found the other way with equal propriety.

6. **Partnership** §328(3)—Evidence held to warrant court's implied conclusion that parties to action for partnership accounting understood that defendants were to receive compensation for their services to partnership.

In action for dissolution of partnership and accounting, evidence held sufficient to warrant trial court's implied conclusion that parties understood that defendants were to receive compensation for their services to partnership.

7. **Partnership** §333—Partner entitled to draw stated salary held entitled to balance not drawn on accounting.

Partner permitted to draw stated sum per year as salary held entitled to balance not drawn on accounting, though action therefor could not have been maintained before accounting and settlement of partnership affairs.

8. **Partnership** §333—Partner allowing his percentage of earnings to remain in business at copartner's request could not recover interest thereon in accounting, in absence of agreement to pay interest.

Partner allowing his percentage of partnership earnings to remain in business at copartner's request could not recover interest thereon in accounting, in absence of agreement to pay interest; such permission being in effect a loan to partnership.

9. **Interest** §1—Payment of interest generally must be subject of agreement, express or implied.

Generally, payment of interest must be the subject of an agreement, express or implied.

Appeals from Superior Court, City and County of San Francisco; John J. Van Nostrand, Judge.

Action by James O. Dugan against William J. Forster and another. From the judgment rendered, both parties appeal.

Modified, and affirmed as modified.

See, also, 281 P. 411.

Charles L. James and C. K. Bonestell, both of San Francisco, for plaintiff.

Walter E. Dorn and L. W. Lovey, both of San Francisco, for defendants.

PER CURIAM.

The defendants for some time previous to January 29, 1923, were copartners doing busi-

ness under the firm name and style of William J. Forster Company. On that date they entered into an agreement in writing with the plaintiff, who was named therein as the party of the second part, whereby he became a special partner in the business for the purpose of sharing the profits, it being stipulated that any loss should be borne by the defendants. The agreement provided that each partner should take an active part in the business, one of the defendants being the business manager, the other the general superintendent of work, and the plaintiff to have charge of the men employed. It was also agreed that plaintiff should have a drawing account of not more than \$50 a week and ten per cent. of the net profits "minus the amount advanced on the drawing account, and in the event there should be no profits at the end of each calendar year then the party of the second part shall be entitled to said fifty dollars per week as a salary and not obligated to return same to said copartnership." This action was brought for dissolution of the copartnership and an accounting.

An accounting was had, and it appeared that no profits were earned by the concern during the years 1924 and 1925. During the year 1923, however, the net profits shown by the books amounted to \$14,106.21. According to the findings of the court plaintiff was entitled to 10 per cent. thereof in addition to the amounts received by him on his drawing account, to which the court found he was entitled as a salary, and entered judgment in his favor for \$1,410.62, with interest thereon from December 31, 1923, a total of \$1,847.60.

Defendants have appealed therefrom, contending that the amounts drawn by plaintiff during the year should have been deducted from his percentage of the profits. The accounting also showed that defendants withdrew certain amounts as salaries, and that the plaintiff failed to withdraw the full amount from his drawing account which the contract permitted. The plaintiff—who also appeals from the judgment—claims that the sums drawn by the defendants were improperly allowed as salaries, and that he is entitled to the difference between the total amount of his drawing account and that received by him.

According to the testimony of the plaintiff it was not the understanding of the parties that the amounts drawn by him should be deducted from his share of the profits, if any, but that the same should be charged to general operating expense; that when the contract was drawn he protested against its wording, but was assured by defendants' attorney that it expressed plaintiff's understanding of the agreement. It also appears without dispute that at the end of the year 1923 defendants informed plaintiff that the business for the year showed a profit of \$12,952.70, his percentage being \$1,295.27, request-

ing him, however, not to withdraw the same as the concern was in need of money, to which he agreed.

[1, 2] The practical construction placed upon the contract by the parties is strong evidence of their intention (6 Cal. Jur., Contracts, § 184, p. 304), and the foregoing testimony sufficiently supported the conclusion of the trial court that the amounts drawn by plaintiff pursuant to the contract were properly chargeable to the expense of conducting the business, whether the same showed a profit or otherwise.

[3-5] As a general rule a partner is not entitled to any compensation for services rendered by him to the partnership. Civ. Code, § 2413 (see Code 1929, § 2412(f)). It has been frequently decided, however, that the partners may agree that a partner shall receive compensation, or such an agreement may be implied, and the existence or nonexistence of such a contract is a question for the court to determine from the facts and circumstances of the case, and its inferences of fact which support its conclusions will not be disturbed on appeal, though it might with equal propriety have found the other way. *Nevills v. Moore Mining Co.*, 135 Cal. 561, 67 P. 1054.

[6] The evidence was that in 1923 one of the defendants drew sums from the partnership, these amounts being entered, according to the statement filed by the accountant employed by the referee, as wages drawn, and each year thereafter both of the defendants followed the same course, entering the amounts received on the books as wages and salaries drawn. According to the plaintiff a statement of the profits was made for the year 1923, and it may be inferred from his testimony that it was shown to him. Moreover, he does not claim to have been denied access to the books, or that he was not aware of the receipt of salaries or wages by the defendants, and the point does not appear to have been raised at the trial. The circumstances shown were sufficient to warrant the implied conclusion of the trial court that the parties understood that the defendants were to receive compensation for their services, and no contention is made that the amounts were excessive.

[7] Under the contract plaintiff was permitted to draw \$2,600 each year, or \$7,800 for the three-year period. During that time he drew a total of \$7,503.25, and claimed the difference of \$296.75. It has been held that a contract providing for a drawing account in a certain sum per week as against commissions is an agreement to pay that amount absolutely and not on condition (*Schnabel v. American Educational Alliance*, 79 Misc. Rep. 624, 140 N. Y. S. 369; *North Western Life Ins. Co. v. Mooney*, 108 N. Y. 118, 15 N. E. 303; *Handy v. Van Cortlandt Realty Co.*, 156 App. Div. 110, 140 N. Y. S. 1081), and, in view of the finding that the advances were intended as a

salary, plaintiff's claim to the balance must be sustained. While an action therefor could not have been maintained previous to an accounting and settlement of the partnership affairs (*Ferem v. Olson & Mahony*, 176 Cal. 652, 169 P. 386; *Dukes v. Kellogg*, 127 Cal. 563, 60 P. 44; *Murphy v. Community, etc., Bureau* [Sup.] 190 N. Y. S. 849), the amount should have been allowed in the accounting.

[8] As stated, the trial court allowed plaintiff interest on his percentage of the proceeds earned during the year 1923 at the rate of seven per cent. per annum from December 31st of that year. The latter testified that at the request of his partners he allowed this amount to remain in the business. This was in effect a loan to the partnership, and, there being no agreement to pay interest thereon, it is the rule in such cases that interest cannot be recovered. *Carpenter v. Hathaway*, 87 Cal. 434, 25 P. 549; *Clement v. Duncan*, 191 Cal. 209, 215 P. 1025.

[9] The same rule should apply to the balance remaining in the drawing account. So far as appears there was nothing to prevent the plaintiff from drawing each week the full amount allowed by the contract. No demand for or refusal to pay the balance was shown, and there was no express agreement to pay interest thereon. It is the general rule that the payment of interest must be the subject of an agreement, express or implied (*Young v. Canfield*, 33 Cal. App. 343, 164 P. 1134), and here it was manifestly not the intention of the parties that the drawing account should bear interest. For the foregoing reasons the amount allowed by the court as interest, namely, \$436.98, should be deducted from the judgment, and the balance of the drawing account amounting to \$296.75 added thereto.

The judgment is accordingly modified by deducting therefrom the sum of \$140.23, the difference between the above amounts, and, as so modified, is affirmed. It is further ordered that each party pay his own costs of appeal.

104 Cal. App. 39

PEOPLE v. FREER.
Cr. 1106.

District Court of Appeal, Third District,
California.

Feb. 13, 1930.

1. Larceny ⚡65—Evidence held sufficient to support conviction of grand theft.

In prosecution for grand theft, evidence held sufficient to support conviction.

2. Criminal law ⚡698(1)—Hearsay evidence adduced without objection is proper to be considered in support of verdict of conviction.

Hearsay evidence which is adduced without objection is proper to be considered in support of a verdict of conviction.

3. Criminal law ⚡511(1)—In prosecution for grand theft, evidence held sufficient to corroborate testimony of defendant's wife if she was an accomplice (Pen. Code, § 1111).

In prosecution for grand theft, evidence held sufficient, under Pen. Code, § 1111, to connect defendant with commission of crime and to corroborate his wife's testimony that he struck her and took stolen purse away, if she was an accomplice.

4. Criminal law ⚡556—Prosecution is not bound by self-serving declaration of accused person included in statement, merely because offered in evidence by state (Code Civ. Prac. § 2049).

Prosecution is not bound by a self-serving declaration of an accused person included in his statement, merely because it is offered in evidence by state, since Code Civ. Prac. § 2049, authorizes party introducing witness to contradict him by other evidence.

5. Criminal law ⚡554, 741(1)—Jury had exclusive right to pass upon weight of evidence, and could reject entire statement of defendant or any part thereof.

Jury had exclusive right to pass upon weight of evidence, and in doing so it was privileged to reject entire statement of defendant or any part thereof which it believed to be false.

6. Criminal law ⚡739(2)—In prosecution for grand theft, whether defendant established an alibi held for jury.

In prosecution for grand theft, question whether defendant established an alibi held for jury.

7. Criminal law ⚡829(12)—Refusing instruction that mere proof defendant had opportunity to commit grand theft was insufficient to warrant conviction held not error, in view of instructions given.

In prosecution for grand theft, refusal of instruction that mere proof that defendant had opportunity to commit crime was insufficient to warrant conviction, but prosecution must prove beyond reasonable doubt that defendant actually did commit crime, held not error, in view of other instructions given to effect that defendant's guilt must be established beyond reasonable doubt and that if jury entertained reasonable doubt defendant committed offense charged it was their duty to return verdict of not guilty.

8. Criminal law ⚡829(12)—Refusing instruction defendant could not be convicted of grand theft upon mere evidence of unlawful possession or sale of liquor held not error, in view of instructions given.

In prosecution for grand theft, refusal of instruction to effect that defendant could not be convicted of grand theft upon mere evidence of unlawful possession or sale of illicit liquor, and that such evidence did not even tend to prove

crime with which he was charged, held not error, where jury were specifically instructed with respect to necessity of proving each of essential elements of particular offense with which defendant was charged.

Appeal from Superior Court, Humboldt County; Thomas H. Selvage, Judge.

Virgil Freer was convicted of grand theft, and he appeals.

Affirmed.

Blaine McGowan, of Eureka, for appellant.
U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

R. L. THOMPSON, J.

The defendant was convicted of grand theft. It is contended the evidence fails to support the judgment and that the court erred in refusing to give certain instructions to the jury.

The defendant's wife, who is named Dolores, but was called Del, was employed as an entertainer at the Frontier Cabaret in Eureka. She had apartments at the Redwood rooming house, which she used for assignment purposes. The defendant was a taxi driver. On the night of August 22, 1929, the prosecuting witness Vikan and a companion by the name of Brough visited the Frontier Cabaret, where they met Mrs. Freer and other entertainers. The cabaret closed at 2 o'clock in the morning. The group consisting of Mrs. Freer and Vikan, Brough, and two other dance girls named respectively Annabelle and Florence, were driven by the defendant in his taxicab to the Splendid Café, where they remained for an hour eating and drinking. The defendant was not a member of this party. The entire group then went to the Redwood rooming house, where for two hours they occupied together the bedroom of Mrs. Freer. The evidence would warrant the jury in assuming that by prearrangement between the defendant and his wife, Vikan was lured to this room for the purpose of plying him with liquor until he became sufficiently drunk to safely rob him. Mrs. Freer knew he had a purse containing a number of greenbacks. He had exhibited it at the restaurant when he paid the bill for refreshments. She saw him slip the purse under the pillow on his bed in her room. During the two hours the revelers occupied the room at the Redwood apartments, Mrs. Freer was actively engaged in procuring and dispensing whisky to them. Three times she left the room and returned each time with a bottle of liquor which she obtained from her husband, who was conveniently stationed with his taxicab in front of the Redwood rooming house. The last bottle of whisky was voluntarily contributed by Mrs. Freer without charge. Regarding the presence of the defendant at the rooming

house, Florence Pedro, one of the occupants of the room testified:

"Q. Each time Del had to leave the room and go somewhere and get the liquor and return? A. Yes, but she didn't go so very far.

"Q. How long was she gone? A. Well, she just stepped out and (just) had time to come right back in.

"Q. Did she have it in the hall? A. Well, she had a taxicab there (it was) supposed to be her husband; he was waiting there.

"Q. You didn't see him, did you? A. Saw him once, yes. * * * When he came up with the first bottle, he was standing out in the hall. * * *

In a statement which was made by the defendant after his arrest, he admitted having furnished the liquor and that he twice left the Redwood rooming house, where he was stationed that night, to obtain liquor at the request of his wife. He said:

"Q. You did make two trips from the Redwood rooms that night? A. Yes. * * *

"Q. And you returned each time with a pint of whisky? A. Yes. * * *

"Q. What time was it that you arrived there the second trip? A. Four-fifteen. * * *

"Q. When you came back you were inside the building? A. Yes sir. * * * I went as far as the end of the hall * * * upstairs."

Florence Pedro also corroborates the evidence of his presence at the door of his wife's room about 4 o'clock, which was shortly before the time of the theft. She said she saw him in the hallway at the door.

"Q. It was then that she (Dolores Freer) took the purse? * * * A. Close to four o'clock in the morning."

It is the theory of the prosecution that the purse of Vikan containing \$400 in greenbacks was stolen by Mrs. Freer from under the pillow and delivered to the defendant in the hallway immediately afterward. At the time the purse was taken the entire group were in the room. Vikan sat on the edge of his bed beside Annabelle Sonneland. Florence Pedro sat on the adjoining bed. Mrs. Freer stood near the head of Vikan's bed serving whisky. Suddenly she put the bottle down and, reaching under the pillow, she withdrew the purse and hurried out of the room into the hallway. Both Vikan and Florence Pedro saw her take the purse. The latter immediately arose and called to Annabelle that Dolores had stolen the purse, and directed her to follow the thief and assist in recovering the purse. Within a brief period of time, during which Florence Pedro was engaged in putting on a wrapper and slippers, she rushed in pursuit of Mrs. Freer into the hallway, where she found her alone. The defendant was not in sight. Seizing Dolores, Florence

Pedro accused her of stealing the purse and demanded that she give it up. Whereupon Mrs. Freer slumped down upon the floor, pretending that she had been hurt, and said: "Oh, my husband hit me across the head and took it away from me." A quarrel ensued. Considerable commotion followed. Mrs. Freer was immediately searched by the girls, but neither the purse nor the money was found. The foregoing accusation against the defendant by his wife was hearsay evidence, but it was adduced without objection. Moreover, on cross-examination of Florence Pedro by counsel for the defendant the following controversy occurred: "Q. Oh, you asked her where the purse was? A. Yes. Q. And she said, 'I haven't it'? A. No. She said, 'my husband hit me over the head and took it.'" This statement of Mrs. Freer's was also corroborated by another witness.

After quarreling for some time among themselves about the disappearance of the purse, the police office was called about 5:25 o'clock in the morning and the theft was then reported. The officers immediately hastened to the Redwood rooming house and interviewed the members of the party. They then took the group to police headquarters, where a more particular examination was conducted. They then returned to the Redwood apartments once more, and after a careful search Officer Rutledge discovered the empty purse under the slop-hopper in the hallway where Mrs. Freer stood when she charged her husband with striking her and taking the purse. The officers then went to the home of the defendant, where they arrived at 6:35 o'clock in the morning. He was found in bed, but was immediately placed under arrest. He subsequently made the statement heretofore quoted.

[1-3] We are satisfied the evidence is sufficient to support the judgment of conviction. It is true that the testimony indicates that the defendant was either a principal in the commission of the crime according to the definition of that term which is found in section 31 of the Penal Code on the theory that he aided and abetted in its commission, or that Dolores Freer was an accomplice of the defendant and therefore under the provisions of section 1111 of the Penal Code he could not be convicted upon her charge of his guilt alone "unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense." It is insisted that the evidence merely shows the defendant had the opportunity to steal the money, but that it utterly fails to prove that he actually did so. His wife, however, charged him directly with taking the purse. To be sure this charge was adduced by means of hearsay evidence. But it was introduced in the record without objection and was reiterated on cross-examination by the defendant's own counsel. Hearsay evidence which

is adduced without objection is proper to be considered in support of a verdict of conviction. It will be observed that section 1111 of the Penal Code requires the testimony of an accomplice to be corroborated by facts or circumstances which *tend* only to connect the defendant with the commission of the offense. The record contains ample evidence which tends to so connect him. He took the entire party in his taxicab from the cabaret to the restaurant. He knew his wife's occupation and must have been acquainted with her reputation. He did not take the group from the restaurant to the Redwood rooming house. He knew they were there, however, for his machine was parked out in front while his wife was plying the victim with liquor so as to get him in a suitable condition to safely rob him. The defendant supplied the liquor by means of which the job was accomplished. He delivered the last bottle to his wife in the hallway at about 4 o'clock, which is the exact time when Florence Pedro says the theft occurred. He was therefore present at the very time and place to have received the purse which his wife charged him with taking. He then disappeared from the scene of the theft and returned there no more. Evidently he knew there would be no further demand for liquor. Mrs. Freer was immediately seized after she stole the purse and was searched. She had neither the purse nor the money. The money was never recovered. It seems to have disappeared with the defendant. Soon afterward the empty purse was found under the slop-hopper where it was evidently hastily thrown or hidden.

The defendant admitted he was in the hallway to which his wife fled with the purse at 4:15 o'clock that morning. These facts certainly tend to connect the defendant with the commission of the crime and corroborate his wife's charge that he struck her and took the purse away. At least it is reasonable to infer from these circumstances that the defendant was in the hallway when his wife came from her room and either forcibly took the purse from her or received it when she voluntarily gave it to him and that he hastily extracted the greenbacks, threw the purse under the slop-hopper, and fled. The slight delay which followed Mrs. Freer's flight from the bedroom before she was overtaken in the hallway and the commotion which followed may reasonably account for the failure to hear the defendant as he went down the stairway or to hear him start his machine and drive away from the rooming house.

[4-6] The defendant contends that his statement which was offered in evidence by the prosecution furnishes a complete alibi and binds the state by his assertion that he was in bed at 4:30 o'clock the morning of the theft, which precludes the possibility of his guilt. The prosecution, however, is not bound by a self-serving declaration of an accused

person which may be included in his statement merely because it is offered in evidence by the state. The jury had the exclusive right to pass upon the weight of the evidence and in doing so it was privileged to reject the entire statement or any part thereof which it believed to be false. Any other rule would render such statements valueless to the prosecution for it is a recognized tendency on the part of one who is accused of a crime to strenuously profess his innocence. Section 2049 of the Code of Civil Procedure authorizes the party who produces a witness to "contradict him by other evidence" or show that "at other times (he made) statements inconsistent with his present testimony." Callahan v. Danziger, 32 Cal. App. 405, 408, 163 P. 65; Jones on Evidence (3d Ed.) 1349, § 857. Moreover, the statement fails to furnish evidence of an alibi. The defense assumes that immediately after Dolores Freer was seized in the hallway and accused of the theft, the police department was called; that since this call did not actually occur until 5:25 o'clock in the morning, and the defendant was in bed at 4:30 o'clock, it therefore furnishes a complete alibi. While there may be some evidence to support this theory, the testimony of Florence Pedro, which is quoted above, is that the purse was taken "close to four o'clock in the morning." The defendant admitted he was in the hallway at the Redwood apartments at 4:15 o'clock. This would connect him closely enough with the theft of the purse at about 4 o'clock and still give him ample time to drive his taxicab from the Redwood rooming house and get in bed by about 4:30 o'clock. An alibi was therefore not satisfactorily established. It is unquestionably true that the police department was not called until 5:25 o'clock. This was a little over an hour after the theft occurred. It does not seem unreasonable to believe that the members of this group of revelers laboring under the influence of three pints of whisky, or more, may have consumed the intervening hour and a quarter quarreling and wrangling over the loss of the purse. Under such circumstances as this case presents, too accurate calculation of time may not be insisted upon in order to create an alibi upon which to discharge an accused who is surrounded with so many incriminating circumstances. It was the province of the jury to determine whether an alibi had been successfully established.

[7] The defendant complains of the court's refusal to give to the jury an instruction which was offered, to the effect that mere proof that the defendant had the opportunity

to commit the crime with which he was charged was insufficient to warrant a conviction, but that the prosecution must prove beyond a reasonable doubt that the defendant actually did commit the crime. In view of other instructions which were given to the jury, the refusal to give this instruction was not error. The jury was instructed respecting the nature of the crime with which the defendant was charged in the precise language of the information. They were then repeatedly told that, "The defendant's guilt must be established beyond a reasonable doubt." Furthermore, the jury was instructed that: "You are here for the purpose of trying the issues of fact that are presented by the allegations of the information filed in this court," and " * * * If you entertain * * * a reasonable doubt * * * that the defendant committed *the offense charged in the information*, it is your duty to return a verdict of not guilty." Finally, the jury was instructed that the prosecution must prove to a moral certainty and beyond a reasonable doubt every essential element and circumstance necessary to establish the defendant's guilt of the crime with which he was charged, or he was entitled to an acquittal. In view of these instructions, it seems unreasonable to assume that the verdict could have been based upon evidence that the defendant merely had the opportunity to commit the offense with which he was charged rather than proof that he actually did commit the crime of grand theft.

[8] The defendant also charges the court with error in refusing to give to the jury an instruction to the effect that the defendant could not be convicted of grand theft upon mere evidence of the unlawful possession or sale of illicit liquor, and that such evidence did not even tend to prove the crime with which he was charged. This may have been a proper instruction in view of the prominence which was given to the subject of intoxicating liquor in the present case. However, we do not think it was error to refuse this charge, since the jury was so specifically instructed with respect to the necessity of proving each of the essential elements of the particular offense with which the defendant was charged.

We are of the opinion that the jury was fully and fairly instructed upon the law of the case and that there was no miscarriage of justice.

The judgment is affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

104 Cal. App. 104

GOLISH v. FEINSTEIN.
Civ. 6937.

District Court of Appeal, Second District, Division 1, California.
Feb. 17, 1930.

Appeal and error $\hookrightarrow$ 82(3)—**Order after default judgment overruling plaintiff's objections to hearing by designated judge of any issue held appealable as "special order after final judgment"** (Code Civ. Proc. § 963, subd. 2).

Order, after default judgment overruling plaintiff's objections to hearing by designated judge of superior court of any issue of fact or law arising upon defendant's serving and filing several notices of intention to vacate default and ensuing judgment, to recall and stay execution, and to strike complaint and various paragraphs thereof, held "special order" made after final judgment from which an appeal may be taken under Code Civ. Proc. § 963, subd. 2.

[Ed. Note.—For other definitions, see Words and Phrases, First, Second, and Third Series, Special Order.]

Appeal from Superior Court, Los Angeles County; Harry W. Falk, Judge.

Action by R. H. Golish against Bob Feinstein, doing business under the fictitious name and style of Bob Feinstein & Company. Default judgment for plaintiff, and from an order thereafter overruling plaintiff's objections to hearing by a designated judge of any issue of fact or law arising therein, plaintiff appeals.

Motion to dismiss appeal denied.

Frazier McIntosh, of Los Angeles, for appellant.

Samuel A. Miller and Paul J. Ziegler, both of Los Angeles, for respondent.

HOUSER, J.

This is a motion to dismiss an appeal from an order by which, following a default judgment in the action, plaintiff's objections to the hearing by a designated judge of the superior court (because of his alleged bias and prejudice) of any issue of fact or law arising therein were denied.

More particularly, the facts appear to be that, after the default judgment had been entered, defendant served and filed his several notices of intention to vacate both the default and the ensuing judgment, to recall the execution issued on the said judgment, to stay its execution, and to quash its execution; also, to strike the complaint and various specified paragraphs thereof. Thereafter, plaintiff filed with the clerk of the court objections to the hearing of any further issue of either fact or law by the judge presiding in the department of the superior court where the several matters were set for hearing, on the ground,

primarily, that by reason of the bias or prejudice of said judge a fair and impartial hearing or trial could not be had before him. By order of the trial court, such objections were, and each of them was, overruled. Whereupon plaintiff gave notice of appeal from such order. The reason here urged for the dismissal of the appeal is that no appeal lies from an order of the character of that here in question.

In moving to dismiss the appeal reliance is placed in the general rule that, although under the provisions of subdivision 2 of section 963 of the Code of Civil Procedure, an appeal may be taken "from any special order made after final judgment," before an order properly may be said to be "special," it must appear that in some manner it affects the judgment itself, or at least bears some relation to it, either as to its enforcement or as to the prevention or the staying of its execution. 2 Cal. Jur. 155; *Griess v. State Inv. & Ins. Co.*, 93 Cal. 411, 28 P. 1041; *Kaltschmidt v. Weber*, 136 Cal. 675, 69 P. 497; *Watson v. Pryor*, 49 Cal. App. 554, 193 P. 797. But, however apparently unanimous in expression and however sound in reasoning the authorities may appear to be which deal abstractly in the discussion of a legal principle, nevertheless they must yield to a contrary view when expressed concretely and in relation to and in consideration of basic facts. In the case of *Mercantile Trust Co. v. Sunset Road Oil Co.*, 173 Cal. 487, 160 P. 545, the question presented to the court for its consideration consisted of whether in the circumstances there present an order denying a motion to have a designated judge called to preside at the hearing of a motion for a new trial, on account of the alleged bias and prejudice of the judge whose place the designated judge was expected to occupy, was a "special" order within the meaning of the statute, and appealable as such. After giving consideration to the several expressions of opinion relating to the question, as announced in various adjudications by the Supreme Court of this state, the conclusion was reached that the situation presented was one which fell within that portion of the provisions of subdivision 2 of section 963 of the Code of Civil Procedure which provides that a "special order made after final judgment" is appealable. It is there declared that the effect of a successful appeal from an order by which the right of the appellant to have a qualified judge sit in judgment at the hearing of a motion for a new trial was denied would be one, not reversing the subsequent order by which a new trial was granted, but which would "send the matter back for hearing before a qualified judge." So in the instant case, assuming that by order of the judge whose disqualification is alleged the default of the defendant should be vacated, the ensuing judgment set aside and,

on final hearing of the action, judgment should be rendered in favor of the defendant—in an appeal by the plaintiff from such judgment, if the appellate tribunal should be of the opinion that prejudicial error was committed by the trial court in overruling the several objections interposed by the plaintiff, which primarily were based upon the disqualification of the trial judge to impartially hear and determine the motions made by the defendant—to quote the pertinent language appearing in the cited authority: “The proper order to be made by this court would be one pronouncing void the order denying the motion to disqualify the judge. This would operate not to reverse the * * * [judgment], but to vacate it and send the matter back for a hearing before a qualified judge.” *Mercantile Trust Co. v. Sunset Road Oil Co.*, 173 Cal. 487, 489, 160 P. 545, 546.

Assuming the correctness of the conclusion indicated in such authority, it would follow that the appeal herein is from a “special order made after final judgment,” and consequently, that the motion to dismiss the appeal is not well taken.

It is ordered that the motion to dismiss the appeal be, and it is, denied.

We concur: CONREY, P. J.; ELLIOT CRAIG, Justice pro tem.



104 Cal. App. 30

RICHARDS et ux. v. SELLERS et al.
Civ. 7263.

District Court of Appeal, First District, Division 2, California.

Feb. 13, 1930.

1. Taxation ⚡788(1)—Absent statutory provision, neither tax deed nor its recitals are evidence against property owner of regularity of tax proceeding (Street Improvement Act, §§ 72-76).

In absence of statutory provision of Street Improvement Act (St. 1911, pp. 762, 763) §§ 72-76, to contrary, neither tax deed nor its recitals are evidence against property owner of regularity of tax proceeding.

2. Municipal corporations ⚡982—Property on which billboard was erected containing names of owners of billboard held “occupied” within meaning of statute requiring notice to occupant in tax proceedings (Street Improvement Act, § 75).

Where billboard 50 feet long and 10 feet high, standing on property at time holder of tax certificate applied for tax deed, showed names of owners of billboard, property was “occupied,” and hence it became duty of holder of tax certificate to serve notice on occupant under

Street Improvement Act (St. 1911, p. 762) § 75.

[Ed. Note.—For other definitions, see Words and Phrases, First, Second, and Third Series, Occupancy, Occupation; Occupy (Of land).]

3. Municipal corporations ⚡982—Owner's title held not divested, where owner received no notice and no notice was served on occupant of application for tax deed (Street Improvement Act, § 75).

Where holder of tax certificate seeking tax deed did not serve notice on occupant as required by Street Improvement Act (St. 1911, p. 762) § 75, and owner received no notice, service was incomplete and owner's title was not divested.

4. Municipal corporations ⚡982—Payments made by holder of tax certificate, together with interest thereon, constituted “lien,” although tax deed was invalid (Street Improvement Act, § 72).

Payments made by holder of tax certificate together with interest thereon constituted lien on property under Street Improvement Act (St. 1911, p. 762) § 72, although tax deed was invalid.

[Ed. Note.—For other definitions, see Words and Phrases, First, Second, and Third Series, Lien.]

Appeal from Superior Court, Los Angeles County; Stanley Murray, Judge.

Action by John A. Richards and wife against Bert E. Sellers and others. Judgment for defendants, and plaintiffs appeal.

Affirmed.

Guy Lewis, of Los Angeles, for appellants.

William Ellis Lady, of Los Angeles, for respondents.

STURTEVANT, J.

This is an action to quiet title. The plaintiffs framed their complaint in the ordinary form of an action to quiet title. The defendants appeared and filed an answer in which they denied many of the allegations of plaintiffs' complaint and then they pleaded an affirmative defense. The substance of that defense is that the city of Los Angeles on March 24, 1925, caused to be issued a certificate of sale against the property involved. That certificate purported to have been issued pursuant to certain public improvements made under the Street Improvement Act, chapter 397, of the Statutes of 1911. The defendants allege that they made a tender of the amount due on December 30, 1926, that it was refused, and that they have been and are now willing and ready to pay all sums due. The trial court made findings in favor of the defendants, and among other things it recited certain facts showing that at the time the plaintiffs applied for a deed the only notice served on the owner was a certain notice served by posting on the property, and that thereafter

the plaintiffs made an affidavit that the property was unoccupied. Continuing, the court found that at the time the notice was posted there was standing on the property a billboard 50 feet long and 10 feet high and attached to it was a small sign "Foster and Kleiser"; that the small sign was conspicuously displayed and that Foster & Kleiser had erected the billboard and maintained it under a lease from the owner of the real property. As conclusions of law the trial court found that the plaintiffs' deed to the property was invalid and that the defendants were entitled to have it canceled. It further held that the defendants were entitled to redeem upon paying the principal sum and interest represented in the certificate of sale.

[1-4] The plaintiffs contended the property was unoccupied, that the tax proceeding was regular on its face in all particulars, and that they are entitled to recover on the strength of the tax deed issued to them. The defendants claim the property was in truth occupied and that they were entitled to receive but did not receive personally any notice of the tax proceeding and that they are entitled to show the facts which actually existed and that the plaintiffs' deed was invalid. In the absence of a statutory provision to the contrary, neither a tax deed nor its recitals are evidence against the owner of the regularity of the tax proceeding. *Jackson v. Shepard*, 7 Cow. (N. Y.) 88, 17 Am. Dec. 505; *Norris v. Russell*, 5 Cal. 250; *Bucknall v. Story*, 36 Cal. 67; *Pierce v. Low*, 51 Cal. 580. That rule has been modified by the Street Improvement Act (St. 1911, chap. 397, §§ 72-76). The deed is, by virtue of the provisions of the statute made "primary evidence * * * of all proceedings theretofore had" and "prima facie evidence of the regularity of all proceedings subsequent to the issue of the bond" (section 76). In the instant case the bond was issued, it was not paid, a sale was had, the plaintiffs became the purchasers, and, later, they gave notice by posting the notice that they intended to apply for a deed. After all the evidence was in the trial court made a finding that the property was occupied. We think it may not be said that said finding is not sustained by the evidence. The words "occupied" and "unoccupied" have many meanings. As contained in the statute, they will be construed in connection with the context. Our statute contains no words showing that it refers to only such property as is wholly occupied. Manifestly it was intended that there must be present some evidence of occupancy. How much? Each case must stand on its own facts. In the instant case when the plaintiff John A. Richards went to the property to post the notice, he saw the large signboard and the small signboard showing the names of Foster & Kleiser, the owners of the sign-

board. They were the occupants of at least a part of the premises. Under the terms of the statute it then became the duty of the plaintiff to serve notice on Foster & Kleiser (section 75). He did not do so. If he had done so, doubtless he would have been told the name and address of the owner and it would then have become the plaintiff's duty to have served the owner also (section 75). Because the plaintiff did not serve the occupant and because the owner received no notice at all, the service was incomplete and the owner's title was not divested. In making findings against the plaintiffs the trial court did not hold that the plaintiffs had no rights. It merely held that the plaintiffs' deed was invalid. By the terms of section 72 of the statute the payments theretofore made by the plaintiffs together with interest thereon constituted a lien. That lien still exists and will continue to exist until a redemption is had or a valid deed is made. In no respect did the trial court hold to the contrary. We find no error in the record.

The judgment is affirmed.

We concur: NOURSE, Acting P. J.; DOOLING, Justice pro tem.

104 Cal. App. 72

BULLOCK v. McKEON et al.

Civ. 103.

District Court of Appeal, Fourth District, California.

Feb. 14, 1930.

1. Escrows §8(1)—Deposit of instrument in escrow may constitute part of contract only if preceded by contract.

Where deposit of an instrument in escrow follows an agreement between parties, it may constitute part of a contract; but, where it is not preceded by a contract, it is at best a mere offer.

2. Contracts §19—Mere offer, though continuous in nature, may be withdrawn any time before acceptance, unless promise to hold it open is supported by sufficient consideration.

One making a mere offer to another may withdraw it any time before it has been accepted, and this applies though offer is continuous in nature and is to remain open for a specified time, unless promise to hold it open is supported by sufficient consideration.

3. Escrows §8(1)—Acceptance of offer in escrow instructions not having been communicated to defendant or escrow agent until after defendant withdrew deposit, escrow agent's authority closed (Civ. Code, §§ 1486, 1488, 1494, 1580).

Where offer contained in defendant's escrow instructions required deposit with escrow

agent of assignment of portion of oil lease, and no acceptance of defendant's offer, either partial or complete, was ever communicated to him, and none to escrow agent until after defendant had withdrawn his deposit and closed his part of escrow, *held*, that defendant's acts revoked agency of escrow agent, and latter was not authorized thereafter to receive an offer of performance on part of plaintiff under Civ. Code, §§ 1494, 1486, 1488, 1580.

4. Contracts ⚡23—"Acceptance" to be binding must conform to offer and not impose new conditions, and if it does it is "counter offer" which must be accepted to be binding.

To make acceptance of offer binding, it must conform to terms of offer, and must not impose new conditions, since if it does so it is not an "acceptance," but constitutes a "counter offer" which must be accepted to become binding.

[Ed. Note.—For other definitions, see Words and Phrases, First, Second, and Third Series, Acceptance.]

5. Escrows ⚡5, 9—Escrow instructions must be strictly construed, and no rights are acquired thereunder until terms so construed are complied with.

The terms of an escrow instruction are to be strictly construed, and until the other party has complied with such terms as so construed, he can gain no rights under them.

6. Mines and minerals ⚡74—Attempted acceptance of offer in escrow instructions relating to oil lease assignment held defective because not acceptance of offer (Civ. Code, §§ 1486, 1488, 1494, 1580).

Where defendant's offer in escrow instructions requiring deposit of assignment of oil lease provided that defendant was to pay no rent until certain date, and required plaintiff and another to pay cost of guaranty of title and escrow charges, plaintiff's attempted acceptance thereof by instructions tending to place on defendant half of cost of guaranty of title and escrow charges, and not complying with defendant's escrow instructions as to rent, *held* defective under Civ. Code, §§ 1486, 1488, 1494, 1580, as not constituting an unconditional acceptance of defendant's offer, and therefore not binding on defendant, even if he had not previously withdrawn his offer.

Appeal from Superior Court, Kern County; Wm. D. Dehy, Judge.

Action by J. O. Bullock against R. B. McKeon and another. Judgment for plaintiff, and named defendant appeals.

Reversed.

Rohe & Freston, of Los Angeles, for appellant.

Siemon & Garber, of Bakersfield, for respondent.

MARKS, J.

Respondent recovered judgment against appellant in the sum of one thousand dollars

as liquidated damages based upon an alleged breach of contract.

Under date of June 9, 1926, respondent and his wife, Winnifred Mae Bullock, as lessees, secured an oil lease upon one hundred and sixty acres of land in Kern county, from Clarence T. Mills and Elsie J. Mills, the owners of the property. The lease provided that operations for the drilling of a well for oil or gas must be commenced by the lessees within three years from its date. An extension of the drilling requirements for one year could be obtained by the lessees paying to the lessors "Two Hundred Fifty (\$350.00) Dollars" on or before the expiration of the three-year period. Two additional yearly extensions might be obtained by making the same payment on or before the end of each year.

Respondent secured the services of L. G. Helm and E. W. Bailey, two brokers, to secure an oil operator who would take over part of the leased land and perform the drilling requirements of the lease. They approached appellant who, on July 8, 1927, paid to the First National Bank of Bakersfield, Cal., which we will hereafter refer to as the bank, the sum of one thousand dollars, which payment was accompanied with the following letter of instructions: "July 8th, 1927. First National Bank, Bakersfield, California. Gentlemen: I hand you herewith One Thousand (\$1,000.00) Dollars, with the following instructions: Leases to be deposited from Bullock to Helm and Bailey, and assignment from Bullock, Helm and Bailey to R. B. McKeon, covering North One-Half (N½) of Southwest (SW¼) Quarter, Section Twenty-four (24), Township Twenty-eight (T28), Range Twenty-eight (R28), Kern County, terms being one-sixth (1-6) royalty, and Standard drilling requirements. This to be a three (3) year paid up lease. In consideration of the above lease and assignment, I agree to pay the total sum of Twelve Thousand (\$12,000.00) Dollars cash, as follows: One Thousand (\$1,000.00) Dollars this day paid, and Eleven Thousand (\$11,000.00) Dollars on or before 4 p. m., July 24th, 1927. In case I do not desire to go through with this deal, you are instructed to deliver the One Thousand (\$1,000.00) Dollars to Helm and Bailey, as liquidating damages. When the Eleven Thousand (\$11,000.00) Dollars is paid, I am to be furnished with a guarantee and certificate of title for Twelve Thousand (\$12,000.00) Dollars, showing the property free and clear of all incumbrances, subject only to the above mentioned lease. I am also to deliver an agreement to pay an additional One Hundred (\$100.00) Dollars, per acre in oil, out of Twenty-five (25%) per cent of net production. R. B. McKeon, 809 Great Republic Life Bldg."

On July 9, 1927, Helm and Bailey handed to the Kern County Abstract Company of Bakersfield a letter signed by E. W. Bailey, addressed to the abstract company, dated July 9, 1927; a letter to the abstract company, signed by respondent, dated in one place July 7, 1927, and in another place, July 8, 1927; an unsigned agreement between R. B. McKeon and E. W. Bailey, dated July 7, 1927; and an agreement between J. O. Bullock and Winnifred Mae Bullock and R. B. McKeon, in words and figures as follows: "This indenture, made this seventh day of July, 1927, by and between J. O. Bullock and Winnifred Mae Bullock, husband and wife, as first parties, and R. B. McKeon, as second party, Witnesseth: Whereas, the first parties are the owners of an oil and gas lease dated June 9, 1926, executed by Clarence T. Mills and Elsie I. Mills, his wife, as lessors, with first parties herein as lessees, and covering all of the southwest quarter (SW $\frac{1}{4}$), Section twenty-four (24), Township twenty-eight (28) south, Range twenty-eight (28) east M. D. B. & M., in the County of Kern, State of California, containing one hundred and sixty acres (160), more or less, and which said lease was recorded June 28, 1926, in book 132 of official records at page 212, records of Kern County, California. Now therefore, for and in consideration of the sum of ten dollars (\$10.00) to them in hand paid and other good and valuable consideration, first parties do hereby sell, assign, transfer, and set over to second party the said lease as above described, in so far as the same relates to and affects the north half (N $\frac{1}{2}$) of said southwest quarter (SW $\frac{1}{4}$) of said section twenty-four (24), the portion hereby assigned containing eighty acres (80), more or less; and, The second party in consideration of such assignment does promise and agree as follows, to-wit: First. That he will faithfully comply with each and every of the terms and conditions of said oil and gas lease, in so far as the said portion thereof hereby assigned to him is concerned, and will save and keep harmless the said parties from and on account of any obligation or liability whatsoever, in so far as such portion so assigned to him is concerned. Second. That he will on or before three years from date hereof, commence the actual drilling (spud in) of an oil and gas well upon said leased premises, and prosecute the drilling thereof with due diligence and dispatch until at least a depth of thirty-five hundred feet (3500 ft.) has been reached, unless oil or gas is found in paying quantities at a lesser depth; and continue such drilling operations thereafter in full conformity with the requirements of said lease. Third. That he will in event oil is produced from said premises pay to the said first parties an additional consideration for said assignment in the sum of Eight thousand dollars (\$8,000.00),

same to be payable out of twenty-five per cent (25%) of the first oil or gas produced thereon. Fourth. And, further, that he will pay to the said first parties an over riding royalty in the amount of two per cent (2%) of all oil and gas produced and saved from said premises and at the times and in the manner provided for the payment of the base royalty in said lease. And it is mutually understood and agreed that the covenants and agreements herein contained shall inure to the benefit of, and shall be binding on the heirs, executors, administrators, successors, or assigns of the respective parties hereto. In Witness Whereof the parties hereto have hereunto set their hands the day and year first above written. J. O. Bullock, Winnifred Mae Bullock, First Parties. R. B. McKeon, Second Party." This was acknowledged by the first parties July 8, 1927, and by McKeon on the next day.

The Bailey letter to the abstract company instructed it to examine the title to the leased property and to write its usual guarantee of title showing title in the lessors free and clear of all incumbrances, except current taxes, and the oil lease, with appellant as the assignee of the north one-half of the leased property; that one-half the escrow charges and cost of the guarantee be paid by appellant and one-half by Bailey; that the company close the escrow when it had received from appellant twelve thousand dollars and, in addition to the requirements of the instructions given by respondent, an agreement executed by appellant agreeing to pay Bailey a separate royalty of two and one-sixth per cent from said property. Of the twelve thousand dollars to be paid by appellant, eight thousand dollars was to be paid to respondent and four thousand dollars to Bailey. The letter of respondent to the abstract company transmitted two copies of the agreement between Bullock and wife and McKeon hereinbefore copied, and authorized the abstract company to deliver one copy thereof to Bailey and one to appellant when he had executed the same and paid to the abstract company eight thousand dollars. It further provided that respondent would be at no expense in connection with the title search and escrow fees and reserved the right to withdraw his papers from the escrow after fifteen days. The unexecuted agreement which we have referred to, provided that McKeon would pay to Bailey "an over riding royalty equal to two and one-sixth per cent of all oil or gas produced therefrom during the full term of said lease, and any renewal or renewals thereof."

Neither appellant nor respondent met during the negotiations which were carried on by Bailey and Helm on one side, and appellant on the other. Respondent and his agents knew that McKeon had placed his instructions and the thousand dollars with the bank, but

appellant was not informed that respondent's papers were deposited with the abstract company. Bailey testified that prior to the papers being deposited in either place, he told McKeon that respondent's papers would be placed with the abstract company. The triplicate agreements between Bullock and wife and McKeon, which we have set forth at length, were taken by Bailey to the Bullocks, who signed the same and returned all copies to him. He then took them to McKeon, who signed the copies and returned them to Bailey, who then deposited two of them with the abstract company.

July 24, 1927, fell on Sunday. About noon on July 25, 1927, appellant called at the bank and asked whether or not the papers connected with the lease had been left with the bank and stated that he desired to look them over. There being nothing at the bank in connection with the transaction other than his letter and one thousand dollars, he asked for and was paid his money, and withdrew from the escrow. On the afternoon of the same day respondent with Bailey and Helm appeared at the bank with all the documents which we have mentioned as left with the abstract company. On the letters to the abstract company they crossed out the words "Kern County Abstract Company" and inserted the words "First National Bank of Bakersfield" in their stead and gave the documents to the cashier of the bank, together with a letter from the abstract company, dated July 15, 1927, addressed to R. B. McKeon, giving the condition of the title of the leased property. The contents of the letter had not been communicated to McKeon. The report showed various incumbrances on the property, among them appearing the following: A reservation to the United States of America, in its patent, of the rights of way for ditches and canals constructed by authority of the United States; right of way two hundred feet wide granted to the Southern California Edison Company across the leased property for its transmission lines; a deed of trust to secure a note for four hundred dollars and also additional loans not to exceed four hundred dollars; a grant of a right of way for road purposes. It was stipulated that the title remained in the same condition up to and including July 25, 1927. Bailey and Helm assigned to respondent all their interest in the claim against appellant before the action was filed.

In this case we have the appellant depositing his money and letter of instructions with the bank thereby constituting it his agent for the purpose of the transaction, while respondent placed his instructions and papers with the title company thereby making it his agent in the matter. *Shreeves v. Pearson*, 194 Cal. 699, 230 P. 448. Appellant contends that since there were separate agents acting for the parties, and the agents were

not brought into communication, there was no contract resulting between the principals. While there might be force in this argument, we do not need to decide it in this case.

[1] Appellant's letter to the bank, accompanied by his deposit of one thousand dollars, was merely an offer to respondent to perform according to the terms he imposed. Where the deposit of an instrument in escrow follows an agreement between the parties it may constitute part of a contract, but where it is not preceded by a contract it is at best a mere offer. *Holland v. McCarthy*, 173 Cal. 597, 160 P. 1069. In this case we have no evidence of any prior agreement of the parties and therefore must look to the documents themselves as prepared by them for their respective actions and intentions in the transaction.

[2] The only consideration which appellant was to receive, under the terms of his offer, was performance by respondent and his assignors, and, until such performance he would receive no consideration for his offer. "The law as applied to the making of contracts permits one making a mere offer to another to withdraw it at any time before it has been accepted by the latter. 'A proposal may be revoked at any time before its acceptance is communicated to the proposer, but not afterwards.' This applies although the offer is continuing in nature and is to remain open for a specified time, unless the promise to hold it open is supported by sufficient consideration." 6 Cal. Jur. p. 51; *Roth v. Moeller*, 185 Cal. 415, 197 P. 62. Therefore, unless respondent had accepted appellant's offer prior to the withdrawal of his money on July 25, 1927, such withdrawal was authorized by law and respondent cannot complain because of it.

[3] The consent to a contract must be mutual (section 1580, Civ. Code). An offer of performance must be absolute and unqualified (section 1494, Civ. Code) and must be communicated to the other party or his agent (section 1488, Civ. Code). An offer of partial performance has no effect and cannot bind the other party unless accepted by him (section 1486, Civ. Code). In this case there was no acceptance of appellant's offer, either partial or complete, ever communicated to him, and none to the bank until after he had withdrawn his deposit and closed his part of the escrow. This act revoked the agency of the bank and it was not authorized thereafter to receive an offer of performance on the part of respondent.

[4-6] In order to make an acceptance of an offer binding, it must conform to the terms of the offer and must not propose new conditions. If it does so, it is not an acceptance, but constitutes a counter offer which in turn must be accepted to become binding on the parties. We find that the attempted offer of

performance by respondent and his assignors differed from the offer of appellant in at least two particulars and attempted to impose added burdens upon him. Respondent and Bailley attempted to place upon appellant one-half of the cost of the guarantee of title and escrow charges of the abstract company, none of which he was to pay according to his offer. Appellant provided in his offer that he was to pay no rental upon the leased property until the year commencing July 8, 1930. Under the terms of the lease an annual installment of rental became due on June 9, 1929, and another on June 9, 1930. If such rentals were not paid a forfeiture of the lease might result. It was incumbent upon respondent and his assignors to make some provision for, or at least an offer to pay the rentals up to July 8, 1930, and not compel appellant to take the risk of either having to pay them himself or suffer a forfeiture of the lease. The terms of an escrow instruction are to be strictly construed, and until the other party has complied with such terms as so construed, he can gain no rights under them. *Dyson v. Bradshaw*, 23 Cal. 528; *Los Angeles High School District v. Quinn*, 195 Cal. 377, 234 P. 313; *McCarthy & Meyer v. Bank of Italy*, 68 Cal. App. 166, 228 P. 724. We believe that the attempted acceptance of appellant's offer by respondent and his assignors was defective in that it did not purport to be an absolute or unconditional acceptance of its terms, and if made before appellant withdrew his offer would not have bound him.

Judgment reversed.

We concur: SLOANE, P. J.; BARNARD, J.

104 Cal. App. 162

HIGGINS v. JULIAN PETROLEUM CORPORATION et al.*
Civ. 235.

District Court of Appeal, Fourth District, California.

Feb. 19, 1930.

Rehearing Denied March 17, 1930. Hearing Denied by Supreme Court April 17, 1930.

Mines and minerals — Bond given prospecting permittee merely calling for derrick was not breached by failure to provide derrick of kind required by principal's contract.

Where bond given by assignee of contract to holder of oil prospecting permit merely required that the principal should on or before a given date "erect a derrick, install a rotary drilling outfit, and commence actual drilling of said well," and where the terms of the bond had been complied with, holder of permit could not recover in suit on the bond, though the contract, referred to in the introductory recitals of the bond, required standard oil well derrick

with a standard or rotary drilling rig, and the derrick furnished was admittedly not a standard derrick.

Appeal from Superior Court, Kern County; Erwin W. Owen, Judge.

Action by Fanny Higgins against the Julian Petroleum Corporation and the Metropolitan Casualty Insurance Company of New York. Judgment for defendants, and plaintiff appeals.

Affirmed.

Siemon & Garber, of Bakersfield, for appellant.

John M. Martin, of Los Angeles, for respondent Metropolitan Casualty Ins. Co. of New York.

Anderson & Anderson and A. G. Ritter, all of Los Angeles, for respondent Julian Petroleum Corporation.

SLOANE, P. J.

The undisputed facts on this appeal show that on and prior to June 15, 1926, the plaintiff, Fanny Higgins, was the holder of a United States prospecting permit for prospecting and drilling for oil and gas on a tract of land in Kern county, Cal. This permit provided that the holder thereof should, within six months of the date thereof, or within the period of specified extensions of time, install and prosecute certain development work, and within two years from date of the permit drill for oil or gas to a depth of not less than two thousand feet, unless valuable deposits of oil or gas should be discovered at a less depth.

On June 15, 1926, the plaintiff entered into a subcontract with one Grant, whereby the latter covenanted and agreed to furnish the necessary machinery, tools, and labor and construct on said land "a standard oil well derrick" and to drill a well to a depth of not less than three thousand feet, unless oil in paying quantities was struck at a less depth, and to begin the actual drilling of said well within 90 days from the above date. In case of failure to accomplish this, he agreed to deposit on said date \$5,000 for an extension of time, the amount to be forfeited in the event actual drilling was not commenced and thereafter prosecuted to the required depth.

Thereafter the said Grant assigned his contract with plaintiff to the Julian Petroleum Corporation, of Los Angeles, which assumed and agreed to perform all the covenants and agreements contained in the contract between Grant and the plaintiff, including the following specific agreement:

"In addition to the requirements herein contained, the party of the second part, (The Julian Corporation) shall have constructed and install a first class rotary drilling outfit, and commence actual drilling of said first

well on or before the First day of Sept., 1926, or in case of their failure so to do as provided by the terms of said contract, they will furnish the bond of \$5,000 therein required on or before the first day of Sept., 1926, which shall entitle the party of the second part to a three months' extension only under the terms of said contract, to-wit, until the 15th day of December, 1926, in which to commence the actual drilling of said well."

The bond in question was thereafter executed by the Julian Company and defendant Metropolitan Casualty Insurance Company of New York, and is in words and figures as follows:

"Know all men by these presents:

"That Julian Petroleum Corporation, a corporation of the State of Delaware having an office in the City of Los Angeles, California, as Principal herein, and Metropolitan Casualty Insurance Co. of New York, a Corporation of the State of New York duly authorized to transact a general surety business in the State of California, as Surety herein, are held and firmly bound unto Fanny Higgins, of Kern County, California, in the full and just sum of Five Thousand Dollars (\$5000.00); for the payment whereof well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally, firmly by these presents.

"The condition of the above obligation is such that:

"Whereas, under date of January 10th, 1921, Secretary of the Interior under and by virtue of Act of Congress approved February 25th, 1920, entitled 'An Act to Promote the Mining of Coal, Phosphate, Oil, Oil Shale, Gas and Sodium, on the Public Domain', granted unto Fanny Higgins of Kern County, California, an unmarried woman, oil and gas prospecting permit Serial #08890 California, through the United States Land Office at Visalia, California, covering the following described lands:

"Northwest $\frac{1}{4}$ of Section 28, Township 27 South, Range 27 East, M. D. M. 160 acres.

"Whereas, under date of April 30th, 1926, the Commissioner of the General Land Office, Washington, D. C., granted an extension of time until May 27th, 1927, for compliance with the requirements of said permit.

"Whereas, by agreement dated June 15th, 1926, said Fanny Higgins covenanted and agreed with J. C. Grant for the drilling of a well for oil upon said land, among other things; all as more fully set out in copy of said agreement hereto attached and made part of this bond.

"Whereas, said agreement provides that if the drilling of said well shall not have been commenced within a period of ninety days (90) from and after June 15th, 1926, then said J. C. Grant shall deposit a bond in the sum of

Five thousand dollars (\$5000.00) in favor of said Fanny Higgins conditioned for the commencement of said well during the four months following the expiration of said nine —(90) day period: whereupon he shall be entitled to such additional time in which to commence said well.

"Whereas, by agreement dated July 1st, 1926, said J. C. Grant sold, assigned, transferred and set over unto Julian Petroleum Corporation all his right, title, and interest in and to said agreement with said Fanny Higgins, subject to certain terms and conditions; all as more fully set out in copy of said agreement hereto attached and made a part of this bond.

"Whereas, one of the provisions of said assignment is to the effect that if Julian Petroleum Corporation shall fail to commence the drilling of a well on said land on or before September 1st, 1926, it shall be entitled to an extension of three months thereafter in which to commence said well, provided it shall on or before September 1st, 1926, file the bond of Five thousand dollars (\$5000.00) required of J. C. Grant under the agreement dated June 15th, 1926, as aforesaid.

"Now therefore, the condition of this bond is that it shall be void and of no effect provided Julian Petroleum Corporation or J. C. Grant or either of them shall, on or before January 15th, 1927, erect a derrick, install a rotary drilling outfit, and commence actual drilling of said well, or shall so cause the commencement of said well: otherwise this bond shall remain in full force and virtue.

"Provided, however, that the Surety hereunder shall be entitled to the benefit of any of the provisions of said permit, extension of permit, agreement or assignment, and may require the performance of any of such provisions by any party to said documents liable to or privileged in the performance thereof, to the same extent as though said Surety were specifically named in said documents and so entitled thereby. Upon written notice by said Surety to said Fanny Higgins of its desire that any of said provisions of any of said documents be exercised or complied with, then as between the Surety herein and said Fanny Higgins such exercise or compliance shall be considered as having been accomplished as of the date of said notice, without further act or notice on the part of said Surety.

"In witness whereof, said Principal and said Surety herein have caused this bond to be executed on their parts respectively, at Los Angeles, California, this 31st day of August, 1926." Upon the alleged failure of the Julian Petroleum Corporation and the Metropolitan Casualty Insurance Company to fulfill the conditions of the bond, this suit was brought by plaintiff, resulting in the judgment for defendants, here appealed from.

The sole question is as to the sufficiency of the evidence to support the finding of the trial court that defendants did not default in performing the conditions of the bond.

The evidence discloses, without conflict, that the defendants, within the time specified, installed on the premises what their witnesses describe and testify to as being, and the trial court finds to be, "a derrick and rotary drilling outfit, and commenced actual drilling of said well, and so caused the commencement of said well."

The contention here is as to whether this compliance with the actual expressed penal clause of the bond fulfilled the obligation of the defendants, or whether, as contended by appellant, defendants were bound to install, as covenanted in the Grant contract, which was accepted and assumed by the Julian Corporation, "a Standard oil well derrick with a standard or rotary drilling rig."

This action is not one to recover damages from the parties to the various drilling contracts, but is an action on the bond to collect the \$5,000 penalty for its breach, as stipulated liquidated damages. No actual damages are alleged or proved. The plaintiff's right of recovery rests upon proof of a breach of the conditions of the bond, and the right to recover the \$5,000 penalty as liquidated damages.

The trial court evidently construed the liability of defendants under the bond as being limited by its express terms, namely the erection and installation of "a derrick and rotary drilling outfit," and the commencement of drilling operations.

It is obvious that a compliance with this condition fulfilled the obligation of the bond, unless, as contended by appellant, there can be read into it an undertaking to carry out the provisions of the Grant and Julian Corporation contracts for installing a "Standard oil derrick" and a different drilling rig than the one actually supplied.

The evidence sufficiently shows that a rotary drilling rig was supplied with sufficient capacity to meet the drilling requirements of the contracts, and with an equipment which some of the witnesses identified as a derrick, though admittedly not a standard derrick.

It will be observed that the bond in question nowhere provides for any particular type of derrick, or for any particular type of rotary drilling rig, and only covenants for the "commencement" of actual drilling operations on or before January 15, 1927. The evidence supports the findings that the express conditions of the bond were complied with. These conditions contain no undertaking to continue the drilling to any specified depth, or to furnish any equipment other than a derrick and rotary drilling outfit sufficient in capacity to sink a well of the size and depth called for by the Grant and Julian Corporation contracts.

Appellants' case rests on the contention that the obligations of these contracts are incorporated in the bond by reference to such contracts as being attached to "and made part of this bond." This reference is made in the following introductory recitals of the bond: "Whereas by agreement dated June 15th, 1926, Fanny Higgins covenanted and agreed with J. C. Grant for the drilling of a well for oil upon said land, among other things; all as more fully set out in a copy of said agreement hereto attached and made a part of this bond." And: "Whereas by agreement dated July 1st, 1926, said J. C. Grant sold, assigned, transferred and set over unto Julian Petroleum Corporation, all his right, title and interest in and to said agreement with said Fanny Higgins, subject to certain terms and conditions; all as more fully set out in a copy of said agreement, hereto attached and made a part of this bond." There is also a preliminary recital that: "Whereas one of the provisions of said assignment is to the effect that if the Julian Petroleum Corporation shall fail to commence the drilling of a well on said land on or before Sept. 1st, 1926 * * * it shall file a bond of Five Thousand Dollars required of J. C. Grant under the agreement of date June 15, 1926, as aforesaid."

Of course, if the conditions for the operation of the penal obligation of the bond had been made to expressly guarantee the carrying out of the terms of these contracts, or if there had been a failure to expressly state the conditions under which the penalty of the bond would accrue, there would be some force to appellant's interpretation of the instrument.

But we think it is clear, in view of the explicit statement of the conditions under which the penalty of the undertaking was to become payable that the recitals in question, and the incorporation of the contracts in the bond were only intended, as respondent suggests, as an explanation of the circumstances under which a bond was contracted for. It may also be noted that in neither of the contracts referred to, providing for the furnishing of this bond, was it indicated what the terms should be, other than that it was to be a bond for \$5,000, and was to entitle the parties to an extension "until the 15th day of December, 1926, in which to commence the actual drilling of said first well."

It is very apparent that the provisions of this bond were very inadequate to secure to the plaintiff the performance of the covenants of the Grant and Julian Petroleum contracts. The instrument as executed, was, however, accepted by plaintiff as a compliance with the agreement to furnish a bond, and the courts cannot extend its liability beyond the reasonable interpretation of its terms.

Respondent also disputes that this is a case for the application of the exceptional rules under which, in case of recovery, liqui-

dated damages could be recovered. In view of our conclusions that no breach of the conditions of the bond has been shown, it is unnecessary to pass upon that point.

The judgment is affirmed.

We concur: BARNARD, J.; MARKS, J.

104 Cal. App. 186

KELLER v. CUSHMAN.

Civ. 3943.

District Court of Appeal, Third District,
California.

Feb. 20, 1930.

1. Automobiles ☞245(24)—Evidence, in action for death of guest resulting from automobile collision, held insufficient to present question for jury on defendant's negligence.

In action for damages for death of guest resulting from automobile collision, evidence merely showing fact of collision, without disclosing where collision occurred at intersection nor which automobile entered intersection first or had right of way, nor showing that driver of either automobile was exceeding speed limit prescribed by California Vehicle Act (St. 1923, p. 517, as amended), *held* insufficient to present question for jury on defendant's negligence.

2. Automobiles ☞242(2)—Fact that testimony left cause of automobile collision uncertain held not to render applicable doctrine of *res ipsa loquitur* in favor of guest.

Fact that testimony, in action for damages for death of guest in defendant's automobile, left it uncertain as to which driver was responsible for collision and merely showed happening of collision, *held* not to render applicable doctrine of *res ipsa loquitur* in favor of guest, since one of automobiles was under control and management of third person, making it just as reasonable to infer that third person was wholly responsible for collision as to infer that defendant was responsible for injuries resulting in death of plaintiff's intestate.

Appeal from Superior Court, Sutter County; K. S. Mahon, Judge.

Action by Lillie M. Keller, administratrix of the estate of William E. Keller, deceased, against Frank Cushman. From a judgment of nonsuit, plaintiff appeals.

Affirmed.

Rich & Weis and Arthur M. Bundy, all of Marysville, for appellant.

Steel & Lingenfelter, of Marysville, for respondent.

PLUMMER, J.

The deceased, William E. Keller, met his death while riding as a guest in an automo-

bile operated by the defendant Frank Cushman, in a collision which occurred between the automobile driven by the defendant and an automobile driven by one Bangs, and this action was prosecuted by the administratrix of the estate of the deceased to recover damages therefor. At the conclusion of the plaintiff's case the court granted the defendant's motion for nonsuit, and it is from the judgment entered thereon in favor of the defendant that the plaintiff appeals.

The record shows that the deceased and the defendant had been acquainted for a short time and were in the county of Sutter looking for work; that on the day of the automobile collision referred to herein, they had been out looking for employment, had secured the same, and were returning to their respective places of residence, traveling eastward on one of the highways of said county; that while so driving eastward, an automobile driven by one Bangs, being propelled in a northerly direction, collided with the automobile driven by the defendant, at an intersection of two highways in said county. The record shows that the automobile driven by Bangs collided with the automobile driven by the defendant Cushman by striking the latter automobile about the center of the right-hand side, on which side the deceased Keller was then sitting. The force of the collision was such that the Cushman automobile was overturned. The injuries received by William E. Keller in the collision, subsequently resulted in his death.

[1] There is no testimony in the record disclosing just where the collision occurred upon the intersection of the two highways, nor is there any testimony in the record indicating which automobile entered the intersection first, or which one had the right of way. Nor is there any testimony in the record indicating that the driver of either automobile was exceeding the speed limit of the California Vehicle Act (St. 1923, p. 517, as amended).

In addition to what we have just stated, the following testimony appears in the transcript, as given by the witness Pepmiller:

"Q. Did you have any talk with Mr. Cushman as to how the accident occurred? A. Yes. I asked him how it happened and he said he didn't know.

"Q. Did you have any talk with Mr. Bangs? A. I did.

"Q. In Mr. Cushman's presence and hearing? A. Mr. Cushman was still in his machine when I walked over to where Mr. Bangs was. Mr. Cushman was kind of knocked out; he was walking around in a circle when I got there, and I went over and asked Cushman how it happened, and he said, 'partner, don't ask me; I don't know.'

"Q. Did they say anything to either of them about it being an unavoidable accident, or anything of that kind? A. I asked Mr. Bangs how it happened; I asked him who was in the fault, and he said, "I don't blame the other man at all.' Mr. Cushman told me he didn't blame the other man, either.

"Q. Did he say anything about what they were doing? A. He said they were coming out of that road from the west, they were looking over toward that service station there, thinking it would be a good place to rent while they were working for Mr. Plummer."

No other testimony was introduced as to the circumstances attending the collision. Mr. Bangs, the driver of one of the automobiles, was not placed upon the witness stand. All that is shown is the fact of a collision in which a car driven by a person other than the defendant, collided with the car driven by the defendant. Whether the car driven by the defendant was where it had a legal right to be at the time of the collision, or was where it had no legal right to be, is a pure question of surmise or guess.

[2] Upon this appeal the plaintiff relies upon the doctrine of *res ipsa loquitur*, and contends that the mere fact of showing a collision and the injury of the deceased places upon the defendant Cushman the necessity of explaining the occurrence. It is likewise argued that the testimony of Cushman that they had been looking toward a service station charges him with negligence. This testimony, however, is so indefinite and uncertain that it cannot be said at what period of time the defendant and the deceased were looking toward the service station.

While a number of cases have been referred to by the respective counsel, illustrating the doctrine of *res ipsa loquitur*, we do not deem it necessary to go into an extensive analysis of the different cases having to do with that doctrine. In the case of *Scellars v. Universal Service*, 68 Cal. App. 252, 228 P. 879, 880, the general doctrine relative to the application of the rule being discussed, is thus stated: "In order that the maxim, '*res ipsa loquitur*,' may apply, it must first be shown that the person held liable had control and management of the thing in question." And further: "Where it is a matter of surmise only that the damage was due to a cause for which the defendant is liable, the doctrine is inapplicable." A number of authorities illustrating the rule, are set forth in that case.

In the case of *Riggsby v. Tritton*, 143 Va. 903, 129 S. E. 493, 495, 45 A. L. R. 280, we find the following: "There must be reasonable evidence of negligence, but where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of

things does not happen, if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care."

In 45 C. J. 1212, § 780, the text, supported by an abundance of authorities, reads: "The doctrine of *res ipsa loquitur* does not dispense with the general rule requiring plaintiff to prove that defendant's negligence was the proximate cause of the injury complained of, but in order to render the doctrine applicable and a presumption of negligence to attach to defendant, the nature and circumstances of the accident must be of such a character that there could be no reasonable inference but that the injury complained of was due to the negligence of the defendant or of others for whose acts he is legally responsible. Accordingly, where there are two or more persons or causes which might have produced the injury, some, but not all of which were under the control of the defendant, or for which he was legally responsible, plaintiff, in order to invoke the doctrine, must exclude the portion of those causes for which the defendant is under no legal obligation. * * * Where either one of two defendants, wholly independent of each other, may be responsible for the injury complained of, the rule of *res ipsa loquitur*, in accordance with the preceding principles, cannot be applied."

In the case at bar one of the automobiles was under the control and management of a man by the name of Bangs, and by reason of the fact that the car driven by Bangs collided with the side of the car driven by the defendant, it is just as reasonable to infer that Bangs was wholly responsible for the collision as to infer that the defendant was responsible for the injuries resulting in the death of Keller.

In the case of *Diamond v. Charles A. Weyerhaeuser*, 178 Cal. 540, 174 P. 38, the court had to do with an instance where an automobile and a wagon had come into collision. It was there held that the doctrine of *res ipsa loquitur* did not apply.

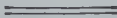
The appellant further relies upon the case of *Brown v. Davis*, 84 Cal. App. 180, 257 P. 877, Id., 92 Cal. App. 20, 267 P. 754, where it was held by this court that the doctrine of *res ipsa loquitur* applied where the deceased was riding as the guest of an automobile driver. However, in that case only the act of one person was involved, the testimony showing that the deceased was injured by the overturning of an automobile driven by the defendant. There is nothing in the case of *Brown v. Davis* supporting the contention that when an automobile collision is shown, and the testimony leaves it uncertain as to which automobile driver was at fault, that the doctrine of *res ipsa loquitur* applies in favor of a guest riding in one of

the automobiles in the collision. Although the case of *Brown v. Davis*, supra, was cited to this effect in the case of *Wilbur v. Home Lumber & Coal Co.*, 282 P. 236, by the Supreme Court of Oregon, and a like construction insisted upon by the appellant in the instant case, we find nothing in the opinion which justifies the conclusion of any such holding by this court, and hence the citation as an authority for such holding must have been through misapprehension.

In the case of *Wilbur v. Home Lumber & Coal Co.*, supra, it was held that where a collision of an automobile and a truck, through skidding on ice pavement, might have arisen from one or more causes, the doctrine of *res ipsa loquitur* could not apply. In the case of *Brown v. Davis*, supra, only the automobile driven by the defendant was involved. In the instant case, just as in the case of *Wilbur v. Home Lumber & Coal Co.*, more than one machine was involved, and therefore the general rule which we have heretofore cited from *Corpus Juris* necessarily applies.

The order of the trial court granting defendant's motion for a nonsuit was and is correct, and the judgment entered thereon must be and the same is hereby affirmed.

We concur: FINCH, P. J.; THOMPSON, J.



104 Cal. App. 107

PEOPLE v. ELLIOTT et al.
Cr. 16.

District Court of Appeal, Fourth District,
California.

Feb. 17, 1930.

1. Criminal law §693—Admitting confession held not error, where no objection was then made, and question of volition arose after people rested.

In prosecution for robbery, admission of confession held not error, where no objection was made at time, and question of confession, being given under promise of immunity or reward, did not appear in case until people had rested and defendants were testifying in their own behalf.

2. Criminal law §1169(10)—Admitting typewritten copy of questions and answers admitting guilt, if error, held harmless; officer testifying concerning such questions without objection.

In prosecution for robbery, admission of typewritten copy of questions asked defendant and answers thereto, in which he admitted guilt, but which he refused to sign, if error, was not prejudicial, where officer had previously detailed questions and answers to jury from mem-

ory without objection, so that admission of paper was merely repetition of competent testimony already before jury.

3. Witnesses §350—In prosecution for robbery, cross-examination respecting prior convictions of felonies held improper, where questions implied other convictions not shown by proof.

In prosecution for robbery, cross-examination of defendant concerning prior convictions of felonies held improper, where district attorney inquired as to other felonies and confinement in United States Penitentiary at Leavenworth, which defendant denied, and questions were not followed up by proof of convictions implied in questions.

4. Criminal law §404(3)—Admitting pistol and revolver alleged to have been used by defendants during robbery held not error.

In prosecution for robbery, admission of pistol and revolver alleged to have been used by defendants during robbery held not error, in view of testimony identifying guns.

5. Robbery §23(1)—In prosecution for robbery committed about 9:30 o'clock, testimony that witness saw men on highway at 11 o'clock, though remote, held admissible.

In prosecution for robbery, which was committed at about 9:30 o'clock at night, admission of testimony to show that witness saw four men together at 11 o'clock on that night at certain place on highway, though remote, was admissible.

6. Criminal law §781(6)—Instruction that incriminatory statements, if made by defendants, may be considered as true, held erroneous.

In prosecution for robbery, instruction that incriminatory statements relative to offense, if made by defendants, could be considered as true, and that law presumes person charged with crime is not liable to make incriminatory statement, unless it is true, held erroneous.

7. Robbery §24(1)—Evidence held to support conviction of robbery.

In prosecution for robbery, evidence held sufficient to support conviction of four defendants, where waitress and cashier of café which was robbed identified defendants as those who committed crime.

8. Criminal law §1186(4)—Error in permitting improper cross-examination and in giving erroneous instructions held harmless, where evidence of guilt was conclusive (Const. art. 6, § 4½).

In prosecution for robbery, error in allowing improper cross-examination of defendants as to prior conviction, and in giving instruction that any incriminatory statements of defendants could be taken as true, held not prejudicial under Const. art. 6, § 4½, where evidence of guilt was conclusive, and left no doubt of correctness of verdict.

Appeal from Superior Court, San Bernardino County; Benjamin F. Warmer, Judge.

Dale Elliott and others were convicted of robbery, and they appeal.

Affirmed.

Trujillo & Eriksson, of San Bernardino, for appellants.

U. S. Webb, Atty. Gen., and James S. Howe, Deputy Atty. Gen., for the People.

MARKS, J.

Defendants were convicted of robbing the Broiler Café in the city of San Bernardino on the night of July 26, 1929, and were sentenced to serve terms in penal institutions. From these judgments the defendants have appealed.

Appellants rely upon six alleged errors for a reversal of the judgments. We will consider them separately as presented.

[1] Appellants complain of the introductions of their confessions because they maintain that they were given under promise of immunity or reward. Each defendant was very willing to admit his participation in the crime at about the time of, and immediately after, his arrest. The confessions were made separately and to a large number of witnesses, both officers of the law and others. In each case the witness laid a proper foundation for the introduction of the confession by testifying to facts showing that it was freely and voluntarily made. No objection was made to the introduction of the evidence of the confession, and the question of its being given under promise of immunity or reward did not appear in the case until the people had rested and the defendants were testifying in their own behalf. The evidence went before the jury without objection, and was properly admitted.

[2] The defendant Jack Elliott maintains that the court erred in admitting a typewritten copy of questions asked him and his answers thereto in which he admitted his guilt. According to the evidence for the people, the paper was prepared in the following manner: Jack Elliott, when under arrest in the city jail in Los Angeles, said he desired to make a statement regarding the crime, and was taken into a room with M. D. Kimberly, a lieutenant of police, and Jacob Schultess, a stenographer. Kimberly asked Elliott questions, which he answered. The questions and answers were taken down on a typewriter by Schultess, and later Elliott refused to sign the paper, which was admitted in evidence as a people's exhibit during the trial, over the objection of the defendant. We can assume that this ruling of the court was error (*People v. Luis*, 158 Cal. 185, 110 P. 580), but still must hold that it was not sufficiently prejudicial to cause a reversal of the judgment. Prior to the admission of the paper, and its being read to the jury, Officer Kimberly had, from memory and without objection, detailed the

questions and answers to the jury. The admission of the paper itself was merely a repetition of competent testimony already before the jury, and appellant Jack Elliott was not sufficiently prejudiced thereby to cause a reversal of the judgment against him.

[3] Jack Elliott further complains of rulings of the trial court in permitting the district attorney to cross-examine him at length concerning prior convictions of felonies. He was asked if he had been convicted of a felony, which question he answered in the affirmative. The district attorney was then permitted, over the objection of the defendant, to ask him if he had not been convicted of other felonies and confined in the United States Penitentiary at Leavenworth, all of which he denied. These questions were not followed up by any offer of proof of convictions for the crimes, the commission of which was implied in the questions. The district attorney was also permitted to ask the defendant if he had not gone under an assumed name. The cross-examination went entirely too far, and court should not have permitted it. *People v. Chin Hane*, 108 Cal. 597, 41 P. 697; *People v. Eldridge*, 147 Cal. 782, 82 P. 442; *People v. Adams*, 76 Cal. App. 178, 244 P. 106.

[4] The defendants complain of a ruling of the trial court admitting in evidence a pistol and a revolver alleged to have been used by them during the robbery. Two witnesses testified that Jack Elliott and William Morgan were armed during the robbery, with guns similar to those introduced in evidence, and other witnesses testified that each of these defendants admitted ownership of one of the weapons and its use during the robbery. They were properly admitted in evidence and placed before the jury.

[5] Appellants complain that the court committed error in permitting the people to prove by a witness, Wesley Flickinger, that he saw the four men together at about 11 o'clock p. m. on the night of July 26, 1929, on the main highway about one mile west of Riverside, and brought them into that city. The robbery was committed at about half past 9 o'clock on the same night. The evidence, while remote, was admissible. The weight to be given it was to be determined by the jury.

[6] Appellants further contend that the trial court erred in giving people's instructions Nos. 3 and 4, and quote the most objectionable portion as follows: "And, in this connection, you are further instructed that if the jury believe that the defendants, or any of them made any statement or statements relative to the alleged offense which were of an incriminatory nature, then the jury may consider any such statement or statements, if any, made by the defendants or any of them which were of an incriminatory nature, as true as the law presumes that a person

charged with a crime or knowing that they are about to be charged with the commission of a crime is not liable to make an incriminatory statement relative to such crime unless such statement be true." This instruction has been expressly criticized in the case of *People v. Piner*, 11 Cal. App. 542, 105 P. 780. Part of instruction 3 is also open to criticism.

[7, 8] It is admitted by the Attorney General, and we agree with him, that two errors, one in cross-examination of Jack Elliott, and the other in the two instructions noted, were committed during the trial, and it remains to be determined whether or not these errors resulted in a miscarriage of justice requiring a reversal under the provisions of article 6, § 4½, of the Constitution.

The transcript of the evidence in this case is long, and it would serve no good purpose to review in detail the testimony of the twenty-one witnesses who appeared before the jury. Suffice it to say that the evidence of the guilt of all the defendants is overwhelming. Pansy Thomas, a waitress in the Broiler Café, served the four defendants immediately before the robbery, and saw three of them actually engaged in the crime. The fourth had gone to the street in front of the café and started the automobile in which they made their escape. Mary Peck, the cashier in the café, positively identified all of the defendants as the ones committing the crime. The evidence of these witnesses alone was sufficient to support a conviction. Further, the defendants confessed to a number of people, both in Riverside and Los Angeles, and then in San Bernardino. The evidence of guilt was conclusive, and leaves no doubt of the correctness of the verdict of the jury. This is a proper case in which to invoke the provisions of the Constitution above referred to. *People v. Burns*, 27 Cal. App. 227, 149 P. 605; *People v. Black*, 73 Cal. App. 13, 238 P. 374.

Judgment affirmed.

We concur: SLOANE, P. J.; BARNARD, J.

104 Cal. App. 212

POUNDSTONE et al. v. GOFOOR.

Civ. 4011.

District Court of Appeal, Third District,
California.

Feb. 21, 1930.

1. Landlord and tenant ⇨291(13)—Evidence sustained findings that lessee breached lease by failing to commence cultivation of land within time required.

Evidence in action by lessor for unlawful detainer of land by lessee held sufficient to sup-

port findings that lessee failed or neglected to move on land and commence operations of plowing land for growing of rice crop within time required by terms of lease, and refused or neglected to prepare land for rice culture in due or proper season.

2. Landlord and tenant ⇨103(1)—Demand for performance by lessor terminating lease was unnecessary, where time for lessee's performance of broken covenants had passed.

Where time had passed at which broken covenants of lease of land to commence preparation of soil for growing of rice crop during season could be performed, therefore demand for performance thereof was not required by lessor electing to terminate lease for lessee's failure to perform covenants.

3. Landlord and tenant ⇨103(1)—Lessor's right to terminate lease depended upon whether lessee's failure to perform was breach for which damages would inadequately compensate, and not upon time being of essence.

Lessor's right to terminate lease of land for growing of rice crop was not dependent on whether time was of the essence thereof, but whether lessee's failure to perform covenant to commence preparation of land for crop to permit harvesting of crop during season was substantial breach for which damages would be inadequate compensation.

4. Landlord and tenant ⇨103(1)—Lessee's use of inadequate equipment to prepare land for rice crop to be harvested during season justified lessor's termination of lease conditioned thereon.

Failure of lessee to perform covenants of lease requiring commencement of preparation of land for growing of rice crop to be harvested during season not only constituted substantial breach of terms, but warranted belief that lessee could not or would not in good faith discharge obligations thereunder, justifying termination thereof by lessor because inadequacy of equipment employed by lessee effected breach of covenants of lease by preventing timely preparation of land.

5. Landlord and tenant ⇨291(12)—Evidence concerning negotiations leading to lease held admissible to show meaning of lessee's agreement to commence operations for cultivation of land at specified time.

Evidence relating to negotiations between parties leading up to execution of lease and conversations between them as to importance of early preparation of land for seeding of rice crop held admissible in action by lessor for unlawful detainer by lessee, for purpose of showing situation and condition of subject-matter of agreement and understanding of parties as to meaning of lessee's agreement to commence operations of preparing land for crop at time specified in lease.

Appeal from Superior Court, Colusa County; Ernest Weyand, Judge.

Action by Jesse Poundstone and another against Abdul Gofoor. Judgment for plaintiffs, and defendant appeals.

Affirmed.

Howe, Hibitt & Johnston and O. F. Meldon, all of Sacramento, for appellant.

Rutledge & Rutledge, of Colusa, for respondents.

FINCH, P. J.

This is an action of unlawful detainer. Judgment was entered in favor of the plaintiffs, and the defendant has appealed.

The defendant went into possession of 700 acres of land belonging to the plaintiffs under a lease dated March 1, 1927, but not signed by the defendant until March 21, 1927. It appears that the plaintiffs had orally agreed to lease the land to the defendant about the 1st of March, but that, by reason of the defendant's objections to some of the details of the lease, he did not sign it until the time mentioned. The plaintiffs signed the lease several days prior to March 21st, and left it with their attorney, at whose office it was understood the defendant was to sign it. When the defendant finally expressed his willingness to sign the lease, the plaintiffs, on account of the lateness of the season for preparing so large an acreage for rice, required the defendant to sign an indorsement on the lease reading as follows: "As a further consideration of the above lease said second party agrees that he will move upon said land and commence operations under said lease on or before the 24th day of March, 1927." Among the terms of the lease were the following:

"Said lessee agrees that he will plant said lands to rice. * * * The said lessee shall prepare said lands, check the same, and plant the seed and do all the irrigating and harvesting of the said rice in accordance with the best methods of husbandry practiced in the vicinity, and it is expressly understood and agreed that said lessee will properly and efficiently prepare said lands and seed the same and irrigate and harvest and thresh said rice crops and do all things necessary or proper in the business of farming said lands for rice. The intent of this paragraph is to secure the best possible rice crop from said premises during the term of this lease, both in quantity and quality. * * *

"It is agreed that in case of default in the performance of any of the acts herein agreed to be performed by lessee, lessors may at their option, terminate this lease."

The court found:

"That said defendant failed and neglected to move onto said land and commence operations of plowing said land and preparing the same for rice culture, under said lease, on or before the 24th day of March, 1927, * * * and did not commence the operations referred to in said lease prior to the 5th day of April, 1927, the date of the service upon him of the notice hereinafter mentioned except that said defendant did, between the

25th day of March and the 5th day of April, 1927, prosecute certain work of disking a portion of said land; that defendant failed and refused to prepare said land for rice culture or to plow, or check the same for irrigation, or to commence the work of plowing or preparing or check the same for rice culture, in due or proper season or at all, but refused and neglected so to do. * * *

"That in order to successfully grow and raise a crop on said land in said season it was necessary that all of said work in the preparation of said land, especially the work of plowing, checking and preparing the same for irrigation, be done in due and proper season, and that all of said work be commenced not later than said 24th day of March, 1927, in order that the same be properly completed in time to be planted and irrigated thereafter in time to successfully raise a crop of rice thereon in said season, and the agreement on the part of said defendant as to the time for the commencement of it, and doing said work, plowing and preparing said land was an essential term of said contract, and the inducement on the part of the plaintiffs for the execution of the same on their part."

[1] There is sufficient evidence to support the foregoing findings, and, since such findings warrant the judgment in favor of the plaintiffs, it is unnecessary to consider other findings or the evidence in support thereof. Marion Poundstone, who was in charge of the plaintiffs' lands, testified that prior to March 25 the defendant "brought a set of disks. On the 25th of March, why he brought an engine. * * * The evening of the 25th he tried to work but he didn't * * * actually do any work until the 26th. * * * The morning of the 26th I went down in the field and his engine was stopped. * * * His engineer * * * made the remark, 'The old heap won't pull the disks.' * * * We had this piece of land in field No. 1 that was not included in the lease; * * * it was looser, and they thought by going over there they might be able to do something with it, so I allowed them to go into field No. 1. * * * They disked the best they could; the work was very poor. * * * (He) never had any plows of his own; borrowed a set from Mr. Barnett about the 10th of April. * * * His engine was a 75 Best, but practically everything on it was worn out and it had no power. * * * I think on the 6th (of April) they * * * finished that field No. 1 and then pulled over to No. 2." The defendant testified that he had another 75 Best tractor and 44 head of live stock which he could have used in doing the work, but he did not take either the second tractor or the live stock to the Poundstone ranch. He testified that he did not take any plows to the ranch until April 10. The evidence shows that it is necessary to plant rice early in the

spring in order to mature and harvest it before the beginning of the rainy season in the fall or winter months. Henry R. Vail, who raised rice during 1927 on a part of the same land which was covered by the defendant's lease, testified that, "if the work was started by the first of March, I would think two engines of 60 type in good condition could take care of all the work" on the 700 acres of land; that, if the work was commenced about the 1st of April, "I think I had about as few rigs in there as possible to get it through in time to make a crop"; and that he used in the preparation and planting of the land "a 75 Holt, 60 Best, 30 Best, and 75 Best, with one Fordson or possibly two Fordsons." Plaintiff Poundstone testified that on March 13 there was a rainfall of .40 and thereafter .10 March 31, .76 April 1, and .66 April 2.

From the foregoing evidence it may be inferred that, during a week of favorable weather after the time at which the defendant had agreed to "commence operations," he neither had an adequate equipment on the land nor made any reasonable effort to "properly and efficiently prepare said lands and seed the same," as required by the terms of the lease. In the language of counsel for respondent: "Other people were working with a full force during those days. They were vital days for the successful operation of rice growing. Mr. Poundstone had a right to believe if Mr. Gofoor was acting in good faith that he would have been on the ground with adequate equipment and that he would have been able to practically complete the plowing before the rain. * * * In considering whether or not there had been a substantial compliance with this lease, the circumstances surrounding the parties, the season of the year, the character of crop that was to be grown, the things that it was shown were required to (be done) * * * in order to successfully raise such a crop, all must be considered." Through the defendant's continuing neglect to discharge in any substantial manner his obligations under the lease, the plaintiffs were faced with the necessity of either terminating the lease or running the risk of an entire crop failure on their land; the agreed rental being a share of the crop.

[2-4] On April 2, 1927, the plaintiffs served a notice on the defendant to the effect that they had elected to terminate the lease by reason of his failure to perform the covenants thereof, specifying the particulars in which the defendant had failed. A part of the land was then leased by the plaintiffs to Vail, who commenced operations thereon about April 4. On April 5 the plaintiffs served upon the defendant their demand that he "vacate and surrender the possession of said premises." The appellant contends that this notice was insufficient because it did not give him the alternative right either to perform the covenants of the lease or surrender the possession

of the premises. The time had passed at which the broken covenants could be performed, and therefore demand for the performance thereof was not required. *Pfitzer v. Candeias*, 53 Cal. App. 737, 740, 200 P. 839. In this connection the appellant further contends that time was not of the essence of the contract. The plaintiffs' right to terminate the lease was not dependent upon whether time was of the essence thereof, but whether the defendant's failure to perform was a substantial breach for which damages would be an inadequate compensation. *Mettler v. Vance*, 30 Cal. App. 499, 500, 158 P. 1044. The defendant's failure to perform the covenants of the lease not only constituted a substantial breach of the terms thereof, but warranted the belief that he either could not or would not in good faith discharge his obligations thereunder.

[5] The court admitted evidence relating to negotiations between the parties leading up to the execution of the lease and conversations between them as to the importance of the early preparation of the land for seeding. Appellant contends that this was error. This evidence was properly admitted for the purpose of showing the situation and condition of the subject-matter of the agreement and the understanding of the parties as to the meaning of the defendant's agreement to "commence operations" at the time specified. To "commence operations" might mean different things under differing circumstances. Appellant contends "that operations were commenced by the defendant on March 21, 1927, when he procured a disking machine and moved it to the camping grounds provided by the plaintiffs, and moved to and took possession of the camping ground near the rice fields." This construction of the covenant in question might be permissible under other circumstances, but it is perfectly clear from the circumstances proved in this case and the conversations between the parties prior to the execution of the lease that they understood the language used to mean that the defendant was to commence, with adequate equipment, the actual preparation of the land for seeding at a time not later than that stated. To have commenced operations, even at the time stipulated, with the wholly inadequate equipment used by the defendant, would not have been a compliance with the terms of the lease. It was such inadequacy of equipment rather than the mere delay in the commencement of the work which constituted defendant's breach of the contract of lease and justified the plaintiffs' termination thereof.

Other points made by the appellant are not deemed of sufficient merit or importance to warrant the discussion thereof.

The judgment is affirmed.

We concur: R. L. THOMPSON, J.; PLUMMER, J.

104 Cal. App. 203

PEOPLE v. ODENWALD et al. ★
Crim. 1914.

District Court of Appeal, Second District, Division 2, California.
Feb. 21, 1930.

Rehearing Denied March 7, 1930. Hearing Denied by Supreme Court March 20, 1930.

1. Burglary $\Rightarrow$ 3—Conviction for burglary was sustained, notwithstanding intent was to steal liquor possessed contrary to law (National Prohibition Act, tit. 2, § 25 [27 USCA § 39]; Wright Act).

Conviction for burglary was sustained over defendants' contention that property intended to be taken was not subject to larceny, as it was alcoholic liquor possessed contrary to National Prohibition Act, tit. 2, § 25 (27 USCA § 39), which expressly provides no property right shall exist in such liquor, and to Wright Act (St. 1921, p. 79).

2. Burglary $\Rightarrow$ 28(7)—Proof defendants took property from garage, when information for burglary alleged its ownership in garage's owner, held no variance; allegation not being essential.

That information for burglary alleged ownership of property by a certain person, and proof was that defendants took property from a garage owned by this person, held no variance; allegation as to ownership not being essential.

3. Burglary $\Rightarrow$ 41(1)—Proof alleged owner had possession and control of property taken by burglar held to be sufficient.

Where information for burglary alleged property taken was owned by a certain person, proof which failed to show such ownership, but showed possession and control by that person, was sufficient.

Appeal from Superior Court, Los Angeles County; Carlos S. Hardy, Judge.

Ralph Odenwald and others were convicted of burglary, and they appeal.

Affirmed.

John A. Deweese and Josiah Coombs, both of Los Angeles, for appellants.

U. S. Webb, Atty. Gen., John W. Maltman, Deputy Atty. Gen., and Warner I. Praul, of Los Angeles, for the People.

IRA F. THOMPSON, J.

The appellants were convicted of the offense of burglary. They prosecute this appeal from the judgment. But two reasons are assigned for a reversal, and they are: (1) That the proof shows that the property which the appellants intended to steal consisted of intoxicating liquors possessed contrary to the National Prohibition Act (27 USCA) and Wright Act (St. 1921, p. 79) of this state, and therefore not the subject of larceny; and (2) that there is a fatal variance between the allegations of the information and the proof in this, that the information charged the appellants

with entering the garage of one Jeanette Chafffen "with the intent then and there and therein to feloniously and unlawfully steal, take and carry away the goods and personal property of the said Jeanette Chafffen," whereas the proof failed to show that Jeanette Chafffen was the owner of the property intended to be appropriated.

[1] To sustain their first contention, counsel for appellants rely upon the authority of *People v. Spencer*, 54 Cal. App. 54, 201 P. 130. The testimony establishes that the liquor was unlawfully possessed, and therefore the instant cause is brought squarely within the doctrine of the *Spencer* Case and the authorities there cited. The question to be determined by us is: Shall we adhere to the rule there laid down? It cannot be denied that there is a sharp conflict in the decisions from other jurisdictions. The National Prohibition Act (Barnes' Fed. Code, 1921, Supp.) provides by section 8352 (27 USCA § 39) as follows: "It shall be unlawful to have or possess any liquor or property designed for the manufacture of liquor intended for use in violating this chapter or which has been so used, and no property rights shall exist in any such liquor or property." (Italics ours.) The authorities which hold that liquor so possessed cannot be the subject of burglary, including the *Spencer* Case, proceed upon the theory that, since one may not have a property right therein, the property itself cannot be stolen; that, inasmuch as it can have no legitimate or lawful value to its owner, it is *without inherent value*. We are not ready to accede to this reasoning. Regardless of its lawful or legitimate value, the appellants considered it of sufficient inherent value to make it the subject of larceny. Reasoning which accords with our own is found in *State v. Schoonover*, 122 Wash. 562, 211 P. 756, 758, as follows:

"The first contention on the appeal is that the court erred in submitting to the jury the question of the larceny of the intoxicating liquors; the argument being that intoxicating liquors, since they are contraband under both the state law and the National Prohibition Act, have no value, and are not, therefore, a subject of larceny. In so far as the question is affected, by our state laws, we have decided contrary to the contention in *State v. Donovan*, 108 Wash. 276, 183 P. 127. There the precise question was presented, and, after citing and reviewing the sustaining authority, we held that its outlawed and contraband nature did not prevent it from being the subject of larceny. But, subsequent to the decision of the cited case, the National Prohibition Act was enacted, the twenty-fifth section of title 2 of which provides that it shall be unlawful to have or possess any liquor, or property designed for the manufacture of liquor, in violation of the act, and that 'no property rights shall exist in any such liquor or property.' 41 U. S. Stat. at Large, 315 [27

USCA § 39]. It is argued that this provision of the federal act necessitates a conclusion different from that adopted by us, as our statute does not contain the quoted words. We cannot think, however, that this difference in the wording of the statutes in any way affects the principle upon which the rule is rested. The state punishes the wrongful taking of personal property belonging to or in the possession of another because of the offense against the majesty of its laws, and because of the inherent wickedness and criminality of the act, as well as because of the wrong done to the individual whose property is taken. Stated in another way, the state punishes larceny because it is larceny, and, that the guilty may not escape, it will treat any form of personal property having actual value as having value for the purposes of larceny, notwithstanding it may be unlawful for the possessor to have it in possession. Furthermore, the declaration of outlawry against intoxicating liquors and the declaration that there are no property rights therein is for the purpose of discouraging its possession, not for the purpose of encouraging larceny, and it is not the policy of the law, nor conducive to good morals or good government, to allow the laws directed against one offense to become a shield against the punishment of another.

"The case of *People v. Spencer* [54 Cal. App. 54], 201 P. 130, is cited to us as a case decided since the enactment of the National Prohibition Act, holding that there cannot be larceny in the wrongful taking of intoxicating liquors since the passage of that act. But an examination of the case will show that the court pursued the line of reasoning adopted in the cases opposed to our own case of *State v. Donovan*, supra, and that its reasoning, if followed, would have required a contrary conclusion in that case. It was not rested solely on the declaration in the federal act to the effect that no property rights exist in intoxicating liquors held for unlawful purposes. A case decided since the passage of the act, and sustaining our view, is *People v. Wilson*, 298 Ill. 257, 131 N. E. 609."

In the case of *People v. Wilson*, cited in the quotation, we read: "Samuel Fox testified that the burglary was committed and several cases of whisky stolen which were of the value of \$26.50 per case, and the first proposition of counsel in support of the errors assigned is that the evidence failed to support the charge of burglary, because whisky, being contraband under the National Prohibition Act (41 Stat. 305 [27 USCA]), has no value except where it is purchased and kept under a government permit, and is therefore not the subject of larceny unless the indictment charges and the proof shows that a permit has been obtained by the person in whose possession the whisky is kept. Burglary may be committed where personal property which is the subject of ownership is taken, and the fact

that the property is kept for an unlawful purpose does not change the nature of the crime. This has been decided as to intoxicating liquors kept for sale contrary to the provisions of a statute, or property used for gambling purposes contrary to law, or a pistol the sale of which was forbidden. *State v. May*, 20 Iowa, 305; *Bales v. State*, 3 W. Va. 685; *Commonwealth v. Smith*, 129 Mass. 111; *Osborne v. State*, 115 Tenn. 717, 92 S. W. 853, 5 Ann. Cas. 797; 17 R. C. L. 29. The whisky had an actual value, whether it had a market value or not, and was the subject of larceny."

That there has been a confusion of terminology, or a failure at all times to draw the distinction between property rights and property, is indicated by the next excerpt taken from *Arner v. State*, 19 Okl. Cr. 23, 197 P. 710, 711, as follows:

"The argument advanced by counsel for defendants in support of these various assignments of error, and the contention made thereunder, is that, to constitute robbery there must be the taking of personal property from another by means of force or violence, and that the thing taken must be of some value. Therefore, it is contended that because the prosecuting witness had no property rights of any kind in the whisky of which he was possessed for the purpose of violating the prohibitory liquor laws, no property was taken from him, and therefore all the essential elements of the crime of robbery were not present in the taking of this whisky under the circumstances disclosed by the evidence.

"We cannot agree with this contention. Section 3620, Revised Laws 1910, supra, does not have the effect of altering or changing the inherent character or nature of whisky as personal property. An entire consideration of the prohibitory liquor laws of this state discloses that the intent of the Legislature was to provide that intoxicating liquors possessed by a person for the purpose of violating any of the provisions of the prohibitory liquor laws should be contraband property as between the state, its officers, and such person; that a person unlawfully possessed of intoxicating liquors, etc., could not claim to have property rights in such articles in a proceeding brought by the state to confiscate them; not that the articles and things condemned, when unlawfully kept or used, were not property.

"In the case of *Tom Thomas v. State*, 13 Okl. Cr. 414, 164 P. 995, which was a conviction for the crime of murder committed by defendant while engaged in the perpetration of a whisky robbery, the contention was made that defendant was not guilty of the crime of murder committed in the perpetration of a robbery, because whisky used in violation of the law was not the subject of robbery. In passing upon this contention, this court, in the body of the opinion said:

"The contention that because whisky is contraband property in this state, as against the state and its officers, others are entitled to rob and murder * * * to obtain possession of it from one who is using it unlawfully, is wholly without merit. Neither robbery nor murder may be justified or excused on such a ground."

A very convincing statement is also found in *People v. Otis*, 235 N. Y. 421, 139 N. E. 562, in the following language:

"The statute (41 Stat. 315, tit. 2, § 25 [27 USCA § 39]) further provides that 'no property rights shall exist' in liquor illegally possessed. There can be no larceny of property not subject to ownership. How then, it is asked, may there be larceny of such liquor? If we give the broadest possible construction to these words, there is no answer; for it must be conceded that to enforce the recent amendment to the Constitution, Congress may declare that to steal liquor shall no longer be a crime. It might think it wise to license theft so as to discourage intoxication. We should not, however, readily impute to it such a design. *Commonwealth v. Rourke*, 10 Cush. (Mass.) 397. Certainly the earlier declaration of the same statute (section 3) that its provisions are to be 'liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented' gives no indication of such a purpose. To so construe the language of section 25 would be to encourage the transportation, distribution, and consumption of liquor by the thief.

"The truth is that sections 25, 26, and 27 [27 USCA §§ 39, 40, 44] are but three of a number of sections providing remedies by which the statute may be more conveniently enforced. A separate sentence or clause is not to be wrenched from its context. The sections are to be construed as a whole in the light of their general object. We start with the presumption that the possession of liquor is illegal. Section 33 [27 USCA § 50]. Such liquor may be seized. Search warrants may be issued, but not with regard to private dwellings with some exceptions. If being transported the officer making the seizure shall also take possession of the vehicle in which it is found. All this is to be followed by an orderly procedure in court. The court shall dispose of the liquor if it finds that it was unlawfully possessed. The court may order it destroyed, or may order that it be delivered to the government. The court is to deal with the vehicle in which the liquor may have been transported. Mingled as it is with these provisions, the clause as to property rights was clearly intended solely to protect government officials in the exercise of their duties. Questions had arisen as to the taking and destruction of property illegally used without a formal condemnation by court decree. *Lawton v. Steele*, 152 U. S. 133, 14 S. Ct. 499, 38 L. Ed. 385. It was there said that

the owner of property so taken had his remedy. He might, if the use of the property was not in fact illegal, replevy it or have an action for its value, and in such cases the burden would be on the defendant to prove jurisdiction. It was to answer as far as possible these suggestions, to protect the officer making the seizure or destroying the liquor, to secure the title of him who might purchase the liquor from the government, to permit a summary remedy by court decree, possibly also to vest immediately the title to such liquor in the state (*People v. Case*, 220 Mich. 379, 190 N. W. 289, 27 A. L. R. 686), that the provisions as to presumptions and as to property were enacted. However broad the language used, its effects should be confined to the purposes for which it was intended. Property rights in such liquor are not forever ended. They pass to the government. They pass from it to a purchaser. Section 25 is merely a police regulation, adapted to aid the enforcement of the prohibition law and to be applied with that end in view. The intention of Congress went no further."

Any person who contemplates the serious consequences possibly attendant upon a universally accepted doctrine that contraband liquor cannot be the subject of larceny, must do so with serious misgivings concerning its soundness. Focusing our attention upon the fiction that, because it has no legal value, it has no value at all, we must close our eyes to the fact that its illegal value (using that term solely for the purpose of distinction) is such as to arouse the lust of greed to create a new type of dangerous and vicious criminal, the one designated in common parlance as the "hijacker." Can he steal and rob and pillage with impunity simply because the object of his search cannot be made the subject of lawful possession or sale? The question shocks our sense of stabilized society, for the protection of which laws denouncing burglary and like offenses have been adopted. Let him who meditates upon the problem picture to himself the increasing number of breaches of the peace, affrays, and killings, if the illicit dealer in and thief of intoxicating liquors may break locks and doors without fear of drastic punishment, and he will not affirm the right. What becomes of the sanctity of the home if the burglar with apparent intent, whether real or feigned, to steal intoxicating liquor, may ransack it without possibility of serious punishment, except an intent to steal something else of value can be proven? The idea is appalling, and we revolt against the acceptance of any such standard.

Authorities sustaining the view we entertain, in addition to those from which we have quoted, are listed as follows: *State v. Friedman*, 98 N. J. Law, 577, 120 A. 8, 9; *Mance v. State*, 5 Ga. App. 229, 62 S. E. 1053; *August v. State*, 11 Ga. App. 798, 76 S. E. 164; *Hoback v. U. S. (C. C. A.)* 284 F. 529-532; *Gonch*

v. Republic Storage Co., 218 App. Div. 584, 219 N. Y. S. 46.

[2, 3] Concerning the second reason assigned by appellants for a reversal of the judgment, it is conceded by respondent that there is no testimony that Jeanette Chaffen was the owner of the liquor. It becomes necessary, therefore, to inquire if the allegation is essential to the information. In *People v. Rogers*, 81 Cal. 209, 22 P. 592, it is said: "A point is made that it is not alleged that Jones & Harding were partners, or that they were the owners of the building or its contents. Under the Code definition of burglary, it was not necessary to allege the partnership, and the ownership of the building and its contents was sufficiently designated. *People v. Henry*, 77 Cal. 445, 19 P. 830." And in *People v. Price*, 143 Cal. 351, 77 P. 73, it was held unnecessary to describe the house by ownership; it being sufficient to designate it by street and number. There is less reason for designating the ownership of the property which the burglar attempts to feloniously appropriate than there is to designate the ownership of the building. At least the same principle would seem to require us to say that the allegation was not essential; hence there is no fatal variance. An added reason why appellants may not be heard to complain is found in the fact that the liquor was in the garage of the residence of Jeanette Chaffen, and it has been held sufficient to show that the property "was in the possession and under the control of the person from whom it is claimed to have been taken." *People v. Hayes*, 72 Cal. App. 292, 237 P. 390, 393.

Judgment affirmed.

We concur: WORKS, P. J.; CRAIG, J.

104 Cal. App. 89

GACKSTETTER v. MARKET ST. RY. CO.
et al. ★
Civ. 6951.

District Court of Appeal, First District, Division 2, California.
Feb. 17, 1930.

Rehearing Denied March 19, 1930. Hearing Denied by Supreme Court April 17, 1930.

1. Evidence §568(6)—Testimony as to speed of street car given by witness testifying in effect that he had no knowledge on subject held not to conclude court.

In action for injury to four year old girl struck by street car, testimony as to speed of car given by witness, who in effect testified that he had no knowledge on subject of speed, held not to conclude court.

2. Street railroads §114(19)—Evidence did not show that motorman, after discovering peril of child, did not exercise ordinary care.

In action for injury to four year old girl struck by street car, in which plaintiff invoked theory of last clear chance, evidence held not to show that motorman, after discovering peril of plaintiff, did not exercise ordinary care to avoid injuring her.

3. Street railroads §103(4)—Where motorman discovering peril exercised ordinary care to prevent injury to child, there was no liability under last clear chance doctrine.

If motorman of street car exercised ordinary care to avoid injuring four year old girl on tracks when he discovered child's peril, there was no liability under last clear chance doctrine.

4. Appeal and error §1048(6)—In personal injury action against street railway, refusal to permit cross-examination of plaintiff's witness respecting contradictory statement held prejudicial error under circumstances.

In action for injury to four year old girl struck by street car, refusal to permit cross-examination of plaintiff's witness as to contradictory statement made to agent of defendant regarding facts of accident offered as foundation for impeachment held prejudicial error under circumstances, in view of evidence given by such witness.

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Action by Betty Gackstetter, by John Gackstetter her guardian ad litem, against the Market Street Railway Company and another. Judgment for plaintiff, and defendants appeal.

Reversed.

Superseding opinion in 280 P. 154.

Wm. M. Abbott, K. W. Cannon, and Walter H. Linforth, all of San Francisco, for appellants.

Vincent W. Hallinan and James J. Roach, both of San Francisco, for respondent.

STURTEVANT, J.

The plaintiff a minor girl of the age of about four years, was injured by being struck by one of the cars operated by the Market Street Railway Company. By her guardian ad litem she commenced this action to obtain a judgment for injuries sustained. She named the company, L. M. McClelland, the motorman, and W. J. Housel, the conductor, as defendants. The conductor's motion for a nonsuit was granted. The jury returned a verdict in favor of the plaintiff, and, from a judgment entered thereon, the other defendants have appealed.

The accident occurred between Broderick and Divisadero on Hayes street in San Francisco on the 24th day of June, 1925, at about half past three p. m. Hayes street runs from

east to west. Between Broderick and Divisadero there is a slope toward the east and the street has a grade of 3.6 per cent. The defendant maintains a double track on Hayes street. The collision occurred in about the middle of the block, and the plaintiff was struck by a car traveling from west to east. At the time of the collision a building was being constructed on the south side of Hayes street. In front of that building was a pile of rock or sand. The point of the collision was directly north of that pile.

Judging from the instructions requested by the plaintiff and by the questions propounded to the witnesses, it was the theory of the plaintiff that at the time of the accident the defendants' car was being driven at a speed in excess of the speed limited by an ordinance of the city and county of San Francisco, to wit, at a speed in excess of fifteen miles per hour; that in any event the car was being propelled at an excessive speed under the particular circumstances introduced in evidence; and that under the doctrine of the last clear chance the defendants' car could have been and should have been stopped before the collision. On the other hand, it was the theory of the defense that at the time and place of the accident its car was being propelled at a speed not to exceed seven or eight miles per hour, and that when the motorman saw the plaintiff she was on the sand pile and later he saw her move northerly toward the track, and when he saw her so move he slugged the car according to the most approved manner and stopped within fifteen or twenty feet.

[1] The only evidence in the record to the effect that defendants' car was being propelled faster than seven or eight miles per hour was given by Mr. McDonnell, a witness called by the plaintiff. Mr. McDonnell was a police officer, going to work, and had boarded the car in the Western addition. He took a seat in the back end of the car and was reading his paper and paid no attention to the movements of the car until he heard a scream; then he laid his paper down. After he heard the scream he testified that the car stopped very quickly. Regarding the speed of the car, he testified that from the time the car left Broderick street until the little girl was struck "it was going at a *moderate* rate of speed. I would call a *moderate* rate of speed between twenty and twenty-five miles an hour. To the best of my knowledge it was going about that speed at the time I mentioned." Looking at all of that testimony it is perfectly clear that the officer had, in effect, testified that he had no *knowledge* on the subject of the speed of the car and therefore his testimony on that subject does not conclude a court of justice. 22 C. J. 726; Newell-Murdoch Realty Co. v. Wickham, 183 Cal. 39, 43, 190 P. 359, 361. In that case the court said: "These statements of the witness, which are but statements, of conclusions and probabili-

ties, following his emphatic statement that the subject was not touched upon, cannot be considered as a substantial contradiction of the positive testimony of the defendants that nothing of the kind was said."

As to the second theory advanced by the plaintiff, the record contains no combination of facts which brings it into application. When the motorman saw the children at play on the pile of sand, he did not attempt to run by the pile of sand at full speed, to wit, at fifteen miles per hour. He did not run by it at all. When the car stopped after the accident had happened, the nose of the car was opposite the center of the pile of sand. The little girl's body rested on the rail twelve feet back from the front of the fender when the latter is in a down position.

[2, 3] Under the theory of the doctrine of the last clear chance the plaintiff makes two different claims. One is based on the testimony of the defendant motorman. The other is based on the testimony adduced from witnesses called by the plaintiff. We will take up each claim in the order stated. The defendant McClelland was the motorman in charge of the car. He testified that as he was proceeding easterly on Hayes street his car made a stop at Broderick and took on two passengers. He then proceeded at first slowly and then increased his speed to seven or eight miles an hour. After he had left Broderick and when his car was a length and a half back, he saw the plaintiff on the west side of the sand pile a foot or perhaps two feet from the south curb. He kept his eye on her. Later she started to run across his path in the direction of the north curb. As she did so she was facing him, and therefore running somewhat toward him. At that time his car was twenty feet back from the plaintiff. The instant he saw her start to run he immediately tried to stop his car. He slugged it and stopped the car, so he testified, within fifteen or twenty feet after he saw her start to move. When the fender is down the distance from the edge of the fender to the place where the motorman stands is about eight feet. From the edge of the fender to the plaintiff was therefore twelve feet when the motorman saw her move. While he was stopping the car he was giving his attention primarily to that effort but within the scope of his vision he saw the plaintiff to his right, probably three feet from the car. On cross-examination he testified that he could, under the same conditions, at the same place, by using the same method, stop the car in twelve or fifteen feet and by turning on the air that it would take twenty feet. On direct examination and on cross-examination the witness repeatedly stated that from the moment he saw the plaintiff start to move he did everything in his power to stop the car. The plaintiff called two motormen now employed by the municipal road but who were formerly employed by the defendant

road. G. R. Ensign testified that at the time and place of the accident by slugging it the car, traveling seven to eight miles per hour, could be stopped in ten or twelve feet. John Sorgenfrey, similarly qualified, testified that it could be stopped in ten feet. It may be granted that the last two witnesses were more skilled than McClelland. But no witness testified to any fact, or set of facts, tending to prove that after McClelland discovered the peril of the plaintiff he did not exercise ordinary care to avoid injuring her. If he did exercise ordinary care, he was not liable. 19 Cal. Jur. 651. The fact that, notwithstanding the exercise of such care on his part, the plaintiff was injured, is not the test. *Green v. Los Angeles, etc., Ry. Co.*, 143 Cal. 31, 48, 76 P. 719, 101 Am. St. Rep. 68; *Lambert v. Southern Pacific R. R. Co.*, 146 Cal. 231, 79 P. 873; *Kramm v. Stockton Electric R. R. Co.*, 10 Cal. App. 271, 278, 101 P. 914.

As based on the testimony of her own witnesses the case of the plaintiff rested partly on the testimony of Mrs. Blass. She resides on the same side of the street in the same block and a few doors east of the place where the accident occurred. She testified that at the time of the accident she was on the sidewalk near the curb talking to some persons in an automobile that was parked alongside of the curb. She stood in such a position that she was looking toward the west. She saw the plaintiff leave the sidewalk on the north side and run toward the south side. At the same time she saw the car leave Broderick street coming east. The left corner of the bumper of the car struck the child and the child was thrown through the air to the right over to and upon the rock pile and rolled down from the rock pile underneath the car. She further testified that the car was moving very quickly, but she did not testify as to where the car was when the motorman saw the peril of the little girl nor did she testify that the motorman omitted, as soon as he discovered plaintiff's peril, to use all possible care to avoid injuring her.

[4] When Mr. McDonnell took the stand he gave the testimony stated above. That testimony we have discussed. He further testified that after the collision he asked the motorman where the little girl came from and that the motorman said she ran across the street. "The motorman said that she ran from the north side, I believe. He pointed to the north side. He didn't mention the north side but he pointed to it. * * * Well, we

were standing at the front end of the car and he said, 'She ran across in that direction in front of my car.'"

On cross-examination, in reply to questions propounded by counsel for defendants, the witness stated that about two weeks after the accident he had a talk with Mr. Lewin, an agent of the defendants, regarding the facts of the accident. The conversation was held at Sixth and Market streets. "He asked me about the speed of the car and I told him the car was going at a *moderate* rate of speed at the time the accident happened. That was a fact, too.

"Q. Now then, didn't you at that time tell him that in your opinion the motorman made a fine stop and was not at fault?

"Mr. Hallinan: We object to that as not binding on the plaintiff.

"Mr. Linforth: I am laying a foundation to impeach the witness.

"The Court: Sustained."

In their briefs the defendants vehemently press that ruling as a prejudicial error. Under the peculiar facts of this case it was. If the question had been allowed and the witness had answered that he did make that statement to Mr. Lewin, necessarily some of the previous answers given by the witness must have been withdrawn. The statement that the motorman was not at fault conflicts squarely with the facts which the witness knew at the time of the accident, or of which he claimed to have been informed, or which his testimony suggested as being true. If in fact the car was traveling twenty or twenty-five miles per hour that was not *moderate*, but criminally immoderate. Nothing to the contrary appearing, the witness knew the motorman's view was unobstructed, and that, if the latter proceeded at all while an infant four years of age was crossing his path, he was not exercising ordinary care or any care. In short, the facts as related or suggested by the witness were directly contrary to the statement intimated in the question to which an objection was sustained. As the plaintiff had not made a *prima facie* case on any other theory than the one last discussed, the jury must have rested its verdict thereon. It is patent, therefore, that the error mentioned was prejudicial, and that there has been a miscarriage of justice.

The judgment is reversed.

We concur: NOURSE, Acting P. J.; DOOLING, Justice pro tem.

104 Cal. App. 191

ROGERS v. HAINES.

Civ. 4013.

District Court of Appeal, Third District, California.

Feb. 20, 1930.

1. Husband and wife ⇨333(9)—Evidence held to sustain judgment for damages for alienation of affections of wife.

Evidence in action to recover damages for alienation of affections of wife held sufficient to sustain judgment for damages by reason thereof.

2. Husband and wife ⇨324—Action for damages lies against one wrongfully enticing wife to abandon her husband, without proving desertion was accomplished through defendant's malice; "entice" (Civ. Code § 49).

Action for damages lies, under Civ. Code, § 49, against one who wrongfully entices a wife to abandon her husband, without necessity of proving that desertion was accomplished through malice on part of defendant, since the term "entice" means to lure, induce, tempt, incite, or persuade one to do a thing, and it is sufficient if conduct of defendant leading to separation of spouses was intentional and wrongful.

[Ed. Note.—For other definitions, see Words and Phrases, First, Second and Third Series, Entice; Enticement.]

3. Husband and wife ⇨333(9)—Less evidence is necessary to support judgment for damages for alienation of affections of wife by stranger than in case of parent.

Less evidence is necessary to support a judgment for damages for alienation of affections of wife by a stranger to family than is required when a parent is charged therewith, for reason that a parent is recognized as entitled to privilege of reasonably counseling and advising their children for their welfare.

4. Husband and wife ⇨326—That defendant's conduct was not sole cause of separation and loss of affections is no defense to action for alienation of affections.

Fact that conduct of defendant was not the sole cause of separation and loss of affections constitutes no defense to an action for alienation of affections of a spouse, it being sufficient if conduct was procuring or controlling cause of alienation of affections, although other reasons may have contributed to some extent.

5. Husband and wife ⇨333(9)—Circumstantial evidence may be sufficient to establish case in action for damages for alienation of affections.

Circumstantial evidence may be sufficient to establish a case in action to recover damages for alienation of affections, when considered in connection with natural presumptions and inferences which may be drawn therefrom, since it is naturally difficult to prove by direct evidence the purpose and effect of conduct upon affections of a spouse.

Appeal from Superior Court, Sacramento County; H. W. Gregory, Judge.

Action by William Rogers against George Haines. Judgment for plaintiff, and defendant appeals.

Affirmed.

Richard P. Talbot, of Sacramento, for appellant.

George E. McCutchen and Ralph H. Lewis, both of Sacramento, for respondent.

R. L. THOMPSON, J. This is an appeal from a judgment for damages for the alienation of the affections of a wife. The judgment was entered upon the rendering of the verdict of a jury. A reversal is sought upon the sole ground of insufficiency of the evidence to support the judgment.

[1] The plaintiff and Gladys Cheney were married at Jackson, Cal., December 10, 1922. They immediately moved to Marshfield, Or., where they established a home and for some time lived happily. A daughter, Betty, was born as the issue of the marriage in 1924. Mr. and Mrs. Cheney, the parents of Mrs. Rogers, lived near Ione, Cal., where her father was engaged in the occupation of hunting and trapping predatory animals. They had a son, named Albert, who was born in 1912. The defendant was a divorced man who lived at Ione with his mother and infant daughter as neighbors of Mrs. Rogers' parents. The defendant was engaged in raising sheep. In the summer of 1925, Mrs. Rogers visited her parents at Ione and then met and associated with the defendant. After a visit of several weeks she returned to her home at Marshfield. Mr. Haines accompanied her as far as Sacramento. About two weeks later the defendant made an excuse to drive with a new Hudson automobile up to Oregon. He claimed that he was seeking to purchase sheep. He invited Albert, the twelve year old brother of Mrs. Rogers, to accompany him and drove directly to the home of the plaintiff at Marshfield. It is evident that the pretense of seeking for sheep was a mere subterfuge and that the journey to Oregon was prompted solely by his interest in Mrs. Rogers. This is obvious for the reason that Western Oregon is not a sheep country and during the time the defendant was there he made no effort to purchase sheep. Moreover, his invitation to take the boy Albert to his sister's home indicates this was really his destination. He had never before met the plaintiff. When he arrived at Marshfield he was invited to remain as a guest at the Rogers' home. He accepted the invitation and remained for about ten days. The plaintiff was employed at the mill as a wheelwright and his occupation kept him away from home during the daytime. During this period of time the defendant was a constant companion of

Mrs. Rogers, remaining at home with her during the absence of her husband or taking her to ride in his automobile. Certain incidents clearly indicate that she exhibited undue interest in the defendant and neglected her husband. She became critical of her husband and he was an unwelcome associate in their games of cards or pleasure excursions. Finally he became suspicious of their conduct and took occasion to return to his home when he was unexpected. On one occasion he found them seated in the kitchen in earnest conference with their chairs and heads in close contact. They gave no explanation for this conduct. On another occasion he found them together in her dressing room. She was attired only in a slip and was engaged in powdering her face while the defendant stood close by. During this visit of the defendant at Marshfield, the plaintiff once suggested that he and his wife were talking of taking a trip around the world, and the defendant said: "Why don't you get a divorce and go." No occasion for the suggestion of a divorce appears in the record. Up to the time of the visit of the defendant the record indicates that Mr. and Mrs. Rogers were living happily together. The conduct of the defendant and Mrs. Rogers led to some controversy between plaintiff and his wife and she said to him: "You ain't like Mr. Haines, Mr. Haines divorced his wife." The inference is that he should do likewise. While it is true that Mrs. Rogers testified that their subsequent separation occurred because her husband was cruel and that he was engaged in bootlegging, she specified no act of cruelty and he emphatically refutes both charges. Mrs. Dalzell testified that while she was riding with the defendant and Mrs. Rogers at Marshfield, they appeared to be very friendly toward each other, and during a conversation, out of the presence of the plaintiff, Mr. Haines said "he thought Gladys should get a divorce." And again he said, "Gladys had better * * * get a divorce." When the defendant left for California, it is quite evident he attempted to persuade Mrs. Rogers to go with him. Mrs. Lucas, a neighbor at Marshfield, testified that Mrs. Rogers, in the presence of the defendant, while discussing his departure said, "I might go home with Mr. Haines." She did not go, however, explaining that she was afraid her husband would make trouble for them. But she soon followed after him. A few months later she again made an excuse to visit her parents at Ione, during which time she frequently met the defendant. However, she returned to her home at Marshfield once more in 1927, but did not remain long. Considerable controversy arose between the spouses over the defendant. In May, 1927, without previous warning and in the absence of her husband, Mrs. Rogers packed her personal effects and left her home, never to return again. His first intimation of her in-

tention to leave was when he came home and found her gone. Upon inquiry from a neighbor he was told his wife had left him. There was no previous quarrel or warning of her purpose to go. After about two weeks the plaintiff went to Ione to persuade his wife to return to him. He found her at her parents' home. The defendant was also there and remained for several days. The plaintiff's wife avoided him, and both his father-in-law and the defendant prevented him from conversing or associating with her. During this period of time the spouses did not live together as husband and wife. The defendant again suggested to plaintiff: "Why not get a divorce and have it over?" Mrs. Rogers obtained employment as a waitress at the hotel in the adjoining town of Jackson and was often taken back and forth to her work by Mr. Haines. The plaintiff testified in this regard:

"Q. How did she get back from Jackson? A. Mr. Haines and Mr. Cheney took her back.

"Q. Did you try to go on any of those trips? A. I did, but they insisted on me not going after her."

The plaintiff failed to persuade his wife to return to her home in Oregon. He testified in this regard:

"Q. Did you try to get her to come back to Oregon with you? A. Yes, I did as much as I could. I could not get any chance with Mr. Haines and Mr. Cheney (interfering) that is why; whenever she * * * come to the house she was with Mr. Haines and Mr. Cheney."

No reason for the final separation was given by either of the parents of Mrs. Rogers, except the bare statement which Mrs. Cheney made that "she (Mrs. Rogers) wrote me that he (Mr. Rogers) had been bootlegging and her father told me to write her to come home." The defendant was a close friend and in great favor with Mr. and Mrs. Cheney. It seems evident the parents were encouraging the separation.

The foregoing circumstances do not present a strong case of alienation of affections, but we are of the opinion they are sufficient to support the implied finding of the jury to the effect that the conduct of the defendant was the procuring cause of the separation of the spouses and of the alienation of the affections of plaintiff's wife.

[2-5] An action for damages lies against one who wrongfully entices a wife to abandon her husband. Section 49, Civ. Code. It is not necessary to prove that the desertion was accomplished through malice on the part of the defendant. *Smith v. Mitchell*, 64 Cal. App. 463, 467, 221 P. 964. The term "entice" means to lure, induce, tempt, incite, or persuade one to do a thing. It is sufficient if the conduct of the defendant which led to the separation of the spouses was intentional and

wrongful. 30 C. J. 1122, § 974. Less evidence is necessary to support a judgment of damages for the alienation of the affections of a wife by a stranger to the family than is required when a parent is charged therewith for the reason that parents are recognized as entitled to the privilege of reasonably counseling and advising their children for their welfare. *Horowitz v. Sacks*, 89 Cal. App. 336, 341, 265 P. 281; 13 Cal. Jur. 903, § 87; 13 R. C. L. 1471, § 522. It is no defense to an action for the alienation of the affections of a spouse that the conduct of the defendant was not the sole cause of the separation and loss of affections. It is sufficient if the defendant's conduct was the procuring or controlling cause of the alienation of affections, although other reasons may have contributed to some extent. 30 C. J. 1125, § 982. It is naturally difficult to prove by direct evidence the purpose and effect of the defendant's conduct upon the affections of a spouse, and circumstantial evidence may therefore be sufficient to establish a case, considered in connection with the natural presumptions and inferences which may be drawn therefrom. 30 C. J. 1144, § 1019; *Adkins v. Brett*, 184 Cal. 252, 193 P. 251; *Mussellem v. Frenn*, 101 Okl. 45, 225 P. 370.

In the present case the circumstances are very persuasive that the effect of the conduct of the defendant resulted in procuring or at least in substantially contributing to the alienation of the affections of Mrs. Rogers for her husband, and in causing the ultimate separation of the spouses.

The judgment is affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

RICE et ux. v. HANRAHAN CO. et al.*
Civ. 7230.

District Court of Appeal, First District, Division 1, California.

Feb. 15, 1930.

Rehearing Denied March 17, 1930. Hearing Granted by Supreme Court April 14, 1930.

1. Municipal corporations Ⓒ269(1)—Proceedings where work is done on street not acquired at time are not invalid, if land is acquired before judgment is entered (Improvement Act 1911, § 26, as amended by St. 1923, p. 117, § 5).

Under Improvement Act (St. 1911, p. 730) § 26, as amended by St. 1923, p. 117, § 5, where work is done on street or right of way not lawfully dedicated or acquired at time, proceedings are not invalid provided land is lawfully dedicated or acquired at any time before judgment is entered in suit involving such proceeding.

2. Constitutional law Ⓒ289—Inclusion of undedicated strip in street improvement does not deny property owners due process of law (Improvement Act 1911, § 21).

Inclusion of undedicated strip in street improvement proceeding does not deny property owners within assessment district due process of law, since if because of failure to acquire necessary rights their property shall be subjected to an invalid assessment, property owners have their legal remedy under Improvement Act, § 21 (St. 1911, p. 743), and general rules of law applicable.

3. Municipal corporations Ⓒ294(3)—Street improvement proceeding held not invalidated by slight departure from statutory requirement as to lettering of notice of improvement.

Street improvement proceeding held not invalidated by slight departure from statutory requirement as to lettering of heading "Notice of Improvement," in that some of letters fell slightly below statutory standard.

4. Municipal corporations Ⓒ294(4)—Notice of street improvement held not defective because of failure to state work and to describe district (Improvement Act 1911, § 5).

Notice of improvement of street held not defective because of failure to state work was to be chargeable upon a district and failure to describe district, since Improvement Act, § 5 (St. 1911, p. 734), makes no such requirement, and, where resolution gave detailed description of district to be benefited and made subject to assessment, notice, with its reference to resolution, thus afforded necessary information.

5. Municipal corporations Ⓒ339(1)—Award of street improvement contract held not objectionable where contractor had reasonable discretion to vary somewhat proportions of sand and rock in order to fill all voids.

Award of street improvement contract, in which specifications for concrete pavements called for one part of Portland cement, two parts of sand, and four parts of broken rock or stone by measure, with proviso that proportions might be changed by contractor whenever voids in materials used were not filled by use of ingredients in specified proportions, held not objectionable, since discretion of contractor to vary somewhat proportions of sand and rock in order to fill all voids was reasonable.

6. Municipal corporations Ⓒ339(2)—Specifications in street improvement contract held not defective because of clause declaring contractor, if requested, should furnish tests of cement made by reliable chemist, such tests to conform to specifications required by American Association of Civil Engineers.

Specifications in street improvement contract held not defective because of clause in relation to cement for use in concrete pavements, declaring that contractor, if requested by engineer, should furnish tests of cement made by some reliable chemist, such tests to conform to specifications required by American Association of Civil Engineers, where specifications required that all cement should be Portland cement, and should be delivered as specified and be kept dry.

7. Municipal corporations ⇨339(1)—In specifications of street improvement contract, details regarding implements used and material to cover pavement held properly left to engineer's judgment.

In specifications of street improvement contract, details of implements for mixing materials and regarding material to be used in covering concrete pavements during curing process *held* properly left to expert judgment of engineer as supervising officer.

8. Municipal corporations ⇨339(2)—Provision of street improvement contract requiring concrete pavements to be not less than thickness shown in plans held not invalid.

Provision of street improvement contract requiring concrete pavements to be "not less than thickness shown in plans, after being thoroughly tamped," *held* not invalid, where contractor was required to keep upon the work a copy of plans and specifications available at all times to engineer.

9. Municipal corporations ⇨339(2)—Clause of specifications in street improvement contract requiring contractor to furnish work or material unintentionally omitted in description but necessary held not objectionable.

In specifications of street improvement contract, clause stating that "any work or material which may have been unintentionally omitted in description of work, but which is clearly necessary for proper prosecution of contract, shall be furnished by contractor, the same as if it had been specified" *held* not objectionable.

10. Municipal corporations ⇨319—Objections to specifications not presented to town council in protest against proceeding with street improvement were waived (Improvement Act 1911, § 16).

Objections to specifications not made in protest presented to town council under Improvement Act, § 16 (St. 1911, p. 737), against proceeding with street improvement, were waived, and injunction to restrain work would not issue upon grounds not stated in protest.

11. Municipal corporations ⇨331—Notices inviting sealed bids on street improvement held sufficient, where streets were named and reference was made to resolution of intention for further particulars (Improvement Act 1911, § 9).

Notices inviting sealed bids on street improvement *held* sufficient, where streets were named and specific reference was made to resolution of intention for further particulars and description of work, and resolution contained all information necessary, since Improvement Act, § 9 (St. 1911, p. 735), makes reference to resolution sufficient for purposes of description.

12. Municipal corporations ⇨335(2)—Notice of award of contract for street improvement held sufficient, though not naming one of streets to be improved (Improvement Act 1911, § 11).

Notice of award of contract for street improvement *held* sufficient under Improvement Act, § 11 (St. 1911, p. 736), though not naming one of streets to be improved, where notice referred to bid and resolution.

Appeal from Superior Court, Santa Clara County; F. B. Brown, Judge.

Action by Samuel Wallace Rice, also and usually known as and called S. W. Rice, and wife, against the Hanrahan Company and others, to enjoin the performance of street work. From a judgment in favor of defendants, plaintiffs appeal.

Affirmed.

Kirkbride & Gordon, of San Mateo, for appellants.

Albert Mansfield, of Redwood City, for respondent Hanrahan Co.

D. T. Jenkins, of San Jose, for other respondents.

JOHNSON, Justice pro tem.

This is an action to enjoin performance of street work at Los Gatos, pursuant to a contract made on May 4, 1928, with the defendant Hanrahan Company under the Improvement Act of 1911 (St. 1911, p. 730), supplemented by the Improvement Bond Act of 1915 (St. 1915, p. 1441). The trial court gave judgment in favor of defendants, and from that judgment appeal was taken by plaintiffs, who are the owners of property within the district assessable for the work. Plaintiffs contend that the proceedings leading up to the award of the contract were insufficient to confer jurisdiction upon the town council to proceed with the improvement.

Among the streets designated for improvement in the resolution of intention and in the notices preceding the award were Royce street, Gray's lane, and Elm street, Gray's lane lying between the other two streets, and all three running from University avenue on the east to Santa Cruz avenue on the west. The three streets are crossed by tracks of the Southern Pacific Company; and, after the contract had been awarded, the town applied to the railroad commission for an order authorizing the widening and improvement of the crossings at the intersection of these streets and the railroad tracks. The commission gave the desired permission for improvement of the crossing at Elm street, but denied the application as to the other two crossings, upon the ground that the volume of traffic at those points did not justify expenditure by the railroad company to the extent involved in the installation of an improved type of crossing.

In such work the railroad company bears the expense of the improvements within lines set two feet outside of the outermost rails; and both the resolution of intention and the notices described the proposed improvement so as to exclude from the public contract awarded to the Hanrahan Company the crossing work within the lines drawn as just stated. It appears, however, that at Gray's lane some

widening of the street will be necessary, and that, in addition to the land already dedicated for street purposes, the city will need to acquire and has included in the portion of Gray's lane, as described in the contract, a strip 5.7 feet wide by 27.6 feet long, said to belong to the railroad company.

It is contended that the inclusion of this strip in the public contract renders the contract void, and it is further contended that certain alleged defects in the legal notices and certain alleged shortcomings in the specifications were serious enough to deprive the town council of jurisdiction to charge upon property owners the expense of the proposed improvements.

[1, 2] So far as the undedicated strip of land is concerned, it is quite possible that the town may acquire the necessary rights there to either by dedication or otherwise before any assessment is imposed. And under section 26 of the Act of 1911, as amended in 1923 (St. 1923, p. 117, § 5), though work is done on a street or right of way not lawfully dedicated or acquired at the time, the proceedings are not to be held invalid, provided the land is lawfully dedicated or acquired at any time before judgment is entered in the suit involving such proceeding. If, because of failure to acquire the necessary rights, plaintiffs' property shall be subjected to an invalid assessment, plaintiffs will have their legal remedy under section 21 and the general rules of law applicable under such circumstances. The inclusion of the undedicated strip does not result, therefore, in denying to plaintiffs due process of law. *Chase v. Trout*, 146 Cal. 350, 359, 80 P. 81; *Watkinson v. Vaughn*, 182 Cal. 55, 58, 186 P. 753; *Noyes v. Chambers*, 202 Cal. 542, 544, 261 P. 1006.

It appears further that the plaintiffs did not deem this objection to be of sufficient merit to receive specific mention in the notice which they filed with the council under section 16 of the act, protesting against the award of the contract. In that notice plaintiffs contented themselves with the general objection that the council never acquired jurisdiction of the subject-matter of the proceeding.

Plaintiffs rely upon *Spaulding v. Wesson*, 115 Cal. 441, 47 P. 249, and *Hall v. Fairchild Co.*, 66 Cal. App. 615, 227 P. 649. The former, having been decided long before the amendment of 1923, is not now applicable to the situation found here, and in the *Hall* Case the area in question formed part of a public park which could not legally be withdrawn for highway purposes. Accordingly the assessment in that case was beyond cure.

We are of the opinion that the legal rights of plaintiffs are fully protected under the provisions of the act as it read at the time of the proceedings in question.

[3] Another objection made relates to the heading of the posted "Notice of Improvement." The law requires such heading to be in letters of not less than one inch in length. Some of the letters fell slightly below this standard, but the trial court found that the letters were of sufficient height and size so that the words "Notice of Improvement" could be easily read by a person of average eyesight, at a distance of 45 feet (about the width of a street), and that there was a substantial compliance with the legal requirement in that particular. All the letters in this case were larger than those in *Coleman v. Spring Construction Co.*, 41 Cal. App. 201, 182 P. 473, where the notice, being found sufficiently legible, was held to be in substantial compliance with the law. So also in *McCaleb v. Dreyfus*, 156 Cal. 204, 210, 103 P. 924, stress is laid on legibility rather than on literal compliance with the statute. In view of the finding of the trial court, we conclude therefore that the proceedings were not invalidated by the slight departure from the statutory requirement as to the lettering. *Beck v. Ransome-Crummey Co.*, 42 Cal. App. 674, 682, 184 P. 431.

[4] It is urged further that the notice of improvement was defective because of failure to state that the work was to be chargeable upon a district and to describe the district. Section 5 of the act makes no such requirement. It directs that there shall be a brief statement of the work proposed, with reference to the resolution of intention for further particulars. The resolution gives a detailed description of the district to be benefited and made subject to assessment. The notice, with its reference to the resolution, thus afforded the necessary information.

[5] An additional objection to the award of the contract is based on the ground that the specifications are defective because of indefiniteness in requirements concerning materials and also because of unlawful discretion conferred upon the contractor. The specifications for concrete pavements call for one part of Portland cement, two parts of sand, and 4 parts of broken rock or stone by measure, with the proviso that the proportions may be changed by the contractor whenever the voids in the materials used are not filled by use of the ingredients in the specified proportions. But it is also stated that a cubic yard of concrete in place shall contain not less than 6 sacks of cement. And the specifications contain likewise detailed provisions concerning the kind, quality, and condition of the sand and stone, and the sizes of the meshes through which those materials must be screened to assure general uniformity.

It thus appears that the contractor is required to furnish materials definitely described and to mix them ordinarily in the fixed proportions with a view to having a serviceable pavement with all voids filled. —It was recognized, however, that occasionally,

in order to fill all voids, it might be necessary to vary somewhat the proportions of sand and rock so as to procure the right density and make a durable pavement. The contractor has no discretion to depart from the specifications determining the condition and quality of the materials, and since the purpose is to assure, through intelligent exercise of discretion, an admixture making a pavement free of the voids which are apt to occur in any such work because of occasional variation in uniformity of one or another of the ingredients, there is not that vice in the specifications which the law condemns. It is, of course, desirable to have all details precisely fixed so far as reasonably possible, but allowance must be made in practice for contingencies bound to arise in every piece of actual construction. Some modicum of discretion must therefore in sound reason be conceded, and, though a measure of practical judgment is exercised by the contractor, the property owners are safeguarded by the requirement of fulfillment of the contract under the direction, and to the satisfaction, of the city engineer. There is nothing to indicate that the discretion authorized will have any bearing on the cost of the work proposed or any appreciable effect upon the assessments. Public contracts, as well as private contracts, must be dealt with in a practical way. They are intended to get beneficial results, and, while the property owners' rights must be protected by due legal procedure and such definiteness and certainty in plans and specifications as will guard against jerry-building and dishonesty, the tendency to strain at gnats is to be deprecated. The discretion authorized in this instance is reasonable, and is justified by the views expressed in *Mill Valley v. Massachusetts Bonding Co.*, 68 Cal. App. 372, 380, 229 P. 891; *Chase v. Trout*, 146 Cal. 350, 364, 80 P. 81; *Haughwout v. Hubbard*, 131 Cal. 675, 679, 63 P. 1078; *Thoits v. Byxbee*, 34 Cal. App. 226, 234, 167 P. 166; *Burnham v. Abrahamson*, 21 Cal. App. 248, 258, 259, 131 P. 338; *Burns v. Casey*, 13 Cal. App. 154, 168, 109 P. 94.

[6] Defectiveness in the specifications is charged also because of a clause, in relation to the cement for use in concrete pavements, declaring that the contractor, if requested by the engineer, shall furnish tests of cement made by some reliable chemist, such tests to conform to specifications required by the American Association of Civil Engineers. This, however, is not the only provision concerning such cement. Immediately preceding the clause criticized appears the following: "All cement shall be Portland Cement. It shall be delivered in original unbroken barrels or bags, with the name and brand of the manufacturer plainly marked. It must be perfectly dry and free from lumps, and when stored must be protected from the weather and moisture of the ground." Portland ce-

ment is a standard commodity, and the products of the different manufacturers are known to builders and engineers. There is nothing in the language used making it mandatory upon the engineer to demand tests, but as a matter of precaution the contractor is obligated to furnish tests if called for. In relation to cement for use in the construction of sidewalks and curbs, the provision is that "The cement used must be Portland Cement meeting the requirements and tests of the Standard specifications for Portland Cement adopted by the American Society of Testing Materials." There is nothing in the record to indicate that the specifications of the organizations mentioned are not commonly accepted as trustworthy standards, and there is no good reason why general trade usages should not enter into public contracts as well as private. If the engineer may satisfy himself by tests "made by some reliable chemist," and those tests are "to conform to specifications required" in the one case by the American Association of Civil Engineers and in the other by the American Society of Testing Materials, it is fair to conclude that "reliable chemists" in general, as well as engineers and contractors, are thoroughly familiar with the specifications intended. We find no merit in the objection.

[7] The specifications are assailed further because the type of implements for mixing materials is made subject to the approval of the engineer. There is a provision that materials shall be mixed in a batch mixer or a pug mill mixer approved by the engineer, and that, if the latter sort is used, the paddles shall be of the number and type approved by the engineer. Such matters are mere operative details properly committed to the judgment of the engineer as the supervising officer. *Thoits v. Byxbee*, 34 Cal. App. 226, 234, 235, 167 P. 166; *Burns v. Casey*, 13 Cal. App. 154, 158, 109 P. 94. The same may be said concerning the attack upon the provision in relation to the curing of concrete pavements, which on being laid are to be covered with not less than two inches of earth or other material approved by the engineer, and kept wet for at least ten days. The "other material" does not enter into construction any more than the earth, if used. It is a mere temporary protective device, and the substitution may properly be left to the expert judgment of the engineer. *Mills v. City of Elsinore*, 93 Cal. App. 753, 769, 270 P. 224.

[8] Another provision which is said to make for invalidity is that in relation to the concrete pavement, which is required to be "not less than the thickness shown in the plans, after being thoroughly tamped." This is a hypercritical objection. The specifications refer repeatedly to the plans on file, and the plans and the specifications are to be read together; the contractor being required to "keep upon the work a copy of the plans and

specifications" available at all times to the engineer.

[9] Under the head of "General Requirements," the specifications contain a clause stating that "any work or material which may have been unintentionally omitted in the description of the work, but which is clearly necessary for proper prosecution of the contract, shall be furnished by the Contractor, the same as if it had been specified." Criticism is leveled, not at the purpose or effect of the clause, but at the use of the words "unintentionally omitted," without designation of an arbiter. The clause is merely included as a general rule of interpretation of the plans and specifications; the clear intent being to declare that all the incidents to the performance of a workmanlike job are to be deemed incorporated, whether expressly mentioned or not. We apprehend that similar provisions are included in almost every such set of specifications as a precaution against disputes over trivial matters. The provision cannot justly be condemned.

[10] Though plaintiffs presented to the town council, under section 16 of the act, a protest against proceeding with the improvement, none of the various objections now made to the specifications was included in their protest. Therefore, according to the express provision of the section, the objections were waived, and injunction to restrain the work will not issue upon grounds not stated in any protest. *Blake v. City of Eureka*, 201 Cal. 643, 648, 258 P. 945; *Brydon v. City of Hermosa Beach*, 93 Cal. App. 615, 624, 270 P. 255.

[11] All preliminary proceedings having been duly had, the council acquired jurisdiction to order the improvement. It thereupon passed a resolution to that effect, ordering at the same time posting and publication of notices inviting sealed bids. It is contended, though not seriously, that these notices were deficient in their indication of the character of the work to be done and the district to be affected. The streets were named and specific reference was made to the resolution of intention for further particulars and a description of the work. The resolution contained all the information which plaintiffs would have included in the notices, and section 9 of the act expressly makes reference to the resolution sufficient for purposes of description of the improvement and the assessment district. The notices therefore complied with the law.

[12] Hanrahan Company, having been the lowest bidder, received the award of the contract. Notice of the award was then given, but in the notice one of the streets to be improved, Wilder avenue, was, through inadvertence, not named. The notice of award, referred, however, to the bid on file, to the resolution of award, and also to the resolution of intention

for a description of the work and the particulars thereof. Section 11 of the act makes no specific requirement as to the contents of the notice of award, and, since it was not essential that such notice should recite the names of the streets, we are of the opinion that the reference to the resolutions previously adopted and the bid of the successful contractor charged the property owners with notice of the extent of the work actually included in the contract as awarded.

This objection was really the only one now made which was specifically embodied in the protest presented by plaintiffs to the council, and reliance is placed upon the decision in *McNutt v. Los Angeles*, 187 Cal. 245, 201 P. 592, dealing with the concurrent improvement and change of grade of a tunnel and adjacent streets under the act of 1913 (St. 1913, p. 954). Under section 3 of that act, however, it was made the express duty of the city clerk to mail to each property owner in the assessment district a notice of the passage of the resolution of intention "with the name of the street to be improved and between what streets located." There being in the act of 1911 no such mandatory direction to name streets in the notice of award, the case cited is inapplicable.

We have given consideration to the several objections urged by plaintiffs, notwithstanding the fact that these objections, with one exception, had all been waived by failure to present them in the protest to the town council. Our conclusion is that the notices given were in substantial compliance with the law; that the specifications possess legal definiteness and certainty; that the council was invested with jurisdiction to order the work; and that the contract therefor was legally awarded and made.

The judgment is affirmed.

We concur: TYLER, P. J.; CASHIN, J.

VEDOVI v. WATSON & TAYLOR. ★
Civ. 6881.

104 Cal. App. 80

District Court of Appeal, First District, Division 1, California.

Feb. 17, 1930.

Rehearing Denied March 19, 1930. Hearing Denied by Supreme Court April 17, 1930.

1. Libel and slander §21—To render writing libelous, words must be published concerning plaintiff, and understood by third person to have concerned him.

To render writing libelous, it is necessary that words should have been published concerning plaintiff, and understood by at least one third person to have concerned him, since defamatory words, to be actionable, must refer to

some ascertained or ascertainable person, and that person must be plaintiff.

[Ed. Note.—For other definitions, see Words and Phrases, First, Second, and Third Series, Libel.]

2. Libel and slander ☞101(1)—Whether written words libelous in themselves were spoken of and concerning plaintiff is issuable fact, and, if denied, must be established (Code Civ. Proc. § 460).

Whether words used in writing and libelous in themselves were spoken of and concerning plaintiff under Code Civ. Proc. § 460, dispensing with the inducement and colloquium, is issuable fact, and, if denied, must be established at trial.

3. Libel and slander ☞86(2)—If words written are not libelous in themselves, or have some occult meaning or local signification, meaning showing them actionable must be alleged and averred (Code Civ. Proc. § 460).

Under Code Civ. Proc. § 460, dispensing with inducement and colloquium, and requiring only allegation that libelous words were spoken of and concerning plaintiff, if words charged are libelous in themselves, if words used are not libelous in themselves, or have some occult meaning or local signification, and require proof to determine their meaning or show libelous nature, such allegation of their meaning must be made as will show them actionable and by averment to ascertain that to court which is generally or doubtfully expressed.

4. Libel and slander ☞86(2)—Notwithstanding statute dispensing with inducement and colloquium in libel action, averments necessary to show meaning of words must still be made (Code Civ. Proc. § 460).

Though Code Civ. Proc. § 460, dispenses with inducement and colloquium in action for libel, averments necessary in common-law pleading to show meaning of words must still be made.

5. Libel and slander ☞15—If language of instrument is fairly included within statutory definition of libel, it is libelous per se (Civ. Code, § 45).

If language of writing is fairly included within definition of libel contained in Civ. Code, § 45, it is libelous per se.

6. Libel and slander ☞15—Cancellation notice for nonpayment of premium on automobile insurance policy, as to broker soliciting insurance, held not libelous per se (Civ. Code, § 45).

Notice of cancellation of automobile policy for nonpayment of premium, containing nothing exposing broker soliciting insurance to hatred, contempt, ridicule, or obloquy, or causing him to be shunned or avoided, or which had tendency to injure him in his occupation, held not libelous per se, in view of Civ. Code, § 45, defining libel.

7. Libel and slander ☞15—Cancellation notice for nonpayment of insurance premium, when viewed in light of extrinsic facts alleged in inducement and innuendo, held not to charge broker with embezzlement so as to render notice libelous (Pen. Code, § 503).

Cancellation notice for nonpayment of premium on automobile insurance policy, when

viewed in light of extrinsic facts alleged in inducement and innuendo, merely showing that plaintiff collected premium from insured, and that insurer or its agent failed to receive, and not directly or inferentially showing that plaintiff was entrusted with, premium, or fraudulently appropriated it, held not to charge plaintiff with embezzlement so as to render notice libelous, in view of Pen. Code, § 503, defining embezzlement.

8. Libel and slander ☞86(1)—Where written words are not actionable per se, innuendo cannot introduce meaning broader than words naturally bear under facts alleged in inducement.

Where words used in writing are not actionable per se, innuendo can only interpret their meaning, but cannot introduce meaning broader than words naturally bear, in view of facts alleged in inducement.

9. Libel and slander ☞86(1)—Written words bearing but one meaning which is obviously not defamatory cannot be made so by innuendo.

Where words used in writing can bear but one meaning, and that is obviously not defamatory, no innuendo can make such words defamatory.

10. Libel and slander ☞123(2)—Where writing and inducement do not support innuendo, whether in light of existing facts writing is libelous is question for court.

Where writing alleged to be libelous, together with inducement, do not support innuendo, it is for court to determine whether, in light of existing facts, alleged writing can be libelous, and, if in light of existing facts writing is not fairly susceptible of defamatory meaning sought to be attributed to it, complaint fails to state cause of action.

11. Libel and slander ☞123(2)—If alleged libelous article is capable of two meanings, cause of action is stated, and sense in which language was used and understood is for jury.

If language of writing is capable of two meanings, one of which is harmless and the other libelous, and it is alleged that same was used and understood as conveying latter meaning, cause of action is stated, and it is for jury to determine in which sense language was used and understood.

Appeal from Superior Court, City and County of San Francisco; Louis H. Ward, Judge.

Action by Ernesto Vedovi against Watson & Taylor, a corporation. Judgment for defendant, and plaintiff appeals.

Affirmed.

James Sykes, of San Francisco, for appellant.

Redman & Alexander, of San Francisco, for respondent.

GRAY, Justice pro tem.

Appeal from a judgment given in an action for libel for failure to amend after the demurrer to the amended complaint had been sus-

tained. Since the four causes of action set forth in such complaint are alike in form and substance except only as to the recipient of the respective notices and the amount therein stated as due, it will be sufficient, for the present purposes as suggested by counsel, to consider only the sufficiency of the first cause of action. As to the publication of the alleged libel it alleges "that the defendant * * * published, declared and circulated of and concerning the plaintiff by depositing in the United States mail, with postage thereon, directed and addressed to the Western States Life Insurance Company the following written, libelous and defamatory communication in words and figures, to-wit:

"Cancellation Notice for Non-Payment of Premium.

"San Francisco, Dec. 12th, 1927.

"To Western States Life Insurance Co.

"995-Market St. San Francisco.

"Payment has not been made at this office of the premium of \$54.35 under Policy No. 141094 issued to Western States Life Insurance Co., loss, if any, payable to Ditto, written to cover \$400.00 on 1925 Ford Coupe at San Francisco, from July 31st, 1926.

"And you are hereby notified that unless said premium be paid on or before * * * days from the date of service of this notice, said policy, and the whole thereof, including the Mortgage Agreement, if any, will stand cancelled for non-payment of premium without further notice, and thereafter be null and void, and no liability will exist thereunder.

"In the event of cancellation as above, demand is hereby made on you for pro rata earned premium of \$54.35 which must be paid at the San Francisco office of this Company without delay, and demand is also made on you for the return of said Policy to the undersigned.

"Provident Fire Insurance Co.

"By Watson & Taylor, General Agents."

Defendant urges that its demurrer was properly sustained because the notice is not libelous, as (1) it does not refer to plaintiff either directly or by reference, and (2) it does not constitute any charge against him.

[1-4] As to the first point, it is necessary that the words should have been published concerning the plaintiff, and should have been understood by at least one third person to have concerned him. *De Witt v. Wright*, 57 Cal. 576; *Nidever v. Hall*, 67 Cal. 79, 7 P. 136. "Defamatory words to be actionable must refer to some ascertained or ascertainable person, and that person must be plaintiff (citing *Rhodes v. Naglee*, 66 Cal. 677 [6 P. 863]; *De Witt v. Wright*, supra; *Skrocki v. Stahl*, 14 Cal. App. 1 [110 P. 957]). If the words used really contain no reflection upon any particular individual, no averment can make them defamatory. It is not necessary that plaintiff

should be mentioned by name if the words used in describing the person meant can be shown to have referred to him and to have been so understood (citing *Peterson v. Rasmussen*, 47 Cal. App. 694 [191 P. 30])." 36 Cyc. 1159. Plaintiff claims that the apparent deficiency of reference to him in the notice is supplied, in accordance with section 460 of the Code of Civil Procedure, by his allegation that the defendant published "*of and concerning the plaintiff*" the above notice. "By this provision" (referring to said section) "the inducement and colloquium are dispensed with, and, if the words charged are libelous in themselves, the plaintiff is only required to allege that the libelous words were spoken 'of and concerning the plaintiff.' This is an issuable fact, as was the colloquium under the former system, and, if denied, must be established at the trial. If the words used are not libelous in themselves, or if they have some occult meaning or local signification, and require proof to determine their meaning, or to show that they are libelous, or if they are words in a foreign language, it is necessary to make such allegation of their meaning as will show them to be actionable, and by averment 'to ascertain that to the court which is generally or doubtfully expressed.' *Van Vechten v. Hopkins*, 5 Johns. [N. Y.] 220 [4 Am. Dec. 339]. 'The statute dispenses with them (that is, the colloquium and innuendo) only so far as they show that the defamatory words applied to the plaintiff, and goes no further. The averments necessary in common-law pleading to show the meaning of the words must still be made.' Bliss, Code Pl. § 305. See, also, *Fry v. Bennett*, 5 Sand. [7 N. Y. Super. Ct.] 54; *Petsch v. Dispatch P. Co.*, 40 Minn. 291, 41 N. W. 1034; *McLaughlin v. Russell*, 17 Ohio, 479; *Wesley v. Bennett*, 5 Abb. Prac. [N. Y.] 498; *Pike v. Van Wormer*, 5 How. Prac. [N. Y.] 171; *Cook v. Rief*, [20 Jones & S.] 52 N. Y. Super. Ct. 302." *Harris v. Zanone*, 93 Cal. 65, 28 P. 845, 846. If the language of the notice is libelous in itself, this allegation is sufficient (*Rhodes v. Naglee*, supra; *Schomberg v. Walker*, 132 Cal. 224, 64 P. 290; *Bohan v. Record Pub. Co.*, 1 Cal. App. 429, 82 P. 634; *Skrocki v. Stahl*, supra; *Peterson v. Rasmussen*, supra), but, if it is not, the extrinsic facts which make it libelous must be alleged (*Schomberg v. Walker*, supra).

[5, 6] A consideration of this question as to whether the language is libelous in and of itself necessarily involves a consideration of the second point urged by the defendant, that is, the notice does not constitute any charge against the plaintiff. If the language of the notice is fairly included within the definition of libel, given in section 45 of the Civil Code, it is libelous per se. *Tonini v. Cevasco*, 114 Cal. 266, 46 P. 103; *Schomberg v. Walker*, supra; *Stevens v. Snow*, 191 Cal. 58, 214 P. 968; *Maher v. Devlin*, 203 Cal. 270, 263 P. 812.

Since there is nothing in the notice itself, especially in absence of reference to the plaintiff or any charge against him, which exposes him to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation, it is obvious that the notice is not libelous per se. "To constitute a libel, it is not necessary that there be a direct and specific allegation of improper conduct, as in a pleading. The charge may be either expressly stated or implied, and in the latter case the implication may be either apparent from the language used, or of such a character as to require the statement and proof of extrinsic facts (inducement, colloquium, and innuendo) to show its meaning. In the last case, proper allegations and proofs of the facts necessary to make the meaning of the language apparent will be required. Otherwise, whether the charge be directly made or merely implied, the publication, without averment, colloquium, or innuendo, will in itself constitute a libel." *Schomberg v. Walker*, supra, at page 227 of 132 Cal., 64 P. 290, 291.

"Where the words are actionable in themselves, there is no occasion for inducement to be alleged; but, where the words are not actionable, they may be made so by the inducement, and it is then no more necessary to allege special damages than where the words are actionable in themselves. So long as they are made actionable by appropriate pleading, it is immaterial whether this comes about through the words themselves or through the words coupled with the inducement.

"Words not actionable in themselves may be made so by a colloquium and proper averments. *Newell, Defam.* pp. 603, 613, citing *Stancell v. Pryor*, 25 Ga. 40. It is the office of the inducement to narrate the extrinsic circumstances which, coupled with the language published, affect its construction, and render it actionable, where, standing alone, and not thus explained, the language would appear either not to concern the plaintiff, or, if concerning him, not to affect him injuriously. *Townsh. Sland. & L.* p. 554, and notes." *Jarman v. Rea*, 137 Cal. 339, 345, 70 P. 216, 218.

"The rule which governs the action for libel in such cases is perfectly well settled. Words, which on their face appear to be entirely harmless, may, under certain circumstances, convey a covert meaning, wholly different from the ordinary and natural interpretation put upon them. To render such words actionable, it is necessary for the pleader to aver that the author of the libel intended them to be understood, and that they were in fact understood by those who read them, in their covert sense." *Maynard v. Fireman's Fund Co.*, 47 Cal. 208; *Edwards v. San Jose, etc.*, Publishing Soc., 99 Cal. 435, 37 Am. St. Rep. 70, 34 P. 128; *Ingraham v. Lyon*, 105 Cal. 257, 38 P. 892." *Ervin v. Record Publishing Co.*, 154 Cal. 79, 81, 97 P. 21, 22, 18 L.

R. A. (N. S.) 622. See, also, *Nidever v. Hall*, supra.

[7] By way of inducement, the amended complaint alleges the following extrinsic facts: That the Western States Life Insurance Company was a client of plaintiff, with whom he had transacted insurance business as broker, that the policy of insurance, referred to in the notice, was solicited, obtained, and secured by him, and he brokeraged the policy through the defendant, that is to say, the defendant, as general agent, wrote the policy in the Provident Fire Insurance Company and delivered it to plaintiff, who delivered it to the Western States Life Insurance Company and, at the same time, collected the premium, and prior to the notice he remitted to defendant the premium, less his brokerage. By way of innuendo (i. e., meaning), the complaint further alleges defendant published the notice "for the purpose of conveying to and advising the Western States Life Insurance Company that this plaintiff was a defaulter and that he had committed the crime of embezzlement and the same did charge and declare that he had in truth and in fact embezzled the said sum of Fifty-four dollars and $35\frac{100}{100}$ (\$54.35), all of which was false and wholly untrue and known to be false and untrue by the defendant herein at the time of the publication of the same; that defendant, by the publication of said libel, intended and did charge that plaintiff had converted said premium to his own use and that he, the said plaintiff, embezzled said money; that defendant, in the publication of said libelous communication, intended that the same should be understood by said Western States Life Insurance Company * * * to charge this plaintiff with the crime of embezzlement and that the said Western States Life Insurance Co., * * * did understand and believed said libelous communication as charging and intending to charge plaintiff with the crime of embezzlement."

The rule of construction to be applied to the complaint is well stated in *Bettner v. Holt*, 70 Cal. 270, 274, 11 P. 713, 715, as follows:

"In the interpretation to be placed upon language charging the publication of a libel, a court of justice is to put such construction upon the words which it contains as may be derived 'as well from the expressions used as from the whole scope and apparent object of the writer.' *Spencer v. Southwick*, 10 Johns. [N. Y.] 259; *Cooper v. Greeley*, 1 Denio [N. Y.] 358.

"And not only is the language employed to be regarded with reference to the actual words used, but according to the sense and meaning, under all the circumstances attending the publication, which such language may fairly be presumed to have conveyed to those to whom it was published; so that in such cases the language is uniformly to be regarded with what has been its effect, actual

or presumed, and its sense is to be arrived at with the help of the cause and occasion of its publication.

"And in passing upon the sufficiency of such language as stating a cause of action, a court is to place itself in the situation of the hearer or reader, and determine the sense or meaning of the language of a complaint for libelous publication according to its natural and popular construction. Townsh. Sland. § 133."

"It is not required that the facts should be set forth with all the technicality or precision of an indictment, if the crime be imputed in the ordinary language usually employed to denote it in lay conversation." Jarman v. Rea, supra, at page 345 of 137 Cal., 70 P. 216, 218. See, also, Schomberg v. Walker, supra; Carl v. McDougal, 43 Cal. App. 279, 184 P. 885. "Embezzlement is the fraudulent appropriation of property by a person to whom it has been intrusted." Pen. Code, § 503. Applying a liberal construction (Ingraham v. Lyon, 105 Cal. 254, 38 P. 892), the most that appears from the notice, viewed in the light of the extrinsic facts alleged, is that plaintiff collected the premium from his client, and that the Provident Fire Insurance Company or defendant as its agent failed to receive it. There is nothing, either directly or inferentially, to show that plaintiff was intrusted with the premium or fraudulently appropriated it. In short, no words are used in the notice which, even if construed by aid of the extrinsic facts, remotely charge embezzlement.

[8-11] But, in the innuendo, the complaint alleges that defendant, by the notice, meant to charge plaintiff with that crime, and was so understood by the Western States Life Insurance Company. As the words in the notice are not actionable per se, the innuendo may only interpret their meaning, but cannot introduce a meaning broader than the words naturally bear in view of the facts alleged in the inducement. Grand v. Dreyfus, 122 Cal. 58, 54 P. 389. Where the words can bear but one meaning, and that is obviously not defamatory, no innuendo can make the words defamatory. Pollock v. Evening Herald Pub. Co., 28 Cal. App. 786, 154 P. 30; Des Granges v. Crall, 27 Cal. App. 313, 149 P. 777. Since the notice, together with the inducement, do not support the innuendo, the following rule is applicable: "It cannot be disputed that it is for the court to determine whether, in the light of such extrinsic facts as are alleged the writing can be a libel. If, in the light of such extrinsic facts, the article is not fairly susceptible of the defamatory meaning sought to be attributed to it, the complaint fails to state a cause of action. Of course, if the language of the article is capable of two meanings, one of which is harmless and the other libelous,

and it is alleged that the same was used and understood as conveying the latter meaning, a cause of action is stated, and it is the province of the jury to determine in which sense the language was used and understood by the readers of the article. But it is for the judge to determine whether the language used is capable of the defamatory meaning claimed for it by the plaintiff. See Van Vactor v. Walkup, 46 Cal. 124, 133." Mellen v. Times-Mirror Co., 167 Cal. 587, 593, 140 P. 277, 279, Ann. Cas. 1915C, 766; Maher v. Devlin, 203 Cal. 270, 263 P. 812.

Since the demurrer was good upon both points, the trial court properly sustained it, and therefore the judgment is affirmed.

We concur: TYLER, P. J.; CASHIN, J.

209 Cal. 74

**RECLAMATION DIST. NO. 833 et al. v.
AMERICAN FARMS CO.★**
Sac. 4134.

Supreme Court of California.

Feb. 24, 1930.

Rehearing Denied March 20, 1930.

- 1. Torts** ⇨21—One contributing to damage is liable, though his proportional contribution cannot be accurately measured.

One who contributes to a damage cannot escape liability because his proportional contribution to the result may not be accurately measured.

- 2. Waters and water courses** ⇨177(1)—Some damage must be shown to enjoin drainage of water through drainage districts' ditches.

Before injunction against drainage of water from defendant's rice lands through plaintiff drainage districts' canals and drainage ditches is authorized, some damage must be shown.

- 3. Waters and water courses** ⇨177(1)—Drainage districts held not entitled to injunction against drainage from rice lands through their ditches on ground that increased flowage, not shown to be contemplated, will cause injuries to lands, for which they will be liable.

Drainage districts held not entitled to injunction against drainage of water from defendant's rice lands through their canals and ditches on ground that increased use of natural water courses by defendant for such purposes will cause recurrence of flooding and injuries to basin lands, for which plaintiffs will be liable under contracts with landowners and previous injunctive order, in absence of showing that any such increase in rice production as to cause such increased flowage is contemplated or threatened by defendant or other rice growers.

- 4. Property** ⇨7—Owner may use property as he pleases, so long as he does not injure others (Civ. Code, § 3514).

The maxim, "Sic utere tuo ut alienum non lædas," incorporated in Civ. Code, § 3514, implies that one may make any use of his own property which he pleases, so long as he does not injure others.

- 5. Waters and water courses** ⇨162—Rice grower may discharge drainage waters by natural courses on its land as against drainage districts diverting them into their ditches.

Rice grower, in reasonable enjoyment of its own land, may use natural waterways thereon as conduits for discharge of drainage waters, as against drainage districts complaining of drainage thereof through their canals and ditches.

- 6. Waters and water courses** ⇨179(4)—Drainage districts held not entitled to injunction against natural drainage from defendant's rice lands into their ditches, in absence of showing of injury or threatened injury to their works.

Drainage districts held not entitled to injunction against drainage of water from de-

fendant's rice lands by natural water courses thereon through districts' canals and ditches, in absence of showing of injury or threatened injury to plaintiffs' works or property, though court's finding that there was no evidence that any waters drained from defendant's land ever reached plaintiffs' works was contrary to expert testimony based on physical facts, in view of finding, supported by evidence, that such waters could reach plaintiffs' works only by artificial diversion thereof by plaintiffs themselves.

- 7. Waters and water courses** ⇨177(1)—Drainage districts held not entitled to injunction against drainage from defendant's rice lands through their ditches on theory that it may ripen into easement (St. 1903, p. 291, as amended; St. 1885, p. 204, as amended).

Drainage districts, created under St. 1903, p. 291, as amended, and St. 1885, p. 204, as amended, are public corporations, and hence not entitled to injunction against drainage of water from defendant's rice lands through districts' canals and ditches, on theory that defendant's use of their works may ripen into easement, since private rights may not be acquired by prescription in or to property devoted to public use.

In Bank.

Appeal from Superior Court, Colusa County; Ernest Weyand, Judge.

Action by Reclamation District No. 833, Drainage District No. 100 of Butte County, and Butte Creek Drainage District, against the American Farms Company, a corporation. Judgment for defendant, and plaintiff drainage districts appeal.

Affirmed.

Superseding opinion of the District Court of Appeal, 276 P. 1076.

George F. Jones, of Oroville, and Jerome D. Peters, of Chico (W. H. Spaulding, of San Francisco, of counsel), for appellants.

George E. Crothers, C. A. S. Frost, and Treadwell, Van Fleet & Laughlin, all of San Francisco, for respondent.

SHENK, J.

Appeal by the plaintiffs from a judgment for the defendant in an action to enjoin the drainage of water from the defendant's rice lands through the canals and drainage ditches and over the easements of the plaintiffs.

The plaintiff reclamation district No. 833 withdrew from the action after its commencement, and the action was thereafter prosecuted by the plaintiffs drainage district No. 100 of Butte county and Butte Creek drainage district, both of which are duly created, and existing drainage districts under the laws of the state of California. St. 1903, p. 291, as amended; St. 1885, p. 204, as amended. When the word "plaintiffs" is used herein, it will refer to the two drainage districts participating in the trial.

The lands within the exterior boundaries of the plaintiffs drainage districts, comprising some 55,000 acres, are devoted mainly to rice culture and are situated in Glenn and Butte counties northerly from a lowland called Butte sink or basin, which lies within Colusa and Sutter counties. Butte creek is a natural water course flowing southerly through the lands of Butte Creek drainage district and around the westerly side of Butte basin and empties into Butte slough, which lies south of the basin and which in turn empties into the Sacramento river.

The defendant owns land comprising about 2,200 acres in Butte county, situated generally easterly from the lands of the plaintiffs and about fourteen miles northeasterly from Butte basin, but which is not included in any drainage or reclamation district. Several natural waterways, which are normally dry during the late summer months and until the winter rains, have their courses through the defendant's lands and join Cherokee canal at a point about 200 feet below the defendant's southerly boundary. From about that point the Cherokee canal runs in a straight line southwesterly toward Butte creek and Butte basin. It is conceded that the canal has existed for so many years, at least since the eighties, that for the purposes of this controversy it may be considered to be a natural water course (see *San Gabriel V. C. Club v. County of Los Angeles*, 182 Cal. 392, 397, 188 P. 554, 9 A. L. R. 1200), and it is not questioned that its waters flow into Butte creek at a point above Butte basin.

Rice culture is a comparatively recent agricultural development in the state of California. Prior to the time when it was commenced in the region involved in this controversy, Butte basin, which each year during the rainy season became flooded by the overflow of water from Butte creek, had no continuous outlet to the Sacramento river. Except for evaporation and seepage the waters remained in the basin until the increased flow from Butte creek in the winter season raised the water table so that the waters flowed over the rim of the basin into Butte slough, which carried them to the Sacramento river. No complaint was made by the landowners growing various crops on lands in and bordering the basin until rice was produced on such a scale that the drainage of the irrigation waters from the rice fields so enlarged the volume of waters in Butte creek that a flooding of the basin occurred and damaged and destroyed the unharvested bean and other crops of farmers in and around the basin. As a result the growers of general crops in 1919 obtained a judgment in the superior court of Colusa county enjoining the rice growers from emptying their drainage waters into Butte basin to the injury of the complaining owners of lands in and near the basin. Consequently the plaintiffs and other districts were formed for the purpose of con-

structing works to divert the drainage waters to the Sacramento river without injury to neighboring farmers. To accomplish the purposes for which they were organized, the districts purchased rights of way and other easements to construct ditches, canals, cuts, weirs, levees, etc. The principal works involved herein are a canal which diverts water from Butte creek at a point at the upper end of the basin, called Butte Creek drain, and a cut, known as Moulton cut, and appropriate levees at the lower end of the basin designed to drain waters from the basin into Butte slough and on to the Sacramento river. By contract with various gun clubs owning lands in the basin, the districts obtained flowage rights over the basin but obligated themselves to maintain a specified level of water in the basin for the benefit of the clubs.

At the time of the former litigation above referred to, the defendant was not engaged in the production of rice except in small quantities in 1915 and 1917 and was not a defendant in any of the proceedings, nor was its land included within any drainage district. Beginning in the year 1921, the defendant has each year produced rice on a larger scale, ranging in amount from 300 to 675 acres, and intends to continue the production of rice on its land to which, according to the evidence, it is best suited, because, like the other land in that region devoted to rice culture, the subsurface is an impervious stratum of hardpan. For the purpose of irrigating its rice fields, the defendant has drilled eight deep wells from which, by means of pumps, it has developed a flow of from 1,600 to 1,900 gallons a minute for each well. In the rotation of its acreage the defendant operates the number of wells, usually two or three, necessary to irrigate the particular portion of its acreage which in that year is planted to rice.

As is well known, rice culture requires that irrigating waters stand on the planted surface throughout the summer months and until the rice has matured and is ready for harvest. The waters are ponded on the surface by artificial ditches or "checks." Naturally some of this water seeps through the ditches and otherwise escapes during the irrigating season. Prior to the harvest, in late September and early October, this large volume of irrigating waters is drained off the surface. The seepage and escaping waters during the irrigating season and the drainage waters from the defendant's lands in the drainage or run-off period are discharged into one or more of the several natural waterways on the defendant's lands which empty into Cherokee canal. There is a constant though shallow stream of water about twenty feet wide in the Cherokee canal during the summer months. This flow comprises the seepage waters flowing or discharged into it from the rice fields along its banks and along the banks of adjacent streams. During the

irrigating season there are one or more diversions of water from the Cherokee canal below the defendant's lands. How much, if any, of these seepage waters ultimately reach Butte creek or Butte basin is not shown. During the run-off season, however, it appears that no diversions for irrigating purposes are made, but that all rice growers are engaged in draining the irrigating waters from their fields and that the stream of water in the canal at this period is largely increased and flows into Butte creek, and a certain proportion of it is diverted through Butte creek drain into Butte basin. It was in evidence that the amount of water which escaped from the defendant's lands during the irrigating season varied from two to four second feet and that during the run-off period the volume of water flowing from the defendant's property was from six to ten second feet.

The trial court found that "the portion of said water which is not consumed in such irrigation is drained upon defendant's said land into natural and ancient watercourses only to the extent necessary in the proper, reasonable and careful irrigation of said land, and without flowage or seepage upon any property of plaintiffs and without seepage or flowage out of the natural channels of said ancient watercourses"; that there is no evidence that any of the waters drained from the defendant's lands "ever reached any of the canals, works or easements of the plaintiffs," and that they "could only reach the same by being artificially diverted by the plaintiffs; * * *" that the defendant "intends to continue to drain said irrigation water from its rice land into said natural watercourses, but does not threaten to drain the same into any canals, ditches or easements of the plaintiff districts, and there is no evidence showing that said water has ever in any way damaged said right of way or easements of plaintiffs, or that the same will in any way damage or injure the same, and it is untrue that, if the same should continue, it will ripen into any easement or right against the plaintiffs." The court accordingly concluded that the plaintiffs were not entitled to any relief.

The main contention of the appellants is that the findings of the court are unsupported by and are contrary to the evidence.

There was no direct oral evidence that any of the water drained into the natural water courses on the defendant's land ever reached the works of the plaintiffs. The reason for this lack of proof is obvious because of the commingling of such drainage waters with like waters of other rice growers farther down the canal and the impossibility of identifying one flow of water from another. The most that could be said by the experts produced on behalf of the plaintiffs was that they "believed" or were of the "opinion" that some of the defendant's drainage water found

its way to the plaintiffs' works fifteen or more miles below. This opinion evidence was necessarily based on physical facts. That is to say, if it was shown that more water was turned into the water courses on the defendant's land than could seep away or evaporate before it reached the plaintiffs' works and there was no other outlet, the conclusion based on the law of nature would be that the defendant's drainage water passed to and through the plaintiffs' works. The finding of the court that there was no evidence that any of the waters drained from the defendant's land "ever reached any of the canals, works or easements of the plaintiffs" would seem, therefore, to be contrary to the physical facts. But as bearing upon the plaintiffs' right to an injunction, this finding must be considered in conjunction with the further finding, conclusively established by the evidence, that such drainage waters could reach the plaintiffs' works, if they did at all, only by the artificial diversion thereof by the plaintiffs themselves.

[1-4] It is well settled that one who contributes to a damage cannot escape liability because his proportional contribution to the result may not be accurately measured. *Learned v. Castle*, 78 Cal. 454, 18 P. 872, 21 P. 11; *People v. Gold Run D. & M. Co.*, 66 Cal. 138, 4 P. 1152, 56 Am. Rep. 80. But before an injunction be authorized some damage must be shown, and the finding of the court that there is no evidence showing that the defendant's drainage water has in any way damaged the plaintiffs' works or property is supported by the record. It is claimed, however, that a continued and increased use by the defendant of said natural water courses for drainage purposes will so overtax and burden the plaintiffs' properties that there will be a recurrence of the flooding in and injuries to the basin lands for which, under its contracts and the previous injunctive order of the superior court of Colusa county, the plaintiffs will be liable. However, no showing is made that any such increase in rice production in this region by which such an increase in the quantity of waters flowing into the basin would be provoked is contemplated or threatened either by the defendant or any other growers of rice. In the absence of any such showing, to which the defendant may be found to be a threatening factor, we think the plaintiffs cannot be said to have established a right to injunctive relief. The maxim, "*Sic utere tuo ut alienum non laedas*," which is incorporated in the statute law of this state (Civ. Code, § 3514; see *Green v. General Petroleum Corp.* [Cal. Sup.] 270 P. 952, 60 A. L. R. 475), implies that one may make any use which he pleases of his own so long as he does not injure others. *Galbreath v. Hopkins*, 159 Cal. 297, 113 P. 174.

[5, 6] We deem it unnecessary to enter upon a discussion of the principles relating to tres-

pass, negligence, or nuisance. Upon any theory it is clear that as between the parties to this controversy the defendant, in the reasonable enjoyment of its own land, may use the natural waterways on its property as a conduit for the discharge of the rice drainage waters. See 26 Cal. Jur., p. 143, and cases cited. That some of those waters may pass through or over the works of plaintiffs is due to the fact that the plaintiffs have voluntarily come to those points and diverted the water, and the fact that by those voluntary diversions some of the waters may flow over the basin, from the present showing at least, may as well be a benefit as a detriment to the plaintiffs. In the absence of any showing of injury or threatened injury, we conclude that to enjoin the defendant from any reasonable use of the water courses on its land whereby as a consequence its rice drainage waters seep or flow down to and through the works and easements of the plaintiffs would be unduly to restrict the reasonable use to which the defendant is entitled. Whether the result would be otherwise were injury or threatened injury shown is not a question presented nor decided on this appeal.

[7] The plaintiffs are not entitled to injunctive relief on the theory that the defendant's use of its works may ripen into an easement. The plaintiffs are public corporations, and private rights may not be acquired by prescription in or to property owned by them which is devoted to a public use. *Central Pacific Co. v. Droge*, 171 Cal. 32, 40, 151 P. 663; *Patton v. City of Los Angeles*, 169 Cal. 521, 147 P. 141; *County of Placer v. Lake Tahoe Ry. Co.*, 58 Cal. App. 764, 783, 209 P. 900; *Martin v. City of Stockton*, 39 Cal. App. 552, 179 P. 894.

The trial court's finding that there was no evidence of actual or threatened injury is sustained by the evidence and fully supports the judgment herein.

The judgment is affirmed.

We concur: RICHARDS, J.; SEAWELL, J.; CURTIS, J.; LANGDON, J.; PRESTON, J.

209 Cal. 14

HILL v. KNIGHT et al.
Sac. No. 4333.

Supreme Court of California.
Feb. 19, 1930.

1. Brokers ⇨88(3)—Motion for nonsuit in broker's action for commission should have been granted, under evidence showing broker was not procuring cause of sale.

In broker's action for commission where evidence showed that broker did not consummate sale of property, did not have exclusive

agency, that he knew owners claimed right to sell property themselves, did not inform owners that he had endeavored to interest purchaser in property, and that owners sold property without knowledge that broker had called it to attention of purchaser, *held*, that defendants' motion for nonsuit should have been granted.

2. Brokers ⇨49(1)—Merely calling purchaser's attention to property and urging desirability of its purchase is not sufficient to support judgment awarding commissions.

Merely calling attention of a prospective purchaser to property and urging upon him desirability of its purchase is not sufficient basis to support judgment awarding any commissions.

Preston, J., dissenting.

In Bank.

Appeal from Superior Court, Yolo County;
Peter J. Shields, Judge.

Action by W. L. Hill against Edna L. Knight and others. Judgment for plaintiff, and defendants appeal.

Reversed.

For opinion of the District Court of Appeal, see 276 P. 614.

R. M. Rankin, of Willows, for appellants.
J. L. Royle, of Berkeley, for respondent.

PER CURIAM.

The judgment for the plaintiff in this cause was reversed by the District Court of Appeal, Third District, Mr. Justice Plummer writing the opinion. A petition for a hearing in this court was granted. After further consideration of the record, we are satisfied with the reasoning and conclusions of the District Court of Appeal, and adopt the same as the opinion of this court. It is as follows:

This appeal is from a judgment in favor of the plaintiff after motion for new trial had been denied by the court. The action was for recovery of commissions alleged to be due the plaintiff on account of the sale of certain real estate, was tried before a jury, and resulted in a verdict in favor of the plaintiff.

The plaintiff was a real estate broker doing business in Sonoma county, and on or about the 19th day of November, 1923, the defendants executed and delivered to the plaintiff a writing authorizing the plaintiff, for a period of 30 days, to act as agent in making sale of certain real and personal property described and referred to in said instrument. Time was made the essence of the agreement or authorization, and under its terms it expired 30 days after date. On the 11th day of December, 1923, R. N. Rankin, an attorney for the defendants, acting under instructions from one of them, wrote the plaintiff a letter extending the authorization for 30 days from its expiration date, with the understanding that there was no change in price and that the contract or authorization did not confer any exclusive

rights upon the plaintiff. The selling price of the property mentioned in the writing executed and delivered to the plaintiff fixed the real estate at \$35,000, which price included all machinery, farm implements, horses, harness, and saddles then on the property. The writing also included an authorization to sell 250 head of cattle, more or less, at \$30 per head. The plaintiff was to receive 5 per cent. commission on the selling price of the real estate, and \$1 per head for the cattle sold. The terms of sale were also set forth in the authorization, and the real estate, consisting of 2,823.93 acres, sufficiently described by reference to deeds, etc. The record shows that no sale was effected under the authorization to which we have referred, nor during the period of time mentioned in Rankin's letter extending the operation of the agreement for 30 days on and after December 9, 1923. As we have said, time was made the essence of the original agreement. In the extension of the authorization for 30 days mentioned in the letter of Mr. Rankin to the plaintiff, it is specifically set forth that the heirs, which means the persons who executed the authorization, will, if they have the opportunity, sell the property, or that they desire to sell the property. This, of course, is only a statement of a right which the heirs possessed during the entire period of time heretofore mentioned, but constituted a further notice to the plaintiff. No sale of the ranch having been effected, it appears that on or about May 25, 1924, one of the defendants, Mrs. Edna L. Knight, wrote a letter to the plaintiff, which, among other things, contained the following: "In regard to the stock ranch, so far as I know it has never been listed with anyone but yourself and while the heirs would not renew the option, if you consummated a sale, you would be protected in your commission. I think the price would still hold good with the exception of the cattle which of course would be revalued. At present day prices I believe cattle will be worth more money in the near future and then of course we would not sell either ranch or cattle separately. One depends on the other. The only assurance I can give you is that if you sell the property you will be protected in your commission—the price the same as that given you with the exception of the stock as I stated above." In this letter, as shown by the excerpt, it was stated that the heirs would not renew the option; that is, the agreement to which we have referred as having been executed and delivered to the plaintiff on or about the 9th day of November, 1923, authorizing the plaintiff, as agent, to make sale of the property therein mentioned. The letter, however, did state that if the plaintiff consummated a sale, he would be protected in his commission. The information is also imparted in the letter that any sale

made by the plaintiff must be of both the ranch and the cattle; that they would not consider separate sales. The record shows that there was no further communication relative to the sale of the property mentioned in the authorization between the plaintiff and any of the defendants. However, on or about the 30th of July, 1924, a little over two months after receipt of the letter to which we have just referred, it appears that the plaintiff had an interview with Richard Deming, Jr., at plaintiff's office in Sonoma county, but did not succeed in effecting a sale. On the 4th day of August thereafter the record shows that Richard Deming, Jr., called on the defendants in relation to buying the real property heretofore referred to, and before any negotiations were had with him by the defendants, they inquired particularly if he had seen the plaintiff, Mr. W. L. Hill, and being informed that he had not, and had had no negotiations with him, the defendants entered into negotiations with Richard Deming, Jr., for the sale of the real estate heretofore referred to and succeeded in selling said property to him for the sum of \$32,000. Thereafter, the plaintiff learning of the sale of the real property made demand for payment to him of commissions in the sum of \$1,600, and payment being refused, the plaintiff instituted this action.

[1] Upon this appeal it is insisted: First, that the defendant's demurrer to the plaintiff's complaint should have been sustained; second, that the plaintiff had no written contract for the sale of the premises referred to; third, that the court erred in denying the defendants' motion for nonsuit; and, fourth, that the court erred in its instructions to the jury. For the reasons hereinafter mentioned we do not deem it necessary to consider the defendants' demurrer to the plaintiff's complaint, nor do we need to consider the terms and conditions of the alleged contract further than to state that the plaintiff was not authorized to make any separate offer of the property mentioned therein. The letter dated May 25, 1924, which must be the basis of this action if plaintiff had any rights whatever, specifically informed the plaintiff that the real estate and the cattle must be sold together, or to use the language of the letter, "one depends on the other." The letter also informed the plaintiff that the price of the stock included in the sale would be a matter of further consideration. In other words, the letter, if it amounted to an authorization at all, simply authorized the plaintiff to offer the property for sale, accept a bid, and refer the same to the defendants, as the selling price of the cattle was not fixed. None of the other defendants herein signed the letter to which we have referred, but it appears that their attorney, in open court, stated in effect that if the letter of May 25, 1924, bound the defendant Mrs. Edna L. Knight, it bound all of the defendants,

It will be noticed, further, that the only promise made to the plaintiff was in the use of these words in the letter referred to, to wit, "if you consummated a sale, you would be protected in your commission."

Did the plaintiff bring himself within the terms of this letter, or even within the terms of the original authorization, and did the court err in denying defendants' motion for a nonsuit? These questions can be answered more readily after setting forth the testimony of the plaintiff concerning all that he did in the matter. The plaintiff testified that he saw Mr. Deming on what is known as and called the Canfield ranch, near Geyserville; that Mr. Deming was contemplating buying that ranch; that thereafter he wrote a letter to Mr. Deming concerning the property belonging to the defendants, and asked Mr. Deming to come to his office. It appears that the ranch known as the Canfield ranch, and the real property known as the Caldwell property, belonging to the defendants, was some distance apart. That in response to the letter just referred to Deming appeared at the office of the plaintiff, and they talked over the ranch belonging to the defendants; that the plaintiff told him who owned it, and "went through the details regarding it." The plaintiff testified that he told Mr. Deming he could see the president of the Chamber of Commerce at Santa Rosa; also, a Mr. Doyle, president of the bank there; he had a mortgage on the place for \$12,000. The witness then testified as follows: "And after Mr. Deming spent some two hours in the office he got up and said, 'Well, now I am not interested in the ranch,' he said, 'I don't care to figure on it, and,' he said, 'must find a cheaper ranch'; and I said, 'Well, now, you haven't seen it; I will take you up there and show it to you.' He says, 'No,' he said, 'I would be losing my time as well as yours.' So I disregarded all my data on it and threw it in the wastebasket, and disregarded him. A few days later I learned that Mr. Deming had bought the ranch, so I immediately wired the Purkitt heirs that my man had bought it and I expected to be protected on my commissions. Then I looked up the deeds. It was July 30th, the time that Deming came into my office, and the ranch deal was made on August 4th." While there is testimony in the record showing what Mr. Deming, and also a man by the name of Mr. Adams, who appears to have been interested with Mr. Deming, did after the interview with the plaintiff on July 30th, there is nothing in the record showing that the plaintiff took any further action in relation to the sale of the property mentioned in the original authorization, or in relation to the sale of the real property known as the Caldwell ranch belonging to the defendants. No effort was made by him to communicate with the defendants and inform them that either Richard Deming or Mr. Adams had been in plain-

tiff's office, or that he had given them any data or information in relation to the property. The plaintiff appears to have acted in accordance with his own statement, that he disregarded him (referring to Mr. Deming), and threw all his data in the wastebasket. As stated heretofore, the defendants made inquiry of Mr. Deming as to whether he had had any negotiations with the plaintiff Hill, or had seen the plaintiff Hill in relation to the property. We refer to this because it shows that the defendants acted in good faith, and brings them within the language of the Supreme Court of Massachusetts in the case of *Smith v. Kimball*, 193 Mass. 582, 79 N. E. 800: "The fact that the plaintiff had failed to persuade the purchaser to take the property at one price, is not of itself evidence which would justify a finding that his services were the operating and efficient cause of a subsequent sale at a somewhat lower price which yet was higher than the plaintiff had succeeded in obtaining. Nor is there any question possible as to the defendants' right to terminate the plaintiff's employment. They could have done this, acting in good faith, even if they had known who the plaintiff's customer was, and then had proceeded to deal with him themselves. (*Cadigan v. Crabtree*, 179 Mass. 474, 61 N. E. 37, 55 L. R. A. 77, 83 Am. St. Rep. 397.) * * * There is no ground on which it can be said that the defendants in throwing over the plaintiff and themselves dealing directly with A. V. Lincoln, acted in bad faith." (Citing a number of authorities.) "They could not have intended to deprive the plaintiff of his commission; for they did not know that Lincoln had been his customer." Disregarding that portion of the quotation relative to knowledge of the plaintiff's customer, the latter portion of the quotation is directly applicable here. The plaintiff took no means and made no effort to inform the defendants that he had a prospective customer or that he had even mentioned to Richard Deming that the ranch was for sale. The mere fact that the plaintiff called the attention of the property to Richard Deming is not sufficient to enable him to prevail in this action. As said in *Naylor v. Ashton*, 20 Cal. App. 544, 130 P. 181: "It must further appear that the broker performed the duty assumed by him within the time limited in his contract, or within such extension of time as may have been granted by his employer. If he failed to do that, he is not entitled to the commissions, even though he made efforts to sell property, and first called to it the attention of the party who subsequently made the purchase, unless the delay was caused by the negligence, fault or fraud of the owner"—citing *Zeimer v. Antisell*, 75 Cal. 509, 17 P. 642; *Ayres v. Thomas*, 116 Cal. 140, 47 P. 1013; *Ropes v. John Rosenfeld's Sons*, 145 Cal. 671, 79 P. 354; *Hicks v. Post*, 154 Cal. 22, 96 P. 878; *Brown v. Mason*, 155 Cal. 155, 99 P. 867,

21 L. R. A. (N. S.) 328. To the same effect is the case of *Cone v. Keil*, 18 Cal. App. 675, 124 P. 548, where it is said: "Merely putting a prospective purchaser on the track of property which is on the market will not suffice to entitle the broker to the commission contracted for, and even though a broker opens negotiations for the sale of the property, he will not be entitled to a commission if he finally fails in his efforts, without fault or interference of the owner, to induce a prospective purchaser to buy or make an offer to buy, notwithstanding that the owner may subsequently, either personally or through the instrumentality of other brokers, sell the same property to the same individual at the price and upon the terms for which the property was originally offered for sale." In *Stephens v. Anderson*, 36 Cal. App. 199, 171 P. 811, a case where the owner made sale to a purchaser to whom an agent had mentioned the property, and also where the agent had failed to communicate with the owner and inform the owner that he had called the attention of the property to the person to whom the owner thereafter sold, the court held the agent not entitled to commissions, and in so doing used the following language, which is according to the facts of this case: "There was no evidence that Stephens communicated to her any offer to purchase the property, and in these particulars we think there was a failure of proof necessary to sustain the plaintiff's case. We think the rule is fundamental and well understood that before an agent may be said to have earned a commission he is required to show that he produced to the vendor a purchaser ready, able, and willing to buy for the price and upon the terms proposed by the vendor in the agency contract. The alleged agency was in nowise an exclusive agency, and, under the conditions shown, Mrs. Anderson had the right to deal independently with anyone who desired to purchase directly from her," etc.

In the case of *Brown v. Mason*, 155 Cal. 155, 99 P. 867, 21 L. R. A. (N. S.) 328, a case which we have heretofore cited, the rule is affirmed that an agent, by merely calling the attention of the property to one who subsequently purchases the same, is not entitled to commissions unless there is some fault or fraud on the part of the owner.

In *McCoy v. Zahn Corporation*, 183 Cal. 191, 191 P. 20, the quotation which we have taken from *Cone v. Keil*, supra, is set forth and approved.

In the case of *Rosenfield v. Wall*, 94 Conn. 418, 109 A. 409, 9 A. L. R. 1189, a number of cases are cited affirming the rule which we have set forth, and then, in the annotations to that case, beginning on page 1194 of 9 A. L. R., a number of cases are quoted showing under what circumstances an owner may make sale without being liable to a broker who has performed acts similar to

those testified to by the plaintiff in this cause.

The respondent calls our attention to the following language found in 4 California Jurisprudence, 605: "To entitle a broker to his commissions as the procuring cause of a sale, it is not necessary that he should have personally conducted the negotiations between his principal and the purchaser, leading to the sale, nor that he should have been present when the bargain was completed, nor that the principal, at the time, should have known that the purchaser was one found by the broker. It is indispensable, though, that the broker was the procuring cause of the sale, so where it appears that the seller and buyer were for the first time brought together by the broker, duly authorized to act for the seller, and the sale was subsequently consummated by the seller and buyer acting independently of the broker, the broker not having abandoned his agency, and the seller not having revoked the broker's authorization or done any act from which a revocation might be implied, the inference is a reasonable one that the sale, under such circumstances, is effected through the broker's agency as a procuring cause." The respondent relies upon the first sentence of the above quotation, but a reference to the authorities cited in the subjoined note shows that the contracts upon which that statement, or that portion of the quotation is based, were entirely different from the contract under which the plaintiff was acting, assuming that the original authorization was still in full force and effect.

In the case of *Justy v. Erro*, 16 Cal. App. 519, 117 P. 575, one of the cases cited to support the statement contained in the first sentence which we have quoted from 4 California Jurisprudence, the contract reads as follows: "This contract to remain in force for a period of ninety days from the date hereof and thereafter until written notice is given to cancel, and if sale is made by me or through me during the term of this contract, or after the expiration of the same, to anyone to whom said property has been submitted by said N. P. Justy Company, I agree to pay them 2½ per cent. commission on said sale." Nothing of that kind appears in any of the papers under which the plaintiff in this action purports to have acted.

The next California case cited to support the first sentence of the quotation taken from California Jurisprudence, supra, is that of *Briggs v. Hall*, 24 Cal. App. 586, 141 P. 1067. The contract, however, in that case reads as follows: "I reserve the right to sell said property myself, or to sell said property through the agency of anyone else, but I hereby agree that in case such sale be made by myself, or through any other agency, in consideration of their services to pay said Lyman & Briggs a commission of 2 per cent on" said sale. Here, again, the facts are entirely different and justify the statement of

the law as set forth in California Jurisprudence, supra, upon a state of facts or upon a contract binding the owner to pay under conditions covered by the language found in California Jurisprudence, which contemplates an entirely different state of facts from those disclosed by the record in the case at bar. The last California case cited in support of the theory that the language which we have quoted from California Jurisprudence is applicable here, is that of *Levy v. Wolf*, 2 Cal. App. 491, 84 P. 313. The court, however, in its opinion recites the following: "In the case at bar, assuming the testimony" of the "plaintiff to be true, the name of the purchaser was given by the broker to the seller, and his offer accepted within the time allowed by the contract, and a sale consummated in accordance with the offer." That case does refer to some cases with reference to which it was said: "It is also urged that plaintiff cannot recover because he neither procured a written agreement from the purchaser, nor introduced him to the seller; and in support of this contention cites *Gunn v. Bank of California*, 99 Cal. 349 [33 P. 1105], and *Mattingly v. Pennie*, 105 Cal. 514 [39 P. 200, 45 Am. St. Rep. 87]," and then the opinion adds: "In neither of these cases was a written agreement obtained from the buyer, nor was he introduced to the seller by the broker, nor his name disclosed, nor any sale" in fact made. Then follows the language which we have heretofore quoted. And further on in the same opinion the rule is thus stated: "It is well settled, if the agent introduces or discloses the name of the purchaser, and such introduction or disclosure is the foundation on which negotiations are begun and the sale effected, he will be entitled to commissions, and this too, although in point of fact the sale may be made by the owner. In other words, he cannot avail himself of the services, and, by making a sale through information derived from the agent, deprive the latter of his commissions." Like the other cases, this discloses a state of facts entirely different from those in the case at bar, and renders respondent's statement of the law and citation of authorities inapplicable.

Nor is there anything in the case of *Haun v. Rosenmayer*, 46 Cal. App. 353, 189 P. 117, which limits the application of the cases which we have heretofore referred to showing that the plaintiff is not entitled to prevail. In the *Haun* Case we find this statement: "It is not necessary that a broker should personally conduct negotiations between his principal and the purchaser or that he should be present when the bargain is completed; it is sufficient that his efforts are the producing cause of the sale and that through his agency the purchaser is brought into communication with the seller, although the parties then negotiate in person"—citing some of the cases to which we have referred

and some of the cases which are based upon contracts providing for the payment of commissions if sale is made to any one to whom the broker has disclosed the property. But the general statement in the case of *Haun v. Rosenmayer*, while a correct statement of the law, is not all of the law applicable to this case, because in the case at bar the plaintiff, by his own testimony, stopped the negotiations and made no effort to communicate with the defendants the incident of his conference with *Richard Deming, Jr.*, or that *Deming* might be considered a possible purchaser.

Nor do we find anything in the case of *Sessions v. Pacific Imp. Co.*, a corporation, 57 Cal. App. 1, 206 P. 653, which limits anything stated in the cases which we have referred to showing that mere disclosure of the property is not sufficient upon which to base an action for commissions when the property is thereafter sold by the owner under circumstances such as appear in the case at bar. The *Sessions* Case is too long to admit of any quotations therefrom.

In view of the fact that the plaintiff's own testimony shows that he did nothing more than has been held insufficient in the case of *Cone v. Keil*, supra, which case was affirmed in *McCoy v. Zahn Corp.*, supra; that he did not consummate any sale of the property referred to in this action; that he did not have any exclusive agency; that he knew the defendants claimed the right to sell the property themselves; that there was no communication between the plaintiff and the defendants for more than two months after the receipt of the letter under which the plaintiff claimed the right to act; that the plaintiff made no effort to inform the defendants, or any of them, that he had endeavored to interest *Richard Deming, Jr.*, in the purchase of the defendants' property; that the defendants made the sale of the property without any knowledge that the plaintiff had called it to the attention of the purchaser; that the record shows that the defendants acted in entire good faith without any subterfuge, without any attempt to make a sale of the property so as to deprive the plaintiff of commissions; that the record shows no fraud or delay on the part of the defendants; and in further view of the cases which we have cited applicable to the facts involved in this action—we find no escape from the conclusion that the defendants' motion for a nonsuit should have been granted. The fact that the purchaser, after having his attention called to the property belonging to the defendants, may have come to the conclusion that he did not wish to deal with the agent, or that he could drive a better bargain by dealing directly with the owners, does not alter the situation or give the plaintiff any right of action against the defendants.

[2] As to the alleged errors in the instruc-

tions, a general statement in relation thereto will suffice. The jury was instructed upon the theory that the plaintiff, by simply calling the attention of the purchaser to the property and explaining the desirability of its purchase, entitled the plaintiff to a judgment; that such action would constitute a proximate cause, irrespective of whether the vendors, the defendants in this action, had any knowledge that the purchaser was one found by the plaintiff, or that the plaintiff had placed the property in question before the purchaser for consideration, and irrespective of the fact that the sale was consummated by the defendants, when the authority, if any, given to the plaintiff, required him to consummate the sale. Under the facts as disclosed by the record in this case and the contract or authorization under which the plaintiff acted, the California cases which we have cited show that merely calling the attention of a prospective purchaser to the property involved and urging upon him the desirability of its purchase is not sufficient basis to support a judgment awarding any commissions. The cases which we have cited based upon an authorization to a broker such as here presented show the correct theory of the law to be adopted in instructing the jury.

The judgment is reversed.

PRESTON, J.

I dissent.

I think the evidence sufficient to sustain the verdict of the jury that plaintiff, acting under a proper authorization, was the procuring cause of the sale.

209 Cal. 52

KEATON et al. v. MUNICIPAL COURT OF LOS ANGELES et al.

L. A. 11849.

Supreme Court of California.

Feb. 21, 1930.

1. Criminal law $\S$ 260(4)—Serving and filing statement on appeal is essential to perfect appeal from municipal court judgment by giving oral notice (Pen. Code, $\S$ 1468).

To perfect appeal from judgment rendered in municipal court in criminal matters by giving oral notice of appeal, under Pen. Code, $\S$ 1468, statement on appeal must be served and filed within five days after oral notice, and failure to do so renders notice of appeal ineffectual for any purpose, and judgment appealed from may be enforced as if no attempt had been made to perfect appeal therefrom.

2. Criminal law $\S$ 260(4)—Where statement on appeal was not filed within 5 days after oral notice, appeal was not perfected so as to defeat appeal by written notice (Pen. Code, $\S$ 1468).

Where oral notice of appeal from conviction in municipal court was not followed by serving

and filing of statement on appeal within five days thereafter, appeal was not perfected under Pen. Code, $\S$ 1468, so as to defeat defendant's right under same section to appeal by filing written notice of appeal within fifteen days after judgment, since appeal taken by means of written notice of appeal under such circumstances is not second appeal from judgment, because appeal under oral notice never perfected.

In Bank.

Application by Harry Keaton and another for a writ of mandamus, prayed to be directed to the Municipal Court of Los Angeles, Los Angeles County, and Hon. Caryl M. Sheldon, Judge thereof, to compel settlement of proposed statement on appeal.

Writ granted.

Max Lewis, of Los Angeles, for petitioners.

Lloyd S. Nix, City Pros., and Joe W. Matherly and F. W. Fellows, Deputy City Pros., all of Los Angeles, for respondents.

CURTIS, J.

Petition for writ of mandate directed to the respondent court and to the Honorable Caryl M. Sheldon, the judge of said court, commanding said court to settle and allow a proposed statement on appeal filed by petitioners in said court.

Petitioners were on the 22d day of March, 1929, convicted in the municipal court of the city of Los Angeles of the crime of petty theft. On the same day they each gave oral notice of appeal from the judgment of conviction entered against them on said 22d day of March, 1929. The petitioner Love, on March 30, 1929, and the petitioner Keaton, on the 1st day of April, 1929, filed written notice of appeal from said judgment, and on April 3, 1929, petitioners served and filed in said court their proposed statement on appeal from said judgments. Demand has been made upon the respondent court to settle said statement, but respondent has refused to settle said statement or to take any action thereon.

The grounds upon which the respondent court bases its refusal to settle said statement is that, while said statement was filed within five days after the giving of petitioners' written notices of appeal, it was not served or filed within five days after the giving of their oral notice of appeal. This same point was raised and decided adversely to respondent's contention by this court in the recent case of *Hansen v. Municipal Court* (November 22, 1929), 282 P. 384. Respondent contends that the *Hansen* Case was erroneously decided, and in support of its contention, cites the following decisions of this court: *Hill v. Finnigan*, 54 Cal. 311; *Brown v. Plummer*, 70 Cal. 337, 11 P. 631; *Tompkins v. Montgomery*, 116 Cal. 120, 47 P. 1006; *Peo-*

ple v. Bank of San Luis Obispo, 152 Cal. 261, 92 P. 481.

[1, 2] These cases undoubtedly hold, as contended by respondent, that there cannot be two appeals from the same judgment, and that, where the appellant has perfected a valid appeal from a judgment, such appeal vests the appellate court with jurisdiction of the case, and that any proceedings thereafter taken by appellant to take a separate or second appeal from said judgment are ineffectual for any purpose. These authorities, in our opinion, contain correct statements of the law upon the right of a party to take two separate appeals from a judgment against him. We think, however, that they are not applicable to the facts in the present action. While the petitioners gave oral notice of appeal, they did not serve or file any statement on appeal within five days after giving said notice of appeal as provided by section 1468 of the Penal Code. This section prescribes the procedure to be taken in the preparation, service, and filing of statements on appeal from judgments rendered in municipal and justices' courts in criminal matters, and expressly provides that, "if no statement is filed and served as herein provided (that is, within five days after giving notice of appeal), the appeal is ineffectual for any purpose, and shall be deemed dismissed, and the judgment and order appealed from shall be enforced as if no appeal had been taken." By this provision of the statute, the Legislature has made the serving and filing of the statement on appeal an essential and necessary step to be complied with in perfecting an appeal from a judgment of the municipal court. Unless the statement on appeal is served and filed within the five-day period, "the appeal is ineffectual for any purpose." The oral notice of appeal, given by the petitioners, as it was not followed by the serving and filing of a statement on appeal within five days, cannot be regarded as a valid appeal from the judgment so as to defeat the right of petitioners given by said section of the Code to appeal by filing written notice of appeal within fifteen days after judgment. The appeal taken by means of the written notice of appeal under these circumstances is not a second appeal from said judgment, for the reason that the appeal under the oral notice of appeal was never perfected. This question was decided in the case of *Bornheimer v. Bald-*

win, 42 Cal. 27. There it was decided that, where an appeal from an order denying a new trial was not perfected and, afterwards, but within sixty days from the order, a second appeal was taken and perfected, the failure to perfect the first did not defeat the second appeal.

It is contended by respondent that these views are in conflict with those expressed in the cases of *In re Bathurst* (Cal. App.) 271 P. 781, and *In re Bathurst* (Cal. App.) 277 P. 201. In the first of these cases it was held that oral notice of appeal from a judgment of the municipal court vests the appellate court with jurisdiction over the appeal, notwithstanding the appellant's failure to serve and file a statement on appeal within five days, and that said appeal stays all proceedings in the lower court until the same is dismissed by the appellate court. We think this ruling directly contrary to the express directions of section 1468 of the Penal Code, providing that, "if no statement is filed and served as herein provided, the appeal is ineffectual for any purpose, and shall be deemed dismissed, and the judgment or order appealed from shall be enforced as if no appeal had been taken."

The plain and unequivocal meaning of this language is that the failure to file the statement on appeal within the five-day period renders the notice of appeal of no effect, and the judgment appealed from may be enforced as if no attempt had been made to perfect an appeal therefrom. It would be unnecessary to make a motion to dismiss the appeal in either the trial or appellate court, for the reason that no appeal had been perfected, and whatever proceedings in the shape of an appeal had been taken were "deemed dismissed." In *re Bathurst* (App.) 271 P. 781, was never before us on petition for transfer, and we have therefore not heretofore directly or indirectly approved the same. A petition for transfer to this court in *Re Bathurst* (App.) 277 P. 201, was denied. There was nothing decided in the latter case contrary to the views expressed herein.

In our opinion a peremptory writ of mandate should issue as prayed for, and it is so ordered.

We concur: LANGDON, J.; RICHARDS, J.; SHENK, J.; SEAWELL, J.; PRES-
TON, J.

209 Cal. 777

Marjorie MILLER, Petitioner, v. MUNICIPAL COURT OF THE CITY OF LOS ANGELES, in the County of Los Angeles, State of California, and Honorable Caryl M. Sheldon, Judge Thereof, Respondents.

L. A. 11926.

Supreme Court of California.

Feb. 21, 1930.

In Bank.

Application for writ of mandate prayed to be directed to the Municipal Court of the City of Los Angeles, Caryl M. Sheldon, Judge, requiring settlement of proposed statement on appeal.

Writ granted.

Gerald R. Edgington and Lewis A. Schaffer, both of Los Angeles, for petitioner.

Lloyd S. Nix, City Pros., and Joe W. Math-
erly and F. W. Fellows, Deputy City Pros.,
all of Los Angeles, for respondents.

PER CURIAM.

Upon the authority of *Hansen v. Municipal Court*, 282 P. 384, and *Keaton v. Municipal Court*, 285 P. 696, this day decided, we are of the opinion that the peremptory writ of mandate should be issued as prayed for, and it is so ordered.

209 Cal. 778

Gertrude HOWE, Petitioner, v. MUNICIPAL COURT OF THE CITY OF LOS ANGELES, in the County of Los Angeles, State of California, and Honorable Caryl M. Sheldon, Judge Thereof, Respondents.

L. A. 11927.

Supreme Court of California.

Feb. 21, 1930.

In Bank.

Application for writ of mandate prayed to be directed to the Municipal Court of the City of Los Angeles, Caryl M. Sheldon, Judge, requiring settlement of proposed statement on appeal.

Writ granted.

Max Lewis and Gerald R. Edgington, both of Los Angeles, for petitioner.

Lloyd S. Nix, City Pros., and Joe W. Math-
erly and F. W. Fellows, Deputy City Pros.,
all of Los Angeles, for respondents.

PER CURIAM.

Upon the authority of *Hansen v. Municipal Court*, 282 P. 384, and *Keaton v. Municipal Court*, 285 P. 696, this day decided, we are of the opinion that the peremptory writ of mandate should be issued as prayed for, and it is so ordered.

209 Cal. 778

Robert G. WELCH, Petitioner, v. SUPERIOR COURT of the State of California, IN AND FOR THE COUNTY OF LOS ANGELES, and Honorable Victor McLucas, Honorable Edward T. Bishop, and Honorable Marshall F. McComb, Justices of the Appellate Department Thereof, Respondents.

S. F. 13695.

Supreme Court of California.

Feb. 21, 1930.

In Bank.

Application for writ of mandate prayed to be directed to the Superior Court of Los Angeles County, Appellate Department, Victor McLucas, Edward T. Bishop, and Hartley Shaw, Justices, to require said court to proceed with the hearing of the appeal, of Robert G. Welch from a judgment of the Municipal Court of the County of Los Angeles.

Writ granted.

Waldo, Hinds & Lawrence, of Pasadena, for petitioner.

Buron Fitts, Dist. Atty., and Tracy Chat-
field Becker, Deputy Dist. Atty., both of Los
Angeles, for respondents.

PER CURIAM.

Upon the authority of *Hansen v. Municipal Court*, 282 P. 384, and *Keaton v. Municipal Court*, 285 P. 696, this day decided, we are of the opinion that the peremptory writ of mandate should be issued as prayed for, and it is so ordered.

209 Cal. 779

Nathan SCHWARTZ, Petitioner, v. MUNICIPAL COURT of the CITY OF LOS ANGELES, in the County of Los Angeles, State of California, and Honorable Caryl M. Sheldon, Judge Thereof, Respondents.

S. F. 13706.

Supreme Court of California.

Feb. 21, 1930.

In Bank.

Application for writ of mandate prayed to be directed to the Municipal Court of the City of Los Angeles, Caryl M. Sheldon, Judge, requiring settlement of proposed statement on appeal.

Writ granted.

Henry Hayes and W. L. Engelhardt, both of Los Angeles, for petitioner.

Lloyd S. Nix, City Pros., and Joe W. Ma-
therly and F. W. Fellows, Deputy City Pros.,
all of Los Angeles, for respondents.

PER CURIAM.

Upon the authority of *Hansen v. Municipal Court*, 282 P. 384, and *Keaton v. Mu-*

municipal Court, 285 P. 696, this day decided, we are of the opinion that the peremptory writ of mandate should be issued as prayed for, and it is so ordered.

209 Cal. 55

**HARRIS v. MUNICIPAL COURT OF
CITY OF LOS ANGELES et al.**

L. A. 11787.

Supreme Court of California.

Feb. 24, 1930.

1. Constitutional law $\S$ 33—Constitutional provision guaranteeing accused right to speedy and public trial is self-executing (Const. art. 1, $\S$ 13).

Provision of Const. art. 1, $\S$ 13, that in all criminal prosecutions, in any court whatever, the party accused shall have the right to speedy and public trial, is self-executing.

2. Criminal law $\S$ 251—Law requiring dismissal, unless defendant is brought to trial within 60 days, applied to misdemeanor charge in municipal court (Pen. Code, $\S$ 1382; Const. art. 1, $\S$ 13, and art. 6, $\S$ 1).

Pen. Code, $\S$ 1382, enacted pursuant to Const. art. 1, $\S$ 13, guaranteeing accused the right to a speedy and public trial, and requiring dismissal of prosecution of felony case, unless defendant is brought to trial within sixty days after finding of indictment or filing of information, was applicable to misdemeanor charge in municipal court which is a court of record provided for in Const. art. 6, $\S$ 1.

3. Criminal law $\S$ 576(1)—Delay of 18 months in trial of misdemeanor was "unreasonable" within constitutional provision guaranteeing speedy trial (Pen. Code, $\S$ 16; Const. art. 1, $\S$ 13).

Delay of eighteen months in trial of misdemeanor, constituting a crime under Pen. Code, $\S$ 16, held "unreasonable" within meaning of Const. art. 1, $\S$ 13, guaranteeing the accused in criminal prosecution the right to a speedy and public trial.

[Ed. Note.—For other definitions of "Unreasonable," see Words and Phrases, First, Second, and Third Series.]

4. Criminal law $\S$ 576(2)—Delay in prosecution for misdemeanor, in order to coerce payment of money, was no excuse.

Fact that prosecution for misdemeanor was commenced for purpose of coercing the payment of a money claim, and cause was not brought to trial in order to effect that purpose, constituted no excuse for delay in trial thereof, in that such a course of action was abuse and perversion of criminal process, and wholly unjustifiable.

5. Criminal law $\S$ 576(2)—Defendant held entitled to dismissal of prosecution of misdemeanor; warrant of arrest being intentionally withheld from service, and no excuse for delay was tendered.

Answer to application for peremptory writ of mandamus to terminate prosecution of mis-

demeanor charge admitting that warrant of arrest was intentionally withheld from service for eighteen months, and that no excuse for delay was tendered or pretended on motion to dismiss, held insufficient to state a defense.

6. Criminal law $\S$ 576(1)—Incarceration is not essential to operation of constitutional guaranty to speedy trial (Const. art. 1, $\S$ 13).

Incarceration of defendant during delay in prosecution of criminal offense is not essential to operation of Const. art. 1, $\S$ 13, guaranteeing accused in criminal prosecution the right to speedy and public trial.

7. Criminal law $\S$ 576(11)—Accused need not affirmatively show prejudice by reason of delay of trial of criminal charge (Const. art. 1, $\S$ 13).

Accused need not affirmatively show prejudice by reason of delay in trial of criminal charge in order to warrant operation of Const. art. 1, $\S$ 13, guaranteeing the right to a speedy and public trial, in that prejudice will be presumed from the violation of such constitutional right, and it is enough for defendant to show that prosecution was unreasonably delayed.

8. Mandamus $\S$ 61—Mandamus is available to accused to terminate prosecution of misdemeanor charge on ground of delay (Const. art. 1, $\S$ 13).

Writ of mandamus is available to terminate prosecution of misdemeanor charge on ground of delay in bringing accused to trial in violation of Const. art. 1, $\S$ 13.

In Bank.

Application by Michael Harris for peremptory writ of mandate directed to the Municipal Court of the City of Los Angeles and another to terminate prosecution of a misdemeanor charge against petitioner.

Writ granted.

Mitchell, Silberberg & Davis, O'Melveny, Tuller & Myers, Homer I. Mitchell, and Louis W. Myers, all of Los Angeles, for petitioner.

Everett W. Mattoon, County Counsel, and S. V. O. Prichard, Deputy County Counsel, Lloyd S. Nix, City Prosecutor, and Ray Brockman, Deputy City Prosecutor, all of Los Angeles, for respondents.

PER CURIAM.

This is an application for an appropriate peremptory writ to terminate the prosecution of a misdemeanor charge against the petitioner in the municipal court of the city of Los Angeles. The application is made upon due notice after the issuance of an order to show cause. In response to the order, the respondents filed a general demurrer to the petition and an answer. The demurrer will first be passed upon.

It appears from the verified petition that at all times involved in this proceeding the city prosecutor of the city of Los Angeles was charged with the duty of prosecuting, in the

name of the people of the state of California, misdemeanors committed in the city of Los Angeles; that early in 1927 the Julian Petroleum Corporation collapsed, and receivers were appointed therefor by the United States District Court; that the receivers found that the corporation was heavily indebted, and was in immediate need of a large amount of cash to meet its obligations and to carry on its business, but that it was unable to raise the amount needed except by recovering from various individuals large sums of money which were alleged to have been theretofore paid to said persons by said corporation in excess of the rate of interest permitted by the laws of the state; that the receivers in August, 1927, commenced several civil actions to recover usurious interest; that in addition thereto there were 143 known transactions with the corporation, by a like number of individuals, alleged to be usurious; that the then city prosecutor came into possession of a full and complete report of said transactions, which report included the names of the 143 individuals claimed to have made loans to said corporation, for which they had been paid large sums of money as interest in excess of the lawful rate; that, in order to assist the receivers in recovering the alleged usurious payments of interest, the then city prosecutor, during the months of August, September, and October, 1927, caused an investigator in his office and under his control to swear to, and caused one of his deputies to file, in the respondent court, 143 complaints charging in each case the crime of usury, a misdemeanor; that, when these complaints were filed, said city prosecutor caused a statement to be published that in every instance where restitution of the usurious interest should be made to the receivers the criminal complaint would be dismissed; that in each instance the complaint named the defendants as "John Doe (whose true name is to affiant unknown)," or by other fictitious name; that in no instance had the complaint described the person or set forth any means of identifying the person so charged except as "John Doe," or by other fictitious name; that in the report submitted to him the city prosecutor was given the information that the petitioner herein was claimed to have loaned to said corporation \$45,000 in one, and \$46,550 in another, transaction in April, 1927, and had thereupon obtained a usurious return as interest; that on October 5, 1927, when the complaint on which the prosecution of the petitioner is founded was prepared and filed, the then city prosecutor and his said subordinates well knew, and the files of the city prosecutor's office contained, the name of the petitioner and the fact that the petitioner had been a party to the alleged usurious transactions in April, 1927, and well knew that the allegations of the complaint that the true name of the defendant was unknown were

untrue; that notwithstanding these facts, the city prosecutor's office, knowingly and willfully, and with the intent to carry out the scheme to compel restitution, caused the defendant in said complaint to be designated as John Doe; that on October 5, 1927, prior thereto and to the present time, the petitioner had been and is a resident of the city of Los Angeles; that his true name is Michael Harris; that he had never been known by any other name, and that his name and address had been listed in the Los Angeles city directory and in the city telephone directory since 1924; that he has been engaged in business continuously in said city since 1923, and has not been absent from the city except on business or pleasure for infrequent periods not exceeding thirty days.

It is further alleged that, upon the filing of each of said complaints on October 5, 1927, the respondent court issued a warrant commanding any officer within the county of Los Angeles "forthwith to arrest the above named defendant John Doe and bring him before the judge" of said court; that, when said warrants were issued, they were delivered by the respondent court to the city prosecutor's office, and that the city prosecutor caused the same to remain in his office without being served; that the warrant issued pursuant to the complaint on which the petitioner is being prosecuted remained in the office of the city prosecutor until May 1, 1929, on which day it was placed in the hands of a peace officer for service, and on said day was served on the petitioner; that between October 5, 1927, and May 1, 1929, no effort was made by the city prosecutor or by any other person to serve said warrant on the petitioner or to bring said criminal action on for trial, and that until his arrest the petitioner had no knowledge that he was accused as a defendant or charged with an offense in said action or of the pendency of said proceeding; that upon his arrest he was taken before said court, released on bail, and the matter of his plea was continued to June 7, 1929; that prior to the last-mentioned date the petitioner, through his counsel, filed a written motion to quash the service of said warrant and to dismiss said complaint on the grounds, among others, that the court had no jurisdiction to hold the petitioner for trial; that the proceeding in the name of John Doe was a subterfuge and in fraud of the petitioner's rights to be timely and openly informed of the charge against him while the pertinent evidence, oral and otherwise, was available, and was conducted with the intent to deprive him of the right to a speedy trial, guaranteed to him under the state and Federal Constitutions. The motion was supported by affidavits of the petitioner and of a former deputy city prosecutor, which set forth substantially the facts alleged in the petition herein. Up-

on the hearing of the motion, no showing was made by affidavit or otherwise in opposition to the affidavits submitted by the petitioner. The motion was denied and the defendant was called upon to plead. He stood mute, a plea of not guilty was entered for him, the cause was set for trial on July 5, 1929, and was thereafter continued to October 14, 1929. The present proceeding was commenced on August 30, 1929.

Two main contentions are presented. First, if the respondent court had jurisdiction of the person and subject-matter of the action, the prosecution was unreasonably delayed in violation of the petitioner's constitutional right to a speedy trial, and a writ of mandamus should issue to compel its dismissal; and, second, that the court had no jurisdiction to try the defendant in view of the form of the "John Doe" complaint and warrant issued under the particular facts and circumstances here shown.

[1] Section 13 of article 1 of the Constitution of California provides in part as follows: "In criminal prosecutions, in any court whatever, the party accused shall have the right to a speedy and public trial." This provision of the Constitution is self-executing. In *re Alpine*, 203 Cal. 731, 265 P. 947, 58 A. L. R. 1500; In *re Begerow*, 133 Cal. 349, 65 P. 828, 56 L. R. A. 513, 85 Am. St. Rep. 178. It reflects the letter and spirit of the following provision of the Federal Constitution to the same effect: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial. * * * U. S. Const., Amend. 6. This is a fundamental right granted to the accused, and has been the policy of the law since the time of the promulgation of Magna Charta and the Habeas Corpus Act. In *re Begerow*, supra. The policy of the law in this respect has been further declared by the Legislature and by constitutional amendment in this state. In 1872 section 1382 of the Penal Code was enacted, wherein, and in subdivision 2, it was provided as to criminal cases originating in the superior court: "The court, unless good cause to the contrary is shown, must order the prosecution to be dismissed in the following cases: * * * 2. If a defendant, whose trial has not been postponed upon his application, is not brought to trial within sixty days after the finding of the indictment, or filing of the information." This provision of the Penal Code, founded on sections 593 and 594 of the Criminal Practice Act (St. 1851, p. 278), has not been changed during the intervening years. In 1927 the Legislature of this state adopted section 681a of the Penal Code, declaring: "The welfare of the people of the State of California requires that all proceedings in criminal cases shall be heard and determined at the earliest possible time. It shall be the duty of all courts and judicial

officers and of all district attorneys to expedite the hearing and determination of all such cases and proceedings to the greatest degree that is consistent with the ends of justice." At the general election in 1928 article 6 of the Constitution was amended (section 4c) so as to cut down the time for the finality of judgments on appeal in criminal cases. It will thus be seen that the time within which criminal cases should be disposed of has been and is a matter of great public concern, and the duty is imposed upon courts, judicial officers, and public prosecutors to expedite the disposition thereof.

[2] What is a "speedy trial," as those words are used in the Constitution? The Legislature in section 1382 of the Penal Code has declared that, unless a defendant in a felony case has been brought to trial within sixty days after the finding of the indictment or the filing of the information, the court must, in the absence of good cause shown for the delay, dismiss the prosecution. Thus the Legislature by necessary inference had said that a trial delayed more than sixty days without good cause is not a speedy trial, and the courts have not hesitated to adopt and enforce the legislative interpretation of the constitutional provision. Nor have the courts hesitated, by writ of mandamus or on appeal, to compel the dismissal of felony cases not speedily brought to trial in accordance with the legislative interpretation. *Ford v. Superior Court*, 17 Cal. App. 1, 118 P. 96; *Abbott v. Superior Court*, 17 Cal. App. 13, 118 P. 100; *People v. Morino*, 85 Cal. 515, 24 P. 892. Furthermore, said section 1382 has been applied and enforced by writ of mandamus in the case of a misdemeanor charge in the superior court. *Cordts v. Superior Court*, 53 Cal. App. 589, 200 P. 726. We have been referred to no statute or case, and we have found none in this state, compelling the dismissal of a misdemeanor charge in a court inferior in jurisdiction to the superior court, but no reason appears to justify a refusal to enforce the self-executing provision of the Constitution in such a case. The Constitution says that in criminal proceedings, *in any court whatever*, the party accused shall have the right to a speedy trial. The respondent court is a court of record provided for in the Constitution. (Const., art. 6, § 1.)

[3, 4] Commenting on section 13 of article 1 of the Constitution and section 1382 of the Penal Code, this court, in *People v. Morino*, supra, at page 517 of 85 Cal., 24 P. 892, 893, said: "A party charged with crime has the constitutional right to a speedy trial, and the court has no discretionary power to deny him a right so important. * * * The statute is imperative. 'The court, unless good cause to the contrary is shown, must order the prosecution to be dismissed.' Here no cause for delay was shown. It was enough for the defendant to show that the time fixed by the

statute, after information filed, had expired, and that the case had not been postponed on his application. If there was any good cause for holding him for a longer time without a trial it was for the prosecution to show it. The court could not presume it." The complaint pending in the respondent court charged a crime (Pen. Code, § 16), and the Constitution strikes at an unreasonable delay in all criminal cases. The prosecution involved herein was commenced by the filing of the complaint on October 5, 1927. Nothing was done thereafter until the service of the warrant on May 1, 1929, eighteen months after the commencement of the action. It would be most unreasonable to hold that a delay of eighteen months in the trial of the action was not in violation of the constitutional right to a speedy trial when, as here, it is admitted that the petitioner was at all times available for the service of process and that the delay was not at all traceable to him. The only reason for the delay found in the petition herein is that the prosecution was commenced for the purpose of coercing the payment of a money claim from the person so sought to be prosecuted, and the cause was not brought to trial in order to effect that purpose. Such a course of action was an abuse and perversion of the criminal process, was wholly unjustifiable, and constituted **no** excuse for the delay.

The petitioner has alleged a full and complete cause of action entitling him to a writ of mandamus to compel the dismissal of said action, and the demurrer thereto is not well taken. Next to be considered is whether the answer in itself constitutes a valid defense or raises issues of fact requiring a reference.

[5] The answer consists solely of an allegation that the respondents "have no information or belief upon the subject sufficient to enable them to answer the allegations" of paragraphs III, IV, and VI of the petition, and, placing their denial on that ground, deny generally and specifically the allegations of those paragraphs. Said paragraphs contain the allegations that the former city prosecutor had in his possession a full and complete report of the 143 alleged usurious transactions, and knew, or possessed the means of ascertaining, the names and whereabouts of the persons charged as John Doe; that said complaints charging usury, a misdemeanor, were filed for the purpose of assisting the receivers in collecting the alleged money claims and of coercing payment thereof, and that with full knowledge of each of the transactions involving the petitioner herein and of his true name the city prosecutor's office caused the complaint to be filed, charging him under such fictitious name. It is admitted that the prosecution was commenced on October 5, 1927; that the whereabouts of the petitioner within the jurisdiction of the court were easily ascertainable; that the warrant of arrest was

intentionally withheld from service by the prosecuting officer for eighteen months; that the cause was not set down for trial until July 5, 1929; and that no excuse for the delay was tendered or pretended before the respondent court on the motion to dismiss. The issues of fact sought to be raised by the answer, if resolved against the petitioner, would not change the result of the present proceeding, and, if resolved against the respondents, would only serve to aggravate the situation in the petitioner's favor. In either event the unreasonable delay in the prosecution is incontrovertibly established, and the answer does not state a defense.

[6, 7] The respondents contend that during the period of the delay the petitioner was not incarcerated and has shown no prejudice to himself by reason of the lapse of the twenty months before the case was set for trial. But incarceration is not essential to the operation of the constitutional guaranty. *State of Wyoming v. Keefe*, 17 Wyo. 227, 98 P. 122, 22 L. R. A. (N. S.) 896, 17 Ann. Cas. 161. The guaranty operates on behalf of the "party accused," and, if the petitioner was accused at all, he was accused by the filing of the complaint on October 5, 1927. Furthermore, it is not necessary that the party accused affirmatively show prejudice. Prejudice will be presumed from the violation of this constitutional right. It is enough for the defendant to show that the prosecution has been unreasonably delayed. It will not be presumed that good cause for the delay in fact existed. If there was any good cause, it was for the prosecution to show it. *People v. Morino*, supra; *In re Begerow*, supra. If good cause be shown, the defendant is not entitled to relief. *In re Gere*, 64 Cal. App. 418, 221 P. 689. Here no good or any cause has been shown either in the respondent court or in this court, other than the whim of the prosecution. The facts in the case of *United States v. Kojima*, 3 Hawaii Fed. 381, are strikingly similar to those in the present case. It was there held that the commencement of the reasonable time within which a defendant must be tried is not postponed until the time of his arrest, when, as here, he was at all times available for the service of process. In the case of *Arrowsmith v. State*, 131 Tenn. 480, 175 S. W. 545, L. R. A. 1915E, 363, the holding in the earlier case of *State v. Sims* (Tenn.) 1 Overt. 253, that a speedy trial guaranteed to the accused means a trial as soon "after indictment" as the prosecution can with reasonable diligence prepare for it, was approved.

In *U. S. v. Fox*, 3 Mont. 512, the court said: "The speedy trial, to which a person charged with crime is entitled under the Constitution, then is, a trial at such a time, after the finding of the indictment. * * *" This is also the test prescribed by section 1382 of the Penal Code. As opposed to this rule the respondents cite *Hammond v. State*, 39 Neb.

252, 58 N. W. 92, and State v. Williams, 35 S. C. 160, 14 S. E. 309. Neither case is in point. The Nebraska case involved the application of two sections of the Code of Criminal Procedure of that state. The first section prescribed the time for trial when the defendant was incarcerated. The second, when the defendant was on bail. It was held that the first section was inapplicable because it was not shown that the defendant was confined in jail during the delay, and as to the second section that the trial was had within the time therein prescribed. In the South Carolina case it was held that the particular statute there involved, patterned after the seventh section of the Habeas Corpus Act, was available in terms only to one in actual custody. We have no similar statute in this state, and our constitutional provision strikes at the accusation as well as the custody of the defendant.

[8] What has been said renders it unnecessary to pass upon the other question, viz. whether the facts stated by the petitioner entitle him to a writ of prohibition. Under the admitted facts, there was no justifiable reason for the respondent court to refuse to dismiss the action against the petitioner. An abuse of discretion was thereby committed to correct which, under the authorities in this state above cited, the writ of mandamus is available to the petitioner.

Let the peremptory writ of mandamus issue as prayed.

209 Cal. 65

**GUTTERMAN v. MUNICIPAL COURT OF
CITY OF LOS ANGELES et al.**

L. A. 11605.

Supreme Court of California.

Feb. 24, 1930.

Criminal law §576(2)—That material evidence was in possession of superior jurisdiction was not good cause for delay of 18 months in prosecution of misdemeanor.

Answer to application for writ of mandate to compel dismissal of misdemeanor charge, alleging that delay was occasioned by reason of fact that material evidence, including documents and records, was in possession and under judicial control of superior jurisdictions, and unavailable to prosecution, did not state good cause for delay of over eighteen months; there being no showing that any effort was made to obtain such evidence or that it could not have been obtained by exercise of reasonable diligence.

In Bank.

Application by Herman Gutterman for writ of mandate prayed to be directed to the Municipal Court of the City of Los Angeles

and another to compel the dismissal of a misdemeanor charge pending in such court.

Peremptory writ granted.

Cooper & Collings, of Los Angeles, for petitioner.

Everett W. Mattoon, County Counsel, S. V. O. Prichard, Deputy County Counsel, Lloyd S. Nix, City Prosecutor, and Ray P. Brockman, Deputy City Prosecutor, all of Los Angeles, for respondents.

PER CURIAM.

Application for writ of mandate to compel the dismissal of an action pending in the respondent court, charging the petitioner with usury, a misdemeanor. An alternative writ was issued. As a return the respondents filed a demurrer and an answer.

This proceeding in its controlling features is the same as the case of Harris v. Municipal Court et al., 285 P. 699, this day decided. There is some dissimilarity in the facts, not however, sufficient to change the result.

It appears from the admitted allegations of the petition that the complaint under which the petitioner is sought to be prosecuted is a so-called "John Doe" complaint, filed in the respondent court on September 8, 1927; that upon its filing a "John Doe" warrant was immediately issued; that during the years 1926 and 1927 petitioner had numerous dealings with the Julian Petroleum Corporation, its officers and agents, and that these transactions led to the filing of said complaint; that the petitioner was arrested on April 20, 1929; that nothing was done in the meantime to bring said action on for trial; that upon his arraignment the petitioner moved the court to dismiss the complaint on the ground, among others, that the petitioner was not granted and did not receive a speedy trial, guaranteed to him under the state and Federal Constitutions. Upon the hearing of the motion, no reason or excuse for the delay was shown or suggested by the prosecution. Upon such hearing, the petitioner offered to prove that about the time the complaint was filed he was under indictment by the grand jury of Los Angeles county involving transactions between himself and the Julian Petroleum Corporation; that he had been a resident of Los Angeles for twenty years, and was at all times available for the service of process in the misdemeanor action; that, after said complaint was filed, he made full settlement with the receivers of the Julian Corporation, and that said receivers advised a dismissal of the misdemeanor complaint. The court refused the offer of proof and denied the motion to dismiss, and set the cause for trial on May 28, 1929. Thereafter this proceeding was commenced to compel the dismissal on the

ground that the court abused its discretion in denying said motion, in the absence of any showing, reason, or excuse for the delay.

The only excuse for the delay advanced by the respondents is contained in the answer, wherein it is alleged on information and belief that it was impossible for the city prosecutor to prosecute the misdemeanor charge, for the reason that material evidence, including documents and records by which the corpus delicti must be established, was at all times mentioned in the petition and until recently in the possession and under the "judicial control of two superior jurisdictions, and were therefore unavailable to the prosecution." The answer does not state good cause for the delay of over eighteen months. It does not appear that any effort was made by the prosecution to obtain this evidence or that it could not have been obtained by the exercise of reasonable diligence.

No adequate defense is presented, and the peremptory writ should issue as prayed.

It is so ordered.

209 Cal. 780

E. M. HACKEL, Petitioner, v. MUNICIPAL COURT OF THE CITY OF LOS ANGELES, County of Los Angeles, State of California, and the Honorable Charles L. Bogue, Judge Thereof, Respondents.

L. A. 11632.

Supreme Court of California.

Feb. 24, 1930.

In Bank.

Cooper & Collings and Louis W. Myers, all of Los Angeles, for petitioner.

Everett W. Mattoon, County Counsel, S. V. O. Prichard, Deputy County Counsel, Lloyd S. Nix, City Prosecutor, and Ray P. Brockman, Deputy City Prosecutor, all of Los Angeles, for respondents.

PER CURIAM.

This is a proceeding in mandate similar in all essential particulars to the preceding cases of *Harris v. Municipal Court et al.*, 285 P. 699, and *Guterman v. Municipal Court et al.*, 285 P. 703, this day decided. The complaint against the petitioner for usury, a misdemeanor, was filed in the respondent court on September 23, 1927, and the warrant was served on April 18, 1929, and nothing was done by the prosecution in the meantime to bring the case on for trial. Proceedings similar to those in the other cases were taken in the respondent court to bring about a dismissal of the action with like result. On the authority of those cases, the peremptory writ of mandamus is ordered issued as prayed.

PEOPLE v. ROCCO.

Cr. 3303.

Supreme Court of California.

Feb. 24, 1930.

1. Homicide $\S$ 250—Evidence held sufficient to sustain conviction for murder.

In prosecution for murder, evidence which included proof of association of defendant and deceased as bootleggers and of finding blood stains in defendant's automobile, *held* sufficient to sustain conviction for murder.

2. Homicide $\S$ 166(1)—Statements of defendants that defendant and deceased were living with women in apartment and that defendants "got in" with deceased to make money assisting in running alcohol, held admissible in murder prosecution as showing motive.

In prosecution for murder, statement of defendants made after their arrest that defendants had picked up women at hotel, and that one of defendants and deceased were living with them at apartment; that defendants were engaged in traffic in alcohol and had "got in" with deceased and were willing to make some money in assisting him in running alcohol, *held* admissible to connect defendants with deceased and show opportunity and motive for crime, where state relied on circumstantial evidence.

3. Criminal law $\S$ 1035(3)—Defendant could not on appeal complain of refusal to permit attorneys, appointed for himself and codefendant to withdraw where defendants, after hearing counsel's argument disclosing adverse defenses requested that attorneys continue.

In murder prosecution, refusal of trial court to permit attorneys, appointed by court to represent defendants, to withdraw from case during progress of trial *held* not error where defendants, after argument between court and counsel disclosing that defenses of the two defendants were adverse to each other, stated, on being asked separately, that they desired the attorneys to continue as their counsel, and one of defendants, after being found guilty, could not on appeal complain of court's action.

4. Criminal law $\S$ 622(1)—Defendants jointly accused could not as matter of right have separate trials.

Defendants jointly accused of murder were not entitled to separate trials as a matter of right.

5. Criminal law $\S$ 641(1)—Defendants whose defenses were adverse could waive any right to be represented by independent counsel.

If defendants whose defenses were adverse were entitled to be represented by independent counsel, they had privilege of waiving that right.

Appeal from Superior Court, Ventura County; Edward Henderson, Judge.

Frank Rocco was convicted of murder, and he appeals.

Affirmed.

Superseding opinion, 281 P. 443.

R. D. Knickerbocker, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., John L. Flynn, Deputy Atty. Gen., and James C. Hollingsworth, Dist. Atty., and Don R. Holt, Chief Deputy Dist. Atty., both of Ventura, for the People.

LANGDON, J.

This is an appeal by Frank Rocco from a conviction of the charge of murdering one James Brady, within the county of Ventura, California.

[1] Briefly, the record discloses: In January, 1929, the defendant, Frank Rocco, and his codefendant, Dominic Leo, came to the city of Los Angeles. They went first to the restaurant operated by one Santanillo, on Lucile avenue. From there they were taken by Santanillo to the Louise Hotel, in the vicinity of West Sixth street, where Rocco and his codefendant rented two rooms. At this time the defendant Rocco was accompanied by his wife and they rented room 309 and his codefendant Leo rented room 311. The two defendants had driven across the continent in a Packard roadster bearing a Maine license. Shortly after their arrival at the Louise Hotel, the defendant Rocco made the acquaintance of one James Brady, who was subsequently murdered. Brady also had a room at the Louise Hotel. Within a short time the wife of Rocco left and returned to New York. On or about the 19th day of February, 1929, the deceased, James Brady, went to the King Apartments in the city of Venice, where he, with one Audrey Morosco, rented a double apartment in the rear on the second floor. The defendant Rocco also occupied this apartment, together with another woman by the name of Geraldine Forrester. During the joint occupancy of this apartment, Rocco and Brady were frequently together and had conversations with reference to the illicit liquor "racket."

At about 10:30 p. m. of February 28, 1929, the defendant Rocco, in company with the deceased James Brady and his codefendant Dominic Leo, left the King Apartments in Venice. The two women remained in the apartment. Rocco, Brady, and Leo walked out and got into the gray Packard roadster and drove away, Rocco being the driver of the car. About 1 o'clock in the morning of the following day, March 1, 1929, a resident in the upper Conejo district of Ventura county heard what he described as three or four shots. There was an interval of time, and he heard the engine of an automobile. At about 4:30 of the same morning, a body was found lying in an open field a distance of one and one-half miles east of the town of Camarillo in Ventura county, a distance of about seven miles west of where the shots

were heard. The body was identified as that of James Brady. At about the time of the discovery of the body, the two defendants returned to the King Apartments at Venice, where they were received by the two women, who served them coffee, and, shortly thereafter, the two defendants left the apartment and did not again return to it. Shortly before he returned to the apartment for the last time, Leo was seen to enter a garage in Venice, a short distance from the King Apartments, with the gray Packard roadster bearing the Maine license. A short time after his first visit to the garage, Leo again returned and took the Packard automobile, and at this time bought a pint bottle of gasoline.

Shortly after Rocco and Leo left the King Apartments, the two women left in a taxicab. Audrey Morosco went to the California Hotel on West Sixth street, where she rented a room, and the other woman went to the home of one of her relatives. At this time the rent for the apartment at Venice was paid up for another week, but neither Rocco, Leo, nor the women ever returned to it. About half an hour after leaving the King Apartments in Venice, Leo was seen by a policeman to park the gray Packard automobile with a Maine license alongside of the curb at the Hotel Louise on West Sixth street.

An examination of the body of deceased showed that he had received three wounds in his head, which had been inflicted by bullets from a pistol, one bullet having entered on the right side of the head from the rear, and another being in approximately the same position on the head on the left side, and the third wound being on the right cheek. The pockets in his clothing had been turned inside out. The gray Packard automobile was found in a garage in the vicinity of Sunset and Glendale avenues. An examination of the car revealed that it had blood spots on it in fourteen places. There was a bullet hole in the canvas top of the car, and, on the right side of the top of the car, toward the rear, some brain matter was found. In the room which the defendant Rocco occupied at the Louise Hotel some underwear was found on which were blood stains. Blood spots were found on the shoes which were being worn by Rocco, which had been covered over with black shoe polish. There was also blood under the seat of the Packard automobile, and there was a package of cigarettes in the car upon which appeared blood stains. The revolver with which the crime was committed was found about one mile from the position of the body of deceased.

When Audrey Morosco left the King Apartments and went to the California Hotel, it was in accordance with the instructions of Rocco. She registered there under the name of Perro and was joined by Rocco at about 2 o'clock in the morning on March 2, 1929.

Both defendants, upon being arrested, made contradictory statements, which were shown to be untruthful, as to their whereabouts and their acquaintance and association with the deceased, etc.

It is apparent from the foregoing that it cannot be contended, with any forcefulness, that the evidence is insufficient to justify the verdict.

[2] It is contended that the court erred in permitting to be read to the jury certain admissions made by defendants. These statements, made after arrest, are to the effect that the defendants "picked up" two women at the Louise Hotel and afterwards Rocco and deceased lived with them at the King Apartments; that they (the defendants) were engaged in traffic in alcohol and had been engaged in such occupation in the east; that they "got in" with Brady and were willing to make some money assisting him in "running alcohol." It was necessary to prove the charge against defendants entirely by circumstantial evidence, and it was important to connect defendants and deceased and to show opportunity and motive for the crime. It may readily be assumed that persons engaged in the illicit distribution of alcohol must frequently carry large amounts of cash upon their persons, thus giving a motive for robbery. One who was familiar with the "rum running racket" as it is termed in the record before us, and who had previously been engaged in it, would naturally seek the acquaintance and gain the confidence of another so engaged. The statements offered were relevant upon these matters, even though, incidentally, they did discredit the defendants, and if any other portion of the statements was inadmissible, the error of the trial court in ruling upon that portion was not such an error as to warrant a reversal of the judgment where the record discloses no prejudice occasioned by such ruling.

[3-5] The next objection of appellant is that the trial court erred in not permitting the attorneys, who had been appointed by the court to represent defendants, to withdraw from the case during the progress of the trial. On March 26, 1929, the trial of the case opened, and after considerable testimony had been taken, on March 29, counsel for defendants moved the court that they be permitted to withdraw as attorneys for the defendants. The reason for the motion, as stated to the court, was that while acting jointly for the defendants, counsel had received confidential communications from both, which made it unethical for them to represent the defendants, either jointly or separately. It was in-

timated in the long discussions between court and counsel that the defenses of the two defendants were adverse to each other. Although counsel forcefully urged this matter before the court, the court insisted that they should continue to represent the defendants; counsel, as insistently, refused and were adjudged in contempt of court, and it was only upon a threat of imprisonment that counsel continued the defense.

It is important to observe, however, that during the course of the discussion between court and counsel, the court asked each of the defendants, separately, if he desired the attorneys to continue as his attorneys, to which question each defendant answered: "Yes."

The defendants were not entitled to separate trials as a matter of right. *People v. Dowell*, 204 Cal. 109, 266 P. 807; *People v. Perry*, 195 Cal. 623, 234 P. 890. If it be conceded that they were entitled to be represented by independent counsel when their defenses were adverse, it must also be conceded that they had the privilege of waiving that right, as they had the privilege of waiving the right to be represented by any attorney. The argument between court and counsel was lengthy and dramatic; it brought forcefully to the attention of defendants any possible dangers to them and to each of them by reason of their joint representation by counsel, but, nevertheless, for reasons which were evidently sufficient to them at the time, defendants not only declined to insist upon their privilege, but expressly stated that they desired counsel to continue in their defense. Since the privilege, if it existed, was entirely for the benefit of defendants, it would seem that the court could not do otherwise than defer to the wishes of the defendants, regardless of the wishes of counsel. And since that was done, the one defendant, who was found guilty, could not object to the action of the court, which he had asked to be taken. Indeed, in the event that the court had permitted counsel to withdraw over the protests and objections of defendants and a conviction had occurred while one of the defendants was being represented by other counsel, such defendant would have had grounds to object that against his insistence, he had been denied the right of representation by counsel that he desired.

There are no other matters requiring consideration upon appeal.

The judgment is affirmed.

We concur: CURTIS, J.; PRESTON, J.; SHENK, J.; RICHARDS, J.; SEAWELL, J.

104 Cal. App. 34

OCEAN ACCIDENT & GUARANTEE CORPORATION, Limited, v. INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. 6572.

District Court of Appeal, Second District, Division 1, California.

Feb. 13, 1930.

1. Master and servant ⇨417(7)—Industrial Commission's implied finding based on conflicting evidence is binding on certiorari to review award.

On certiorari to review award of Industrial Accident Commission, implied finding based on conflicting evidence is binding.

2. Insurance ⇨435—Indemnity policy covering personal injuries to employees of partnership held not to cover member thereof for injuries sustained in connection with employment.

Indemnity policy covering personal injuries sustained by employees issued to partnership, providing that, if employer is partnership, policy shall not apply to any member thereof, except those named in declaration with disclosure of annual wages, held not to cover member of partnership for injuries received by him in connection with any employment whatever.

3. Partnership ⇨95—One partner's purchase of another's interest presumptively includes final settlement of all existing partnership indebtedness.

Where one partner purchases interest of another transaction presumptively includes final settlement of all partnership indebtedness existing between partners.

4. Partnership ⇨263—Partner remaining in charge of business after withdrawal of other may continue business as liquidating partner until contractual conditions and liabilities are carried out.

Where one partner merely withdraws from business, remaining partner is entitled to continue business as liquidating partner until contractual conditions and liabilities are carried out.

5. Partnership ⇨263—Outgoing partner retains interest in partnership subject to appropriate liquidation of business with right to accounting when net assets are ascertained.

Outgoing partner merely withdrawing from business retains interest in partnership subject to appropriate liquidation of business and with right to an accounting when net assets of partnership as of date of dissolution are ascertained.

6. Insurance ⇨435—Outgoing partner was not covered by indemnity policy covering employees only, unless partnership was dissolved and he retained no interest therein.

Outgoing partner, in order to establish contention that he ceased to be partner, as described in indemnity insurance policy covering personal injuries to employees, but excluding partners, should show, not only that partnership has been dissolved, but also that at time of accident he retained no interest whatever in assets or business thereof, especially so far as particular job was concerned.

Certiorari by the Ocean Accident & Guarantee Corporation, Limited, to review an order of the Industrial Accident Commission awarding compensation to C. H. Dillman, employee of George C. Schuldt, employer.

Award annulled.

George H. Moore and Hubert Starr, both of Los Angeles, for petitioner.

G. C. Faulkner, of San Francisco, for respondent Commission.

Hoye & Boehler, of Los Angeles, for respondent Dillman.

CONREY, P. J.

C. H. Dillman, claiming as an employee of George C. Schuldt, made application to the Industrial Accident Commission for an award of compensation for disability, resulting from an accident in which he was injured, while engaged in service for his employer. An award was made in favor of Dillman and against the Ocean Accident and Guarantee Corporation, Limited (hereinafter called the corporation), as insurance carrier of the employer. In this proceeding by writ of review the corporation contends that the commission was without jurisdiction to make said award.

The evidence shows that the accident and injury to Dillman occurred while he was working for Schuldt. It arose out of, and in the course of, the employment. If the insurance policy covered the employment of Dillman by Schuldt, the award is valid; otherwise, the award should be annulled.

Prior to October 26, 1927, Schuldt and Dillman entered into an oral agreement of partnership as building contractors. Schuldt had obtained a contract for the construction of a public school building, and this contract, although held in the name of Schuldt, was by the partners understood to be included in their business. On October 26, 1927, they made application to the corporation for an indemnity policy to cover personal injuries sustained by employees. In the declarations of their application they represented themselves to be a copartnership, and named themselves, George C. Schuldt and C. H. Dillman, as the members of the partnership. In the policy issued pursuant to said application (and bearing the same date as the date of the application), it was provided that "if this employer is a partnership, this policy shall not apply to any member * * * of such * * * partnership except those named in the Declarations with disclosures of the annual amount of wages," etc. The declarations did not contain any such exception.

[1] In the testimony of Mr. Dillman, before the commission, he admitted that he told the agent of the corporation that he and Schuldt were partners, and, further admitted, that

when the policy was written up he knew that it was written in his name as well as that of Schuldt; but he also claims, and he so testified, that subsequently and before he went to work on the job, he and Schuldt agreed to dissolve the partnership, and, further agreed, that he would work for Schuldt on the school building at a stated wage. The work under the building contract was commenced early in November, but the brickwork on which Dillman was employed did not commence until the 2d day of December. The accident to Dillman occurred in the latter part of January, 1928. Dillman admitted that he did not at any time, prior to the accident, notify the corporation about any change in the partnership arrangement. With respect to the time when the partnership was dissolved, as compared with the commencement of the work, the following testimony of Dillman is interesting: "Q. How far had you proceeded with this particular job when you learned you could not go through on basis of a partnership and then decided that Mr. Schuldt would have to go ahead alone and you would merely work for him, how far had you proceeded on this work? A. I hadn't proceeded with the work. That is, we hadn't proceeded on this work. Q. Hadn't done any work at all? A. No." The inference from this testimony is that the partnership was dissolved early in November. Nevertheless, a partnership contract in writing had been prepared, which carries a notarial certificate that it was "subscribed and sworn to" before the notary, on November 25, 1927. However, for the purposes of this proceeding, and since the evidence is conflicting, we are bound by the commission's implied finding that the partnership was dissolved as Dillman says that it was.

[2] For the corporation it is contended that, in the creation of the insurance policy, the intention was for partnership coverage only, and that in no event was it intended to furnish indemnity for liability to employees of either Schuldt or Dillman as individuals. In reply to this contention, counsel for the commission refers to section 2557 of the Civil Code, which reads as follows: "*In the case of transfer between cotenants.* A transfer of interest by one of several partners, joint owners, or owners in common, who are jointly insured, to the others, does not avoid an insurance, even though it has been agreed that the insurance shall cease upon an alienation of the thing insured." Whether or not said section has any application to work-

men's compensation insurance policies is a question, which we think is not necessary to decide. The terms of the policy, as hereinabove set forth, show that it was issued to a partnership of which Dillman was a member, and that by reason of his membership in the partnership, it was agreed that the policy should not apply to him, since he was not "named in the declarations with disclosure of the annual amount of wages," or at all. The meaning of the language used could not have been more direct and certain if the policy had said, "C. H. Dillman is a member of said partnership and it is hereby agreed that this policy shall not cover any compensation for injuries received by him in connection with any employment whatever." See Zurich, etc., Company v. Stadelman (Cal. Sup.) 280 P. 687.

[3-6] For yet another reason, the applicant, Dillman, was not entitled to compensation. "It is the law of partnerships that when one partner purchases the interest of the other the transaction presumptively includes a final settlement of all partnership indebtedness existing between the partners." Wilbur v. Wilbur, 197 Cal. 1, at page 14, 239 P. 332, 337. On the other hand, upon a dissolution of the partnership, where one partner merely withdrew from the business, the partner who remained in charge of the business "was left in a position where under the law he was entitled to continue the business as a liquidating partner until the contractual conditions and liabilities were carried out." Mervyn Investment Co. v. Biber, 184 Cal. 637, 644, 194 P. 1037, 1040. In this latter form of dissolution, the outgoing partner retains his interest in the partnership, subject to the appropriate liquidation of the business, and with the right to an accounting when the net assets of the partnership, as of the time of dissolution, shall have been ascertained. Avery v. Peirson, 74 Cal. App. 617, 241 P. 406. Dillman, in order to establish his contention that he had ceased to be a partner as described in the insurance policy, should have been required to show not only that the partnership had been dissolved, but also that, at the time of the accident, he retained no interest whatever in the assets or business of the partnership, especially so far as the job on which he was injured was concerned. But there is not in the record any such evidence.

The award is annulled.

We concur: HOUSER, J.; YORK, J.

104 Cal. App. 47

JONES v. PACIFIC GAS & ELECTRIC CO. et al.

Civ. 3628.

District Court of Appeal, Third District,
California.

Feb. 13, 1930.

1. Appeal and error ⇨170(3)—Overruling of demurrer to answer not stating facts showing alleged unfitness, negligence, etc., of one driving automobile in which plaintiff was riding, held not reversible error (Const. art. 6, § 4½).

Overruling of special demurrer to amended answer alleging plaintiff's contributory negligence in riding in automobile, with knowledge of driver's recklessness, negligence, and unfitness, held not reversible error, under Const. art. 6, § 4½, though amended answer stated no ultimate facts showing his unfitness, etc., and plaintiff's knowledge thereof, where depositions taken before trial clearly stated all facts underlying such allegations and plaintiff was fully advised of facts relied on to establish contributory negligence.

2. Electricity ⇨19(5)—Evidence held to justify finding that driver of automobile colliding with electric power pole was under influence of intoxicating liquor.

In action against electric company for injuries to guest in automobile colliding with power pole, evidence held sufficient to justify jury's finding that driver of automobile was under influence of intoxicating liquor at time of accident.

3. Electricity ⇨19(5)—Evidence held to negative contention that electric power pole was lawfully maintained in boulevard, when automobile collided therewith.

In action against electric company for injuries to guest in automobile colliding with power pole in boulevard, evidence held to negative defendant's contention that pole was lawfully maintained where it stood at time of collision.

4. Electricity ⇨18(1)—One intoxicated to degree preventing him from exercising normal faculties and driving with care of sober, prudent person, cannot drive automobile, though not drunk (California Vehicle Act, § 112).

California Vehicle Act (Acts 1923, p. 553), § 112, prohibiting persons under influence of intoxicating liquor from driving vehicles on public highways, applies if intoxication is to such degree as to prevent or tend to prevent driver of automobile from exercising his normal faculties and driving with care and caution characteristic of sober and prudent person, though he is not drunk.

5. Electricity ⇨18(1)—Guest knowing that automobile driver was under influence of intoxicating liquor held guilty of contributory negligence precluding recovery for injuries (California Vehicle Act, § 112).

One riding in automobile with knowledge that driver was under influence of intoxicating liquor held guilty of contributory negligence precluding recovery for injuries in collision with electric power pole, under California Vehicle Act (St. 1923, p. 553), § 112.

Appeal from Superior Court, Sacramento County; Raglan Tuttle, Judge.

Action by Florence L. Jones against the Pacific Gas and Electric Company and another. From a judgment for named defendant, plaintiff appeals.

Affirmed.

Charles L. Gilmore, of Sacramento, for appellant.

T. J. Straub and Charles E. Finney, both of San Francisco, W. H. Hatfield, of Sacramento, and Leo H. Susman, of San Francisco, for respondent.

PLUMMER, J.

Plaintiff instituted this action to recover damages on account of personal injuries sustained when an automobile driven by the defendant Cottrell collided with a power pole, belonging to and maintained by the defendant Pacific Gas and Electric Company. The defendant Cottrell suffered default, and, upon trial, judgment went in favor of the defendant Pacific Gas and Electric Company. From this judgment the plaintiff appeals.

[1] The complaint alleges that on or about the 13th day of November, 1926, the plaintiff was riding as a guest in an automobile, in a northeasterly direction, on a certain highway or street in North Sacramento known as "Del Paso Boulevard"; that at said time and place the defendant Cottrell was then and there operating said automobile in a careless and negligent manner; that at the same time the defendant corporation herein, Pacific Gas and Electric Company, was negligently allowing one of its poles to stand wholly within the main traveled portion of the said Del Paso boulevard and near the intersection of said boulevard with a certain other street known as "Globe Avenue"; that the said defendant corporation negligently failed to have said pole guarded, or otherwise marked, or illuminated, in a manner sufficient to direct attention of persons using said boulevard, of the presence of said pole. The complaint then alleges that as a proximate result of said operation of said automobile, and the maintenance of said pole, the collision herein referred to occurred, and that as the result of said collision, the plaintiff suffered severe bodily injuries, etc. The defendant corporation, in its answer, denied that it negligently allowed one of its poles to stand within said boulevard; denied that it failed to have said pole guarded, or marked, or illuminated, at said time or place; and alleged that at said time and place it maintained on said pole a lighted lantern with a red glass chimney, and that said lantern was so suspended and lighted as to sufficiently direct attention of persons using said boulevard of the existence and presence of the pole. In addition to denying the allegations of the

plaintiff's complaint, the defendant corporation filed an amended answer in which it set up as an additional defense, "that said plaintiff was herself guilty of carelessness and negligence in and about the manner in which she conducted herself at the time and place in question; that said plaintiff, before becoming the guest of said defendant William Cottrell, knew that said defendant William Cottrell had been, and was then and there a careless, reckless and negligent driver and operator of motor vehicles, and had been, and was then and there, unfit to drive or operate said automobile, and having such knowledge, said plaintiff then and there carelessly and negligently volunteered and undertook to, and did, ride in said automobile which was then and there driven by said defendant William Cottrell; that said defendant William Cottrell, at the time and place of the accident mentioned in said complaint, and during all of the times on said day that said plaintiff was riding in said automobile so driven and operated by him, did drive and operate said automobile in a careless, negligent and reckless manner; that said plaintiff, while riding in said automobile so driven by said defendant William Cottrell, knew that said defendant William Cottrell was then and there driving, and would then and there continue to drive, said automobile in a careless, reckless and negligent manner, and knew that said defendant William Cottrell was unfit to drive or operate said automobile, and knowing that fact, said plaintiff carelessly and negligently, and voluntarily continued to ride in said automobile, notwithstanding that said plaintiff had many opportunities to refrain from so doing; and that by reason of such carelessness and negligence on her part, said plaintiff proximately contributed to the damages and injuries of which she complains." To this amended answer the plaintiff interposed both a general and special demurrer, and the action of the trial court in overruling such demurrer is alleged as grounds for reversal. Among other things it is contended that such amended answer does not tender the issue of contributory negligence on the part of the plaintiff. While it is true that the amended answer does not set forth any ultimate facts showing that the defendant Cottrell was an unfit person to drive an automobile, or any ultimate facts showing carelessness, negligence, etc., on the part of the defendant Cottrell, in the control and managing of the automobile in which the plaintiff was riding preceding and at the time of the injury, we do not find that the special demurrer called attention to the fact that the amended answer failed to state any facts upon which it predicated the allegation that the defendant Cottrell was unfit to drive an automobile, and that the plaintiff had knowledge of such facts. On the other hand, if it were to be held that the special demurrer was sufficient, and that it should have been sustained on account of

the manner of pleading the unfitness of the defendant Cottrell which we have mentioned, any error of the court in overruling the plaintiff's demurrer thereto furnishes no ground for reversal under section 4½ of article 6 of the Constitution. The plaintiff in nowise is shown to have suffered by reason of any lack to point out why defendant Cottrell was unfit to drive an automobile prior to the date of the collision referred to. Certain depositions taken prior to the actual trial of this cause set forth clearly all the facts underlying the allegation that the defendant Cottrell was an unfit person to operate an automobile upon any of the highways in Sacramento county, and the plaintiff was fully advised of the facts upon which the defendant corporation would rely as establishing the plaintiff's contributory negligence. As to the form of pleading of the answer, we find in the case of *Griswold v. Pacific Electric Co.*, 45 Cal. App. 81, 187 P. 65, 68, holding the following sufficient to tender the issue of contributory negligence; the allegation in that case upheld is as follows: "That the plaintiff himself did not exercise ordinary care, caution, or prudence in the premises to avoid said accident and the resulting injuries, if any, by him sustained, and that said accident and the resulting injuries, if any, complained of were directly and proximately contributed to and caused by the fault, carelessness, and negligence of plaintiff in the premises." It was there held that this allegation was subject to a special demurrer, but as the plaintiff went to trial upon it, no prejudice had been suffered. The answer in the instant case pleads contributory negligence as an additional defense. In the *Griswold Case* it was pleaded as a further, separate, and distinct answer and defense. The *Griswold Case* refers to the case of *Starck v. Pacific Electric Ry. Co.*, 172 Cal. 277, 156 P. 51, L. R. A. 1916E, 58, where the same form of pleading of contributory negligence was approved. This case relies upon the case of *Crabbe v. Mammoth Channel Gold Mining Co.*, 168 Cal. 500, 143 P. 714. A consideration of these cases leads to the conclusion that the defense of contributory negligence on the part of the plaintiff was tendered as an issue, and further, that if not sufficiently pleaded, the cause was tried upon the theory of the contributory negligence of the plaintiff, and that under the constitutional provision which we have cited, no sufficient error is shown in relation to the pleadings to justify a reversal.

[2] The transcript discloses, among other things, the following facts: That prior to September, 1926, the state highway commission financed the paving of a 30-foot strip along the center of Del Paso boulevard; that prior to the work just referred to, an old pavement had existed on said boulevard along the center thereof, which was from 18 to 20 feet in width; that the pole referred to in this ac-

tion was situate southeasterly of the southerly edge of the old highway pavement, and about 8 feet therefrom; that when the pavement just referred to was finished, a strip of approximately 21 feet in width was paved continuously along the right-hand side of said boulevard for a distance of about one and one-quarter mile, and upon the completion thereof the opposite side was likewise paved, giving a width of the paved portion of the boulevard of 72 feet; that, prior to the work referred to, there was a fence along the property line of the southerly side of said boulevard; that the distance from the property line fence to the center of the pole referred to herein was 37 feet, and from the south curb to the center of the pole the distance was 25 feet. It thus appears that at the time of the accident there was a considerable portion of the paved part of Del Paso boulevard to the right of the pole in question, as well as to the left, and that the right-hand portion was of sufficient width for one to safely drive an automobile when traveling in a northeasterly direction. It further appears from the transcript, beyond any reasonable question, that, at the time of the injury complained of, a lighted lantern with a red globe was suspended in such a manner, upon the pole referred to, as to give notice to anyone approaching from the south, of the existence of the obstruction. As to the actions and movements of the plaintiff on the nights of November 13th and 14th, we find the following: That the defendant William Cottrell and his wife, and a man called Basil Filipino attended the first show of the Hippodrome Theatre on the evening of November 13th. After the show was over the three persons just mentioned went down to the automobile used during the time involved herein, and driven by the defendant Cottrell, and waited for Florence Jones and her husband to come to where the car was parked. Thereupon, all of the party got into the automobile and drove to the residence of Mr. and Mrs. Jones in North Sacramento, where they had a few drinks of what one of the witnesses called "Moonshine" or "Jackass Brandy"; that all five of the party went into the house. The witness Filipino testified that he had four or five drinks, and that others of the party did, also. After this all of the party went down to a place called the "All-Night Grocery," and had something to eat. Following this the party repaired to a place on Second and S streets, in the city of Sacramento, described as a "bootlegging joint"; that the party all went into the bootlegging joint and bought and drank some more liquor; that they all drank at the "joint"; that they were all together, buying drinks like that, each one buying his share; after this the party started for the Jones residence in North Sacramento. This witness could not give any account of how Mr. Cottrell drove on the way home; he does state, however, that Mr. Cottrell was

drinking in the bootleg joint; that Mr. Jones was also drinking; that after leaving the bootleg joint, he, the witness, was intoxicated, and in his own language "went out." It further appears from the transcript that all of the party knew of the existence of the pole heretofore referred to. The transcript also shows that the plaintiff in this action was also drinking with the others of the party; and further shows that the plaintiff knew of the drinking to which we have referred. It appears from the transcript that the social party continued from the time of leaving the Hippodrome Theatre between 9 and 9:30 p. m. until about 1 o'clock a. m. The plaintiff testified, in relation to the intoxication of the defendant Cottrell, the driver of the automobile, as follows: "Mr. Cottrell was not intoxicated to my knowledge that night. In my deposition I testified that he had had other accidents, and that he was in a slightly intoxicated condition; I don't remember back there, but I remember now, he was not in an intoxicated condition, not incapable of handling the machine, or anything of that kind. I thought, of course, he had been drinking; he had a couple of drinks of what is commonly called 'Jackass Brandy'; I had one. I said nothing to him about his driving; I don't know that Mr. Cottrell had any further drinks at that place where we stopped in Sacramento, that night before we started home. I testified, at the time my deposition was taken, that it was my understanding that they went there for the purpose of getting a drink; that was my impression, that they went in there to drink. I knew of the existence of the poles; I had passed them twice a day most of the time for several years; I didn't look at the poles, but I knew I was in their vicinity, and said nothing to Mr. Cottrell about the poles. I did not attempt at any time to get out of the car, nor ask Mr. Cottrell to stop." This witness further testified, as to Cottrell driving: "He did not necessarily drive negligently as to speed that night; he does drive kind of fast, particularly with those poles there, he was driving fast that night; I know they like to ride fast; I did not care; I like to go slow." Upon cross-examination the witness (plaintiff) testified as follows, referring to Cottrell: "Well, I knew he had taken one drink; I knew that he had taken more than one drink at the time." Plaintiff further testified: "In my deposition I stated I knew he occasionally drove when he was drinking; it was a frequent occurrence for him to drink. I don't know as he drove often when drinking. I knew he had been drinking that night. All the other party had a little drink; none were what I would say intoxicated. Mr. Cottrell was feeling good, but I would not say he was intoxicated." The transcript further shows that the bootleg joint to which the party repaired was apparently conducted by a friend of plaintiff's husband. While at this bootleg joint

the party engaged in dancing, singing, and drinking. The defendant Cottrell states that all of the party engaged in drinking at the bootleg joint. The plaintiff testified that she did not drink there. The husband of the plaintiff, who accompanied the party and participated in the drinking, would not say that Cottrell was either drunk or sober. On the way from the bootleg joint on Second and S streets, in the city of Sacramento, to the home of the Joneses in North Sacramento, the plaintiff occupied the front seat of the automobile with the defendant Cottrell. According to the testimony, the machine was driven at a speed of from 30 to 35 miles per hour, and on the way home, the defendant Cottrell, it appears swerved the machine a few times in close proximity to the curbing of the streets on which he was driving. It further appears from the testimony that the defendant Cottrell, as well as other members of the party, saw the red light on the power pole and attempted to swerve the machine so as to escape the collision. The light on the power pole was observed, according to the testimony, while the machine was at a distance therefrom of a half block or more. The defendant Cottrell testified that he was confused by lights of other machines approaching on the boulevard, just preceding the accident. Other members of the party testified that there were no approaching machines. From what the testimony shows as to the carousing of the party, the jury was warranted in drawing the inference that the defendant Cottrell was seeing lights where there were none. It appears also from the transcript that there was considerable arguing as to the manner of Cottrell's driving of the machine. The plaintiff herself testified that the defendant Cottrell made one of his daring attempts in the vicinity of the pole, referring to a swerving of the machine, and just before the accident said to the plaintiff that she was the only one in the car that had any sense. The scene of the accident was in a restricted zone, where the speed of automobiles was limited to 20 miles an hour. The testimony is conflicting as to who was the owner of the machine. The husband of the plaintiff originally bought the machine, and testified that he had sold his interest therein to the defendant Cottrell for the sum of \$25. On the other hand, the defendant Cottrell states that the automobile belonged to the husband of the plaintiff. There is other evidence in the transcript concerning the actions of the party on the night in question, and of the condition of the participants after the collision, but what we have set forth is amply sufficient to justify the jury in coming to the conclusion that all of the men, at least, were under the influence of the intoxicating liquor which they had imbibed both at the home of the plaintiff and her husband, and also at the bootleg joint.

[3] The defendant Pacific Gas and Electric Company, in support of its contention that it was guilty of no negligence in maintaining its power poles, and especially the pole with which the collision occurred, in the place where said pole was then standing, introduced an ordinance granting a franchise to erect power poles along what was then called the "Old Auburn and Sacramento Roads," this franchise having been granted long prior to the incorporation of North Sacramento. A reading of this ordinance, however, does not indicate that the pole in controversy was where the defendant Pacific Gas and Electric Company had a right to place it, or where its grantors had a right to place it. Section 3 of the ordinance reads: "The poles for the support of said wires shall be of height and strength sufficient to forestall interference with the public safety, convenience and comfort, and so located at the side of the highway as not to disturb travel, and such poles shall be erected under the supervision of the Board of Supervisors of Sacramento County." So far as the transcript shows anything in relation to the original location of the poles, it appears that they were not located at the side of the highway, but were located, as shown by the testimony hereinbefore referred to, a number of feet therefrom, and the transcript, so far as it shows anything in relation thereto, shows that the poles were maintained for a considerable period of time, in a situation on the improved highway so as to constitute an obstruction to the free use of Del Paso boulevard. It appears that the Electric Company offered as a reason for not having removed the poles from the boulevard, that there was some delay in determining just where the poles should be located and the grant of a privilege to locate the poles elsewhere. It is evident, however, from the width of the street and the length of time required to pave the same for the distance mentioned in the testimony, and the time that elapsed after the completion of the improvement, that prompt action was not taken to remove the obstruction from the boulevard. There is some testimony to the effect that at the time the poles were erected the highway was not suitable for travel in the vicinity thereof, but there is also testimony in the record to the effect that for a considerable period the highway in the vicinity of the poles could be used, though it was a little rough. If testimony had been introduced to the effect that the poles were erected along the side of the highway, then, and in that case, the law relating to obstructions on the highway under license would apply, but as the testimony set forth in the transcript is only to the effect that the poles were erected under the franchise, and not where the franchise directed that they should be erected, it is unnecessary to consider the various cases relied upon by respondents, to justify the maintenance of

the poles within the improved portion of the boulevard.

[4] This lack of showing that the pole in question was lawfully maintained in the situation where it stood at the time of the collision does not dispose of the case. Nor do we need to consider whether the defendant Pacific Gas and Electric Company had taken adequate means to warn automobile drivers of the then existence of the pole, as the defendant Cottrell, the plaintiff and the other persons composing the party, save Filipino, saw the red light and knew of the location and presence of the pole, and for the further reason that there is another element entering into this case which we think decisive. Section 112 of the California Motor Vehicle Act (St. 1923, p. 553, § 112) in force at the time of the collision, is as follows: "No person who is under the influence of intoxicating liquor or who is an habitual user of narcotic drugs shall drive a vehicle on any public highway within this state." This portion of the section is continued in force in the California Vehicle Act of 1929 (St. 1929, p. 537, § 44). It will be observed that the prohibition of the section applies even though the operator of the machine is not in the condition which in common parlance is called "drunk."

In the case of *Jensen v. Chicago, etc., Ry. Co.*, 133 Wash. 208, 233 P. 635, an instruction to the effect that if the driver of an automobile was, at the time of the accident, or immediately before, under the influence of intoxicating liquor, to such an extent as to dull his sense of sight and to prevent, or tend to prevent him from exercising the care and caution which a sober and prudent man would have exercised under the circumstances, and that Jensen (riding with the driver as a guest) knew, or should have known, of the driver's condition, and thereafter continued to ride with him, this would constitute negligence on Jensen's part, was approved. Thus, it is shown that the statute applies if the intoxication is to such a degree as to prevent, or tend to prevent, the driver of an automobile from exercising his normal faculties, and driving with the care and caution characteristic of a sober and prudent person. The facts related in the case to which we have referred are much less certain in demonstrating the fact of the driver of the automobile being under the influence of intoxicating liquor than appears in the instant case.

[5] In *Schwartz v. Johnson*, 152 Tenn. 586, 280 S. W. 32, 33, 47 A. L. R. 323, the Supreme Court of Tennessee, in passing upon the right of one to recover who voluntarily rides with an intoxicated driver, used the following language: "When one gets into an automobile which is to be operated by a drunken driver, through the traffic of a populous city, such person takes his life in his hands. All the authorities are to the effect that such contributory negligence prevents a recovery by one

taking such a chance, if he is injured as a result of the driver's negligence." Citing *Lynn v. Goodwin*, 170 Cal. 112, 148 P. 927, L. R. A. 1915E, 588; *Jensen v. Chicago, etc., Ry. Co.*, 133 Wash. 208, 233 P. 635; *Winston's Administrator v. City of Henderson*, 179 Ky. 220, 200 S. W. 330, L. R. A. 1918C, 646; *Kirmse v. Chicago, etc., Co.*, 73 Ind. App. 537, 127 N. E. 837; *Cunningham v. Erie Ry. Co.*, 137 App. Div. 506, 121 N. Y. S. 706. In *Lynn v. Goodwin*, 170 Cal. 112, 148 P. 927, L. R. A. 1915E, 588, cited in the *Schwartz Case*, the following language is used: "While it is true that in general the negligence of the driver of a vehicle is not imputable to a passenger so as to bar that passenger's right of recovery" (citing cases) "yet the conduct of the plaintiff in riding and in continuing to ride in an automobile when he must have known that the driver was intoxicated established independent negligence * * * from the driver's negligence, barring the right of recovery." (Citing a number of cases.) In the instant case the plaintiff had every reason to know, and we think it is conclusively shown that she did know that the defendant Cottrell was under the influence of intoxicating liquor at all times while driving the automobile after leaving the home of the plaintiff in North Sacramento. The plaintiff's own testimony shows that the party repaired to the home of the plaintiff and her husband for the purpose of drinking "moonshine" or "jackass brandy," and that after the supply at this home was exhausted, the party went to a bootlegging joint situate several miles distant, for the purpose of securing additional drinks. Under such circumstances the cases which we have cited prohibit recovery on the part of the plaintiff, irrespective of whether the Pacific Gas and Electric Company had or did not have a legal right to maintain its power pole in the position that it occupied on the night of November 13, and morning of November 14, 1926. The testimony shows that the party involved in this proceeding knew of the existence of the pole, and saw the warning light, but notwithstanding this knowledge, the driver was apparently too drunk, and we might add that most of the party was too drunk to know where to drive to avoid the collision. Under the section of the Vehicle Act, the party had no right upon the highway; the party was violating the law, and as said in one of the cases, "they were taking their lives in their own hands."

Some complaint is made as to the instructions given and instructions refused, but a consideration of the instructions given by the court as a whole leads us to the conclusion that the jury was not misled in any particular to the prejudice of the plaintiff. On the subject of intoxication, the court instructed the jury substantially in form and effect as approved in the case of *Jensen v. Chicago, etc., Ry. Co.*, *supra*.

Where one voluntarily participates in mid-night festivities leading to the drunken condition of an automobile driver, the law does not permit such an one to shut his eyes to the hazards of riding with the intoxicated driver and in the event of injury following his careless and negligent driving, hold a third party responsible in damages. We think such facts establish contributory negligence barring the right of recovery.

The judgment is affirmed.

We concur: FINCH, P. J., and R. L. THOMPSON, J.

HAHN et al. v. WILDE.★
Civ. 7269.

District Court of Appeal, First District, Division 2, California.
Feb. 14, 1930.

Rehearing Denied March 15, 1930. Hearing Granted by Supreme Court April 14, 1930.

1. Exchange of property ⇨1—Contract for exchange of realty and personalty is entire, not separable, where nothing to contrary appears on its face.

Contract for exchange of real and personal property is entire, not separable, where nothing to the contrary appears on the face thereof.

2. Exchange of property ⇨8(3)—Plaintiffs cannot recover for breach of exchange contract, in absence of allegation, finding or proof of any damage (Civ. Code, § 3300).

Parties contracting to exchange realty for other realty and shares of corporate stock cannot recover for breach of contract on ground that stock certificates were worthless as representing shares sold for nonpayment of assessments, in absence of allegation, finding or proof of any damage; plaintiff not being entitled to recover damages in excess of detriment proximately caused by breach, under Civ. Code, § 3300.

Appeal from Superior Court, Los Angeles County; Hugh J. Crawford, Judge.

Action by Cliff Hahn and others against Frances E. Wilde, individually and as executrix of the estate of L. J. Wilde, deceased. Judgment for plaintiffs, and defendant appeals.

Reversed.

Ewell D. Moore, James Farraher, and Ben S. Hunter, all of Los Angeles, for appellant. W. A. Alderson, of Los Angeles, for respondents.

STURTEVANT, J.

In their amended complaint the plaintiffs allege in paragraphs I and II the capacity of the defendants. Continuing, they allege that in November, 1925, the plaintiffs and the

defendants entered into a contract of exchange. Continuing, they allege that the defendants were to transfer certain properties, real and personal, giving exact descriptions but not stating any value on the real property and not stating any value on the personal property. The personal property consisted of thirty shares of the corporate stock of the U. S. Grant Hotel and Office Building Company. It was further alleged that, while negotiations were pending, the parties agreed on forty additional shares in the place of one piece of real estate. Then it is alleged that the defendants transferred all properties according to the agreement, but that the certificates of capital stock represented shares of stock that had theretofore been sold for the nonpayment of assessments and that said certificates were worthless and without value, although each share of stock purported on its face to be of the par value of one hundred dollars and the total to be of the value of seven thousand dollars. Finally, it is alleged that prior to the commencement of this action the plaintiffs offered to return the certificate to the defendants, but that their offer was refused. The defendants appeared and answered, and, in their answer, they denied all of the material allegations regarding the certificates of stock as being worthless and of no value, and continuing, they set forth that in the contract of exchange the shares of corporate stock were by the express agreement of the parties thrown in for good measure.

The trial court made general findings which were in favor of the plaintiffs. From a judgment entered thereon, the defendants have appealed.

[1-2] In their brief the defendants assert that the corporate stock was never properly sold for nonpayment of assessments; that the certificates were all that they purported to be on their face; that the plaintiffs were never precluded from exercising any of their rights as stockholders; that the stock was not turned in at par; that the stock was part and parcel of the property transferred by the defendants and is not separable from the other properties transferred by them; that the plaintiffs failed to prove tender prior to suit; that the plaintiffs' offer to restore was incomplete and insufficient; and that the trial court erred in allowing interest as from December 26, 1925, the date the exchange was completed. In reply the plaintiffs assert that the action is not for rescission, that it is not for damages, but that it is to recover the par value of the stock. In support of this claim they cite and rely on *Beckwith v. Sheldon*, 168 Cal. 742, 145 P. 97, Ann. Cas. 1916A, 963. That case is not at all helpful to the plaintiffs. In the first place, in the instant case the contract was entirely executed on both sides and there was nothing left in the

nature of a covenant by which either party was bound to make any payment. In the second place, Beckwith v. Sheldon deals with executory contracts in which one of the parties covenants to pay a sum of money in specific articles at a fixed rate. In the instant case we have no such contract before us. On the contrary, we are dealing with a simple contract of exchange by the terms of which the plaintiff agreed to transfer to the defendants certain real property and the defendants agreed to transfer in exchange therefor certain other real properties and the certificates hereinabove mentioned and referred to. If there has been a breach of an implied warranty of title as to any item of property covered by the contract, the plaintiffs have several remedies (23 C. J. 227). Nothing to the contrary appearing on the face of the contract, it is entire and not separable (1 C. J. 1111). The plaintiffs cite no authority and we know of none that authorizes them to recover any damages in excess of "the detriment proximately caused" by the breach (Civ. Code, § 3300). In the record before us there is no allegation, finding, or proof, of any damage.

The judgment is reversed.

We concur: NOURSE, Acting P. J., and DOOLING, Justice pro tem.

104 Cal. App. 169

DOCKSTADER v. FIRST NAT. BANK OF LEMOORE et al.

FIRST NAT. BANK OF LEMOORE v. DOCKSTADER et al.

Civ. 202.

District Court of Appeal, Fourth District, California.

Feb. 19, 1930.

1. Deeds ⇨194(5)—Recording by wife of husband's deed to her implied delivery.

In action by wife to quiet title against judgment creditor of husband claiming judgment lien upon land in suit, where wife's sole muniment of title was deed from husband alleged by her to have been delivered and proved to have been recorded by her, act of recording implied delivery.

2. Fraudulent conveyances ⇨259(1)—Cross-complaint praying cancellation of husband's deed to wife which she recorded held sufficiently to plead delivery, especially where wife denied nondelivery.

In wife's action to quiet title against judgment creditor of husband, a bank, cross-complaint by bank praying cancellation of husband's deed to wife which she had recorded sufficiently pleaded execution and delivery, where wife in answer to cross-complaint denied nondelivery of deed and relied upon it as sole muniment of title.

3. Quieting title ⇨44(2)—Testimony that witness bank cashier would not have lent money if he knew debtor did not own property was incompetent to show circumstances of loan by another cashier.

In wife's action to quiet title against husband's judgment creditor, a bank, which had lent him money in reliance on his ownership of property in suit, testimony by bank cashier that he would not have made loan if he had known that husband was not owner of property was incompetent to show circumstances surrounding loan in question, which was made by another cashier.

4. Appeal and error ⇨1050(1)—Cashier's testimony that he would not loan money if debtor did not own property was harmless, evidence showing that debtor made misrepresentations to lender.

In wife's action against husband's judgment creditor, a bank, to quiet title to land which husband, after conveying to her, had represented as his property to secure loan from bank, testimony by cashier who had not made loan that he would not lend money if he knew debtor did not own property, although improperly admitted, was not prejudicial in view of evidence and finding that debtor induced loan by representing himself as owner of property, and that such property was community property and hence subject to husband's debts.

5. Fraudulent conveyances ⇨300(5)—Deed by husband to wife held under evidence for adequate consideration.

In action by wife against judgment creditor of husband to quiet title to property deeded to her by husband, evidence that brother-in-law who had boarded with family for many years had conveyed his interest in property to husband with understanding that after debts were paid it should be conveyed to wife held to show trust in husband, executed by deed to wife, which was therefore upon adequate consideration.

6. Appeal and error ⇨1010(1)—Findings supported by material evidence were conclusive on appellate court in action to quiet title.

In action by wife to quiet title to land which husband, after conveying to her, had represented as his own in order to obtain loan from defendant bank which claimed judgment lien on property, findings supported by material evidence were conclusive on appeal.

7. Fraudulent conveyances ⇨299(10)—Evidence held not to show intent to defraud creditors by conveyance to wife.

In action by wife to quiet title to land conveyed to her by husband under deed alleged to be fraudulent as to creditors, evidence that wife collected rent, advertised in her own name for renters, paid taxes and insurance with her own checks, and that deed was acknowledged before notary who customarily took acknowledgments for judgment creditor, tended to show that failure to record deed was not due to intent to deceive creditors.

Appeal from Superior Court, Kings County; K. Van Zante, Judge.

Action by Lou E. Dockstader against the First National Bank of Lemoore and others to quiet title to two parcels of land. The bank filed a cross-complaint demanding cancellation of plaintiff's deeds. From judgment in favor of plaintiff as to one parcel, and in favor of the bank as to the other, both parties appeal.

Affirmed.

Claude L. Rowe, of Fresno, for Lou E. Dockstader.

Clark Clement, of Lemoore, for First Nat. Bank of Lemoore.

SLOANE, P. J.

This appeal involves title to two parcels of land in Kings county which may be sufficiently referred to for purposes of this opinion respectively as the "McBee ranch" and the "Lemoore property."

For an understanding of the case the following preliminary facts may be stated: While both parcels of land stood of record in the name of the defendant J. W. Dockstader, he obtained loans of money aggregating the sum of \$11,800 on credit of the reputed ownership of said real property, from the defendant and cross-complainant, the First National Bank of Lemoore, a national banking corporation.

The bank afterwards brought suit to recover on this loan and procured an attachment lien thereon, subsequently merged into a judgment lien. The plaintiff, Lou E. Dockstader, wife of defendant J. W. Dockstader, claiming ownership of both parcels of real property, thereafter commenced the present action to quiet title against her husband and the bank.

The husband disclaimed, and the bank by answer denied plaintiff's title, and alleged, by way of cross-complaint, that plaintiff's claim of ownership was based upon two separate deeds from her said husband executed in fraud of the latter's creditors, particularly the cross-complainant bank, and demanding the setting aside and cancellation of said deeds.

The trial court gave judgment in favor of plaintiff, quieting her title to the Lemoore property, and in favor of the cross-complainant bank, sustaining its lien on the McBee ranch.

Both parties have appealed, the plaintiff as to the McBee ranch and the cross-complainant as to the Lemoore property.

The issues as to the McBee property, being the less complicated, will be first disposed of.

Plaintiff's Appeal.

The trial court's findings as to the McBee property are sufficient to sustain the judgment for cross-complainant. The sufficiency of the evidence to support the findings is not questioned.

Plaintiff's claim for a reversal is based upon her objection alleging insufficiency of the cross-complaint to state a cause of action, and certain alleged errors of the court in the admission of evidence at the trial.

Plaintiff's counsel thus states the alleged insufficiency of the cross-complaint.

"Respondent nowhere in his cross-complaint alleges a transfer of the property from Mr. Dockstader to respondent (appellant), or title in her. In fact they directly aver that the essential element of a transfer, viz., a delivery of the deed, is lacking."

[1] This refers to the deed alleged in the cross-complaint to have been dated on the first day of August, 1925, and recorded on the 11th day of April, 1927, purporting to convey title to the McBee property from J. W. Dockstader to the plaintiff, his wife, and which is claimed by her as the sole muniment of her title to this ranch. She in her answer to the cross-complaint denies that it was not delivered; the trial court found that it was delivered. The undisputed evidence shows that it was filed for record by her, and its recordation under these circumstances implies a delivery.

Since prior to the execution of this deed her husband, J. W. Dockstader, was the record owner of the McBee ranch, a holding that there had been no delivery of this deed would leave appellant without any evidence of title whatever, and while such finding might leave no deed subject to cancellation, it would leave appellant without a color of title to be quieted.

[2] We think the execution and delivery to appellant of this deed from her husband to the McBee ranch is sufficiently pleaded and shown by the evidence, and that the deed was subject to annulment and cancellation upon a showing that it was fraudulently given.

[3, 4] The objections to the introduction of evidence are equally without merit. They were directed to questions addressed by counsel for cross-complainant to the witness Campbell. At the time the loans to defendant J. W. Dockstader were made, one N. W. Sorrick was cashier and manager of the bank and conducted the negotiations. At the time of the trial, the witness Campbell was cashier and manager. He was permitted to answer, over appellant's objection, a question propounded by counsel for respondent as to whether Mr. Campbell during the time he was manager would have extended this credit to defendant Dockstader, had he know the latter had deeded this property to his wife. He answered: "Why I might have extended a small amount of credit to Mr. Dockstader." "I would not have renewed the \$11,500 note unless Mrs. Dockstader signed the note."

This question and answer might have been directed to the custom of the bank in such matters, but it was clearly incompetent to show whether or not the transaction in question at the time the note was renewed was

influenced by the state of the title to this property, as this witness was not present when the loans were made.

The matter is shorn of prejudice, however, by the fact that the cross-complaint alleges other evidence was introduced and the trial court found that the renewal of these loans to J. W. Dockstader were induced by reliance on his representations that he was at the time the owner of all this real property.

Besides, under the findings and judgment of the trial court, it is adjudged that the McBee ranch was at all times the community property of Mr. and Mr. Dockstader, and was subject to J. W. Dockstader's debts.

The judgment affirming cross-complainant's lien on the McBee property is affirmed.

Cross-Complainant's Appeal.

The findings of the trial court sustaining the title of plaintiff, Lou E. Dockstader, to the premises described as the Lemoore property are to the following effect:

That it is true that plaintiff above named, Lou E. Dockstader, is now and for a long time hitherto has been the owner and in possession of those pieces and parcels of property situate in the county of Kings, state of California (describing the Lemoore property).

That it is true that the First National Bank of Lemoore claims and asserts an interest in said real property hereinabove set forth, adverse to the plaintiff.

That it is true that said defendant cross-complainant has not any estate, right, title, or interest whatever in said land or premises or in any part thereof. (Referring to the Lemoore property.)

That it is true that said cross-complainant, First National Bank of Lemoore, claims an interest in all of said described real property, upon the ground that said J. W. Dockstader is the owner thereof as community property, and that it is true that said cross-complainant claims an interest in said property upon the alleged ground that the conveyances thereof from the defendant J. W. Dockstader to his wife, Lou E. Dockstader, are void because they were recorded with intent to hinder, delay, and defraud the cross-complainant, but that said claims, as far as the Lemoore property is concerned, are unfounded.

That it is untrue that ever since the 9th day of March, 1918, the said J. W. Dockstader has been or now is the owner or in possession of the said Lemoore property.

That it is not true that said deed of March 9, 1918, conveying the Lemoore property to Lou E. Dockstader was never delivered.

That it is true that the said J. W. Dockstader and said Lou E. Dockstader are and at all times herein mentioned were husband and wife, and for many years prior thereto had been husband and wife.

That it is not true that all of the property in the complaint described has been acquired and is community property, and it is not true that said property has always been treated by the said J. W. Dockstader and the said Lou E. Dockstader as community property, save and except that it is true that said property described as the McBee ranch has been acquired during their marriage out of community earnings, and is community property and has been treated by said J. W. Dockstader and Lou E. Dockstader as community property.

That it is true that on various times and occasions from and including the 4th day of October, 1922, to the 27th day of January, 1927, the said J. W. Dockstader orally represented to said bank that he was and is the owner of all of the real property in said complaint described or referred to.

That it is true that he so represented to said bank at the time he negotiated the said loan commencing on the 4th day of October, 1922.

That it is true that he so represented in a written financial statement on the 22d day of May, 1924, or on the 6th day of March, 1926, or on the 27th day of January, 1927.

That it is true that said bank made said loans on the representations of said J. W. Dockstader that he owned all of said property.

That it is not true that said cross-defendant, Lou E. Dockstader, knew said loans were being made, and/or said money being obtained by the said cross-defendant J. W. Dockstader on the representation that he was the owner of all of said property.

That it is not true that said bank had no knowledge of the existence of said conveyance of March 9, 1918, prior to or on or about the 12th day of April, 1927; or for the reason that the recordation of said deed was not published in the official real estate reports in said county of Kings, but said bank had constructive knowledge of the recording of said deed.

That it is not true that of said sum of \$11,500 the sum of \$6,800 was borrowed from said bank by the said J. W. Dockstader to build a dwelling house upon a portion of said Lemoore property.

That it is true that the said J. W. Dockstader has not in his name any property out of which said judgment shall be satisfied.

That it is true that said bank made said loans on the representation of said J. W. Dockstader that he owned said McBee ranch.

That it is true that when said J. W. Dockstader procured said loans from said bank he was solvent and in good financial circumstances.

That it is not true that there was no consideration paid or given for said deed of March 9, 1918, but that it is true that a val-

uable consideration was paid by the said Lou E. Dockstader to the said J. W. Dockstader for said deed of March 9, 1918, to the Lemoore property.

That it is not true that said deed of March 9, 1918, was recorded as a part of a scheme on the part of the said J. W. Dockstader and Lou E. Dockstader, or either of them, formed with the intent and/or purpose of preventing said bank from collecting said indebtedness.

That it is true that said Lemoore property is exempt from execution under said judgment No. 528 of said bank against said J. W. Dockstader.

That it is true that in equity and good conscience the said cross-defendant, Lou E. Dockstader, should be permitted to retain the said Lemoore property conveyed as aforesaid.

The cross-complainant bases its appeal from the judgment in favor of the plaintiff, Lou E. Dockstader, affecting the Lemoore property on the alleged ground of insufficiency of the evidence to support the findings on which the part of the judgment appealed from is predicated. The substance of the cross-complainant appellant's position is that the court having found that the loans in question to J. W. Dockstader were induced by fraudulent representations relied upon by the bank that he was the owner of these two parcels of land, and the fact that plaintiff, Lou E. Dockstader, retained the deed from her husband to the Lemoore property unrecorded, covering all of the periods of negotiations of these loans, and that the money procured by the loans was used in large measure and presumptively with knowledge of the wife, in the improvement of the Lemoore property, raises a strong implication that she had knowledge of the fact that these loans were being granted on the strength of the apparent ownership of the real property by the husband. There would be strong reason for this contention if respondent's claim that the Lemoore property was deeded to Mrs. Dockstader by her husband as a gift and without a consideration from her was true. Respondent states his case at page 33 of his opening brief as follows:

"Clearly the court has found that J. W. Dockstader was guilty of fraud. The question in this case therefore, is whether the wife, Lou E. Dockstader, should be permitted to claim that she is the owner of the property, after holding an unrecorded deed for nine years, and permitting her husband thereby to commit a fraud on the bank, by representing that he was the owner of this particular property, and obtaining credit thereon."

Respondent quotes largely from the case of *Bush & Mallett Co. v. Helbing*, 134 Cal. 676, 66 P. 967. This was an action in which a deed was made May 15, 1893, by the defendant Louis Helbing to his wife Louise Helbing, when plaintiff was not a creditor of the defendant Helbing. The deed so made to the defendant was executed as a deed of gift.

The Supreme Court says in the course of the opinion:

"One of the main questions in the case is as to whether or not such deed is void as to subsequent creditors. The general rule is that a deed of gift is valid if the grantor was not indebted at the time he made it, or had ample means outside of the property conveyed with which to pay his indebtedness. This is so held for the reason that a man's property is his own, and he has a right to give it away if he so desires. If it be made while the grantor is free from debt, or while his solvency is not questioned, and he has ample means, after so deeding part of his property, to meet all his obligations, it can injure no one, and it is not the business of any one except the grantor and grantee.

"To this rule there is a well-known exception. This exception is that a deed of gift fraudulent in its inception, and made with an intent to enable the grantor to defraud future creditors, is void. A creditor has the right to believe that his debtor has dealt fairly with him, and if, in view of future indebtedness, and secretly, without the knowledge of the creditor, the debtor makes a fraudulent conveyance of his property, upon which he knows his contemplated creditor relies, or has a right to rely, this is actual fraud, and renders the conveyance void."

The trial court had held that this deed could not be defeated as to the defendant, the wife of the grantor, because of the fact that it had not been shown that she was a party to the fraud. The opinion continues:

"In this view of the law the court was in error. A deed of gift made by the grantor for the purpose of defrauding his creditors is none the less fraudulent because the grantee took no part in the fraud. Such grantee is not a purchaser for value, and, being the party benefited by the gift, receiving that for which nothing has been paid, is not in a position to claim the benefit of a conveyance made for the express purpose of defrauding creditors. A man must be just before he is generous. If he makes a deed of gift to his wife, it must be with no fraudulent purpose, and openly and under such circumstances that the law will impute no fraud as to his conduct.
* * *

"It is well settled that it is the motive of the grantor, and not the knowledge of the grantee, that determines the validity of the transfer. The grantee, however innocent, cannot retain the fruits of a voluntary fraudulent transfer. * * *

"The court below was of the opinion that defendant Louise [Helbing] must have been shown to have intended the fraud, and to have been connected with it. If this were true, as a proposition of law, her intention might be inferred from her conduct and all the circumstances of the case. It is well said by Wait, in his work on *Fraudulent Convey-*

ances (section 281): 'In litigations of the class under consideration, great latitude should undoubtedly be allowed in regard to the admission of circumstantial evidence for the purpose of proving participation in manifest fraud. Objections to testimony as irrelevant are not favored in such cases, since the force of circumstances depends so much upon their number and connection. The evidence should be permitted to take a wide range, as in most cases fraud is predicated on circumstances, and not upon direct proof.'

* * *

"In this case the deed was made without consideration. The grantor continued to deal with the property as before. The deed was kept secret and not placed of record. When the wife was called upon to testify, the husband objected. The materials went into her property, with her knowledge, and with no statement to plaintiff as to her title. All these matters might be true, and yet the deed might have been made with no intent to defraud. But the circumstances certainly are such as to call for a full, fair, and complete explanation. The burden was shifted upon the defendant to show that the transaction was honest, and with no fraudulent purpose. The fact that a deed is kept secret and not recorded is a very potent badge of fraud. In *Francis v. Lawrence*, 48 N. J. Eq. 511, 22 A. 259, the wife retained a deed, and the husband obtained credit by representing that he was the owner of the house and lot conveyed. In speaking of the transaction, the court said:

"At the time of these representations, except the first, his wife was in possession of a conveyance of the property from him to his brother-in-law for the purpose of vesting the title in her name. The deed was not delivered to the grantee, and not placed upon the record, but was held by the wife; and the husband was thus enabled to trade upon the false credit which he acquired by being the apparent owner of the property, while the deed was ready to be put upon the record at a moment's notice."

Respondent has strongly fortified his position with citations supporting this view of the law, and there was undoubtedly much evidence introduced on the trial of the present case tending to justify an inference that the wife and plaintiff here had notice that her husband was obtaining credit on the strength of his record title to this property. If the trial court had not found against these contentions and there had not been sufficient conflict in the evidence to give substance to the conclusions of the trial court, the judgment here might well have been rendered against the cross-defendant, but we think that there was substantial evidence to support the findings of the court against the cross-complainant as to the Lemoore property.

[5] On the important question of consideration, the evidence disclosed that the defend-

ant J. W. Dockstader and a deceased brother, Hi Dockstader, had been for many years copartners in all of their property holdings and business transactions, and that this property was acquired by them as such copartners. That the brother, Hi Dockstader, had been an inmate of the household of his brother, J. W. Dockstader, and that Mrs. Dockstader had for many years boarded him and rendered personal services for him, and that it was his purpose that his interest in the property should ultimately go to Mrs. Dockstader in a manner to compensate her for the obligations he felt he had incurred. Prior to his death he conveyed all of his interest to his brother, J. W. Dockstader, with the agreement and understanding that the latter should hold and administer the same until all the debts and incumbrances thereon were paid off, and that he should then convey this Lemoore property to Mrs. J. W. Dockstader for the benefit of herself and the children. This arrangement amounted to a trust in J. W. Dockstader which was finally executed by the conveyance of March 9, 1918, of the Lemoore property to the plaintiff, Lou E. Dockstader, and we think was upon an adequate consideration.

[6] Our examination of the record discloses that on each point of alleged insufficiency of the evidence to sustain a specified finding, there was some material evidence to justify the finding which makes it conclusive on this court.

It may be said that the evidence that cross-complainant was not without notice of the existence of the unrecorded conveyance to Mrs. Dockstader of the Lemoore property is very slight. Of course, the constructive notice of the recording of this deed after the 27th of September, 1926, the date of such recordation, is sufficient. But there is some evidence that prior to that time officers of the bank were informed that Mrs. Dockstader owned the Lemoore property. There is the testimony of J. W. Dockstader in answer to the question "Q. Did you ever tell the First National Bank or any of its officers that you deeded this property (referring to the Lemoore property) to your wife? A. I told Mr. Hinkle that that was my wife's property. Mr. Hinkle was one of the cashiers, clerks of the bank." A witness, Bramkamp, testified that he was present at a conversation between J. W. Dockstader and Mr. Sorrick, the cashier and manager of the bank, who supervised the Dockstader loan, and that he heard Sorrick make the statement that Mr. Hinkle took the first financial statement from Dockstader. This was corroborated by the witness Cochrane, who testified to a statement of Mr. Sorrick, made in his presence, to the effect that he thought Mr. Hinkle had taken the first financial statement from Mr. Dockstader and that Sorrick said: "It was probably the general run for the bank for Mr. Hinkle to take care of that."

[7] Tending at least to show that the failure to record the deed to the Lemoore property was not by reason of any intent to deceive or defraud creditors, are the facts testified to that at all times subsequent to the date of the deed in question, Mrs. Dockstader collected any rentals accruing on the Lemoore property, advertised in her own name for renters, paid the taxes and insurance with her own checks and from her own funds, although these were kept in a joint account with her husband, and there is some significance in this connection, to the fact that the deed itself was acknowledged before the notary who customarily took acknowledgments for the bank. These conditions would not likely exist in connection with any deliberate intent to conceal the transfer from the bank.

Mrs. Dockstader herself denies that she had any knowledge of any loans to her husband, negotiated by the bank, in reliance upon his apparent or represented ownership of this property by her husband; and Mr. Dockstader testified that he at no time informed his wife of these loans. The bank never called them to her attention. It may be assumed that in their business and domestic relations she was aware that he was securing money from some source, but as he was evidently a man of considerable affairs, and at the time solvent, it may reasonably be assumed that it did not occur to her that his credit was being bolstered up on any assumption that he owned this particular property.

Dealing with matters of inference from the conduct and relations of all the parties, it may be a matter of doubt as to the amount of reliance placed on any of the financial statements alleged to have been made to the bank.

Mr. Dockstader was evidently in the confidence of the bank as a steady patron, and on the basis of his general solvency, which existed until sometime after the placing of these loans. Even the criticisms of the bank examiner as to the unsecured conditions of these notes did not lead the bank to any particular investigation or attempt to obtain security.

To the extent, at least, of the value of the McBee ranch, it turns out that cross-complainant was not prejudiced by any misapprehensions as to its ownership.

The finding that the Lemoore property is exempt from execution, when qualified as it is by the statement contained in the finding, that it is exempt from the judgment obtained by the bank against J. W. Dockstader, is clearly correct under the general finding that this property belongs to the plaintiff, Lou E. Dockstader, who was not a party to the judgment.

Without going into the details of the voluminous transcript of the evidence, we are satisfied that the judgment quieting plain-

tiff's title to the Lemoore property cannot be overturned for insufficiency of the evidence.

Both judgments are affirmed.

We concur: BARNARD, J.; MARKS, J.

104 Cal. App. 153

TRACY v. GAUDIN.*
Civ. 94.

District Court of Appeal, Fourth District,
California.
Feb. 19, 1930.

Rehearing Denied March 17, 1930. Hearing Denied by Supreme Court April 17, 1930.

1. Executors and administrators $\S$ 92—**Infants** $\S$ 58(2)—Except in certain instances, contract of minor under eighteen may be disaffirmed by minor or his personal representatives without return of consideration (Civ. Code, $\S$ 35).

Under Civ. Code, $\S$ 35, contract of minor under age of eighteen may be disaffirmed by minor or by his personal representatives, in case of death, without return of consideration received, except in instances specified in statute.

2. Executors and administrators $\S$ 156—**Administrator of minor of 16, who purchased automobile, could disaffirm contract and recover money without making or offering restitution** (Civ. Code, $\S$ 35).

Where minor, 16 years of age, forged name of his guardian to bank withdrawal slip on which he obtained money with which he purchased automobile, and shortly thereafter died, minor's administrator, as personal representative, could disaffirm contract and recover money without restoring, or offering to restore, consideration to seller under Civ. Code, $\S$ 35.

Appeal from Superior Court, Tulare County; J. A. Allen, Judge.

Action by Percy Tracy, as administrator of the estate of Harold Tracy, deceased, against G. C. Gaudin. Judgment for plaintiff, and defendant appeals.

Affirmed.

G. W. Zartman, of Tulare, for appellant.
Walter C. Haight, of Visalia, for respondent.

MARKS, J.

Respondent instituted this action to recover the sum of \$510 from appellant, being money paid him by Harold Tracy, deceased, then a minor under the age of eighteen years, as the purchase price of an automobile. Judgment was rendered in his favor.

The case was submitted to the trial court upon an agreed statement of facts from which it appears that on June 10, 1926, Harold Tracy was of the age of sixteen years, and that Percy Tracy was the duly and regularly ap-

pointed and acting guardian of his person and estate. The guardian had the sum of \$576.51, belonging to the minor, on deposit in a bank in the city of Tulare. Appellant owned and operated an agency for the sale of automobiles and Harold Moffet was employed by him as a salesman. The minor went with Moffet to the home of Percy Tracy, the guardian, and tried to get his permission for the purchase of an automobile by the minor, from appellant, with guardianship funds. This permission was refused by the guardian.

About June 18, 1926, the minor forged the name of his guardian to a withdrawal slip, on which he obtained \$510 of the guardianship funds from the bank, which he placed in the form of a cashier's check, with which he purchased an automobile from appellant, paying for the same in full. A few days later the minor traded the automobile, purchased from appellant, to another as part payment on a more expensive car. The minor died on July 23, 1926, and Percy Tracy was appointed administrator of his estate on August 11, 1926, and thereafter qualified as such and entered upon the discharge of his duties.

The exact date respondent first learned of the withdrawal of the \$510 by the minor from the guardianship account does not appear, except that it was after the automobile obtained from appellant had been traded off by the minor, and prior to August 9, 1926. On this day the bank credited the guardianship account with \$510, which credit it later canceled and refused to restore the money to respondent. At no time did either the minor or respondent restore, or offer to restore, to appellant the automobile which the minor had purchased from him, or its value. On January 7, 1927, respondent demanded the sum of \$510 from appellant, which demand was refused. This action was instituted to recover the money and judgment was rendered for respondent.

[1] The law is well settled in this state that, except in certain specified instances, of which this is not one, a contract of a minor under the age of eighteen years may be disaffirmed by the minor, or by his personal representatives, in case of death, without the return of the consideration received by the minor. Section 35, Civ. Code. As was said in the case of *Flittner v. Equitable Life Assurance Society*, 30 Cal. App. 209, 157 P. 630, 633, in passing upon a contract of a minor under eighteen years of age:

"The law in its wisdom shields minors from their lack of judgment and experience, and vests in them under certain conditions the right to disaffirm their contracts. That right the plaintiff in this case invoked, and he was

thereupon entitled to recover the premiums theretofore paid by him. This position may seem, under all the circumstances of the case, to be a hardship on the defendant, but 'the right of an infant to avoid his contracts is one conferred by law for his protection against his own improvidence and the designs of others; and though its exercise is not infrequently the occasion of injury to those who have in good faith dealt with him, this is a consequence which they might have avoided by declining to enter into the contract. It is the policy of the law to discourage adults from contracting with infants, and the former cannot complain if, as a consequence of their violation of this rule of conduct, they are injured by the exercise of the right with which the law has purposely invested the latter, nor charge that the infant in exercising the right is guilty of fraud.'"

[2] In this case the minor had received and retained the benefits of his contract, and was not required to restore the consideration or its equivalent. To the same effect are the cases of *Hakes Investment Co. v. Lyons*, 166 Cal. 557, 137 P. 911; *Cummings v. Strobridge Land Syndicate et al.*, 150 Cal. 209, 88 P. 901, 119 Am. St. Rep. 189; and *Maier v. Harbor Center Land Co.*, 41 Cal. App. 79, 182 P. 345.

In the case of *Lee v. Hibernia Savings & Loan Society*, 177 Cal. 656, 171 P. 677, the Supreme Court considered a case in which a minor brought suit to escape liability under a note secured by a deed of trust to secure the repayment of money loaned her before she was eighteen years of age, and which loan she attempted to confirm and ratify before her eighteenth birthday. The court held that there was no duty resting upon the minor to either restore, or offer to restore, the consideration received by her for the execution of the note, and held the obligation void. The contract of a minor under eighteen years of age, relating to real property or to personal property not in his immediate possession or control, is void. Section 33, Civ. Code. All other contracts of minors under eighteen years of age, except those specified in sections 36 and 37 of the Civil Code, are voidable by the minor, or his heirs or personal representatives in case of death, without restoring, or offering to restore, the consideration or its equivalent. Section 35, Civ. Code; 14 Cal. Jur. 127. Harold Tracy being under the age of eighteen years at the time he paid appellant for the automobile, his personal representative could disaffirm the contract and recover the money without restoring, or offering to restore, the consideration to appellant.

Judgment affirmed.

We concur: SLOANE, P. J.; BARNARD, J.

104 Cal. App. 112

BREWER v. BENTON et al.*

Civ. 3928.

District Court of Appeal, Third District,
California.

Feb. 17, 1930.

Rehearing Denied March 19, 1930. Hearing De-
nied by Supreme Court April 18, 1930.

1. Appeal and error $\S$ 931(4)—Evidence warranted finding that plaintiff given judgment below for damages to automobile when forced off highway by passing car was not contributorily negligent.

In action for damages to automobile resulting when plaintiff's car was forced off narrow roadway by defendant who was attempting to pass plaintiff, evidence held sufficient to warrant reviewing court's finding, in support of judgment for plaintiff and in absence of finding on issue by trial court, that plaintiff was not guilty of contributory negligence by driving in center of paved highway and neglecting and refusing to allow defendant sufficient room in which to pass.

2. Appeal and error $\S$ 931(4)—Reviewing court in support of judgment for plaintiff may supply finding of want of contributory negligence inadvertently omitted by trial court (Code Civ. Proc. $\S$ 956a).

Where trial court, in action for damages on account of defendant's negligence, adopted findings in favor of plaintiff upon material issues, except that of contributory negligence, and rendered judgment for plaintiff and preponderance of evidence refutes theory of contributory negligence, and it is apparent that the trial court inadvertently omitted to adopt a finding on that issue, reviewing court is authorized, under Code Civ. Proc. $\S$ 956a, to supply the omitted finding.

Appeal from Superior Court, Sacramento County; John F. Pullen, Judge.

Action by Arthur N. Brewer against W. A. Benton and others. Judgment for plaintiff, and defendants appeal.

Affirmed, with additional finding.

Evan J. Hughes, of Sacramento, for appellants.

Butler, Van Dyke, Desmond & Harris, of Sacramento, for respondent.

R. L. THOMPSON, J.

This is an appeal from a judgment for damages to the plaintiff's automobile sustained by coming in contact with an electric power pole when his car was crowded from the highway by the passing of defendant Benton's machine. A reversal of the judgment is sought on the sole ground that the trial court failed to adopt findings upon the issue of contributory negligence.

The plaintiff was driving his automobile along the highway from Sacramento to Rio Linda. It was a narrow roadway. The paved portion was but ten feet in width with

a five or six foot shoulder on either side. The plaintiff was traveling about 30 miles an hour. The defendant Benton was driving his Studebaker car which approached from behind the plaintiff's machine. After first passing an intervening Ford coupé, the defendant claims to have sounded his horn and then attempted to pass the plaintiff's car by traveling along the extreme left-hand portion of the highway with his automobile running almost entirely on the dirt shoulder of the road. He admits traveling 36 or 38 miles an hour. Both the plaintiff and his companion who sat by his side testified that the defendant did not sound his horn and that he was traveling 40 or 45 miles an hour. The defendant testified that as his car reached a point opposite the plaintiff's machine the front wheels of his automobile struck a little trench across the roadway and that it was suddenly thrown toward the plaintiff's machine. He said: "There is a little drain over there, probably three or eight inches (wide), and when I passed him the rear end of my car gave a swing like (toward his car)." Both the plaintiff and his companion testified that they were traveling about 30 miles an hour on the right-hand side of the roadway, and heard no horn, but suddenly discovered the defendant's car when it was nearly opposite their car; that it was traveling at a rapid rate of speed estimated at 40 or 45 miles an hour and that it swerved and came at an acute angle directly toward their car; that in order to avoid a collision it was necessary for the plaintiff to turn his car off of the highway entirely; that in doing so, he lost control of the machine and it ran through a ditch which paralleled the highway and collided with a telephone pole, seriously damaging the car.

In separate answers which were filed in behalf of the defendants, contributory negligence was pleaded in the following language: "The plaintiff left the said road and collided with a certain power line pole * * * as the direct and proximate result of his own contributory negligence * * * in this, that the said plaintiff was negligently and carelessly driving in the center of said paved highway and failed, refused and neglected to allow defendants sufficient room in which to pass said plaintiff."

[1] A judgment for \$880, which was rendered in favor of the plaintiff, is amply supported by the evidence. Indeed the appellants' sole claim of error upon which they seek a reversal is the failure of the trial court to adopt findings upon the issue of contributory negligence. This was clearly an inadvertence which occurred in the preparation and presenting of findings. Apparently all available testimony was adduced at the trial. No benefit could be derived by a retrial of the case. From the fact that the trial court

rendered judgment in favor of the plaintiff and adopted findings favorable to him upon all the issues in the case except that of contributory negligence, it is evident that this issued was overlooked, and that a finding on this issue would have also been favorable to the plaintiff if it had been presented and adopted. It is true that, while there is a conflict of evidence respecting the charge that the plaintiff was guilty of contributory negligence in driving along the wrong side of the highway, the evidence upon this subject strongly preponderates in favor of the plaintiff. Only three persons saw the accident. They were the drivers of the respective cars and a companion of the plaintiff, who differ as to whether the plaintiff was driving on the wrong side of the highway. The physical facts seem to preclude the theory that he was on the wrong side of the road, for the highway was narrow and the defendant's car succeeded in reaching a point opposite the plaintiff's machine before the course was changed. This seems to confirm the plaintiff's claim that he was running on his proper side of the highway. The plaintiff's associate who rode with him upon this occasion testified as follows:

"Q. On what side of the road was Brewer driving that car just before the collision occurred? A. On the right side, the car was off as far as it could be driven.

"Q. You are sure of that? A. Positive."

The only other witness to the incident was Mrs. Redmond, who was called by the defendants. It is impossible to tell from her evidence which machine she thought was taking too much space on the highway. Her evidence is valueless.

[2] Under such circumstances when the trial court has adopted findings in favor of the plaintiff upon all the material issues except that of contributory negligence and has rendered judgment for the plaintiff, and the clear preponderance of the evidence refutes the theory of contributory negligence, and it is apparent the trial court has inadvertently omitted to adopt a finding upon that issue, but would have determined the issue favorable to the plaintiff, in support of the judgment and in accordance with justice the reviewing court is authorized to supply the omitted finding pursuant to the provisions of section 956a of the Code of Civil Procedure and thus avoid the unnecessary expense and cost of a new trial. This statutory provision concludes with this sentence: " * * * This section shall be liberally construed to the end, among others, that whenever possible causes may be finally disposed of by a single appeal and without further proceedings in the trial court, except where the interest of justice requires a new trial."

In the case of *Tupman v. Haberkern* (Cal. Sup.) 280 P. 970, 974, the Supreme Court has very properly said it was not the purpose of the legislature in enacting section 4½ of article 6 of the Constitution and section 956a of

the Code of Civil Procedure to transform the reviewing courts into trial courts or to authorize the appellate courts to set aside findings which the trial court has adopted or substitute contrary findings when in doing so it is necessary for the reviewing court to pass upon the preponderance of evidence, for the reason that the trial court is better qualified to exercise that function, since it has the opportunity of observing the witnesses on the stand and determining their credibility. In the last-mentioned case the court says: "The appellate courts will not develop into trial courts because they will undoubtedly exercise this power [of modifying findings] sparingly and will refer any complicated questions of new evidence to the trial court or a referee for hearing." But the court also added: "Whenever possible, and the interests of justice would seem to require, the reviewing court should have the power to make new findings contrary to or in addition to those made by the trial court * * * to the end that the judgment or order appealed from may be affirmed and further litigation terminated."

With this addition to the findings, the judgment is affirmed.

Accordingly, this court hereby finds that the affirmative defenses which are alleged in the separate answers of W. A. Benton and Henderson Bros., charging the plaintiff with contributory negligence, are untrue.

We concur: FINCH, P. J.; PLUMMER, J.

On Application for Hearing in Supreme Court.

PER CURIAM.

Hearing Denied.

SEAWELL, J.

The trial court made the following finding: " * * * That at said time and place defendant W. A. Benton so carelessly and negligently drove and operated said automobile in attempting to pass the car of plaintiff Arthur E. Brewer as to cause the car of said W. A. Benton to cross said highway at said point at an angle and come close to and immediately in front of the car being driven by plaintiff Arthur E. Brewer; that as a result of said careless and negligent driving of defendant W. A. Benton at said time and place it became necessary for plaintiff Arthur E. Brewer to leave said highway, and that his car did leave said highway and collided with a telephone pole and a power line pole; that as a direct and proximate result of said negligence and carelessness of defendant W. A. Benton in driving and operating his said automobile at said time and place, the automobile of plaintiff Arthur E. Brewer was damaged."

In my view, the above finding precludes by way of demonstration any other conclusion than the one that the plaintiff was guiltless of contributory negligence. This being so, it was not necessary to declare in the terms of a conclusion that the plaintiff was not guilty of contributory negligence. The finding fully supporting the judgment, the affirmance should be based solely on that ground. I am in accord with the majority of the court in denying the petition, but think it unnecessary to place it upon the power of the appellate court to make findings where the evidence is conflicting.

I concur: PRESTON, J.

SHEEHAN et al. v. VEDDER et al.★
Civ. No. 222.

District Court of Appeal, Fourth District,
California.

Feb. 19, 1930.

Rehearing Granted March 20, 1930.

- 1. Appeal and error** ⇨916(1)—Appellate court, after judgment on pleadings for plaintiff, must assume truth of allegations of answer.

Appellate court, in case judgment was rendered for plaintiff on the pleadings, must assume truth of all allegations of answer.

- 2. Quieting title** ⇨10(1)—Plaintiff in quiet title action must recover on strength of his own title.

Plaintiff in an action to quiet title must recover, if at all, on the strength of his own title and not on weakness of that of defendant.

- 3. Mines and minerals** ⇨58—Contract granting right to prospect for, drill, and develop oil was sufficient defense in action to quiet title regardless of lack of mutuality in agreement (Code Civ. Proc. § 738).

Contract granting exclusive right to prospect for, drill, and develop oil, in so far as vesting of right to specified use and possession of premises was concerned, was executed and constituted sufficient defense, under Code Civ. Proc. § 738, in an action to quiet title by lessor and lessee under subsequent similar contract, regardless of lack of mutuality in agreement by reason of provision authorizing lessee at any time before or after discovery of oil to quitclaim property, or any part thereof, particularly since lessor had, by his own refusal to perform, denied lessee's offer of performance and prevented efforts to perform part of agreement.

- 4. Specific performance** ⇨32(1)—Equity will not grant specific performance to one not bound to perform his part of contract.

Equity will not grant relief of specific performance to one who is not himself bound to perform his part of contract.

- 5. Specific performance** ⇨32(1)—Lack of mutuality does not always prevent specific performance of contract (Civ. Code § 3386.)

Even where right to specific performance of a contract is involved it is not always true that lack of mutuality prevents specific performance notwithstanding Civ. Code § 3386, which is open to so many exceptions that it is of little value as a rule.

- 6. Quieting title** ⇨49—Generally, in action to quiet title, one may not ask for decree barring another from asserting claim under instrument without restoring consideration.

Generally, in action to quiet title, one may not ask for decree barring another from asserting a claim under an instrument executed by the former without restoring the consideration received.

Appeal from Superior Court, Kern County;
Erwin W. Owen, Judge.

Action by Harry Sheehan, sometimes known as Harry F. Sheehan, and another against Dwight G. Vedder, sometimes known as D. G. Vedder, and others. Judgment for plaintiffs, and defendants appeal.

Reversed.

Robert M. Pease and Roy P. Dolley, both of Los Angeles, for appellants.

Emmons & Aldrich, of Bakersfield, for respondents.

SLOANE, P. J.

This appeal was taken to the Supreme Court and afterwards transferred to the Fourth District Court of Appeal for decision.

This action was brought by the plaintiffs, Harry Sheehan and Elbe Oil Land Development Company, a corporation, to quiet title to a tract of land in the county of Kern, described as the S. W. ¼ of section 18, township 28 S., R. 29 E., M. D. B. & M.

It is alleged in the complaint as the basis of plaintiffs' right of action: That plaintiffs have, and are entitled to have, the exclusive right to prospect for oil or gas, and to drill for oil or gas in and upon said premises.

Dwight G. Vedder, sometimes known as D. G. Vedder, R. D. Vedder, and Vedder Brothers, Inc., a corporation, hereinafter referred to as defendant Vedder, answered to the complaint by setting up and alleging an adverse interest in this property under a drilling contract entered into by and between the plaintiff Harry Sheehan, as party of the first part and the defendant Vedder as party of the second part, on the 3d day of June, 1926, about a year prior to the beginning of this action, the terms of which contract will be later considered.

The exclusive right to prospect for, drill, and develop oil on this land claimed by plaintiffs was acquired by the plaintiff Sheehan under United States prospecting permit serial No. 010684 in the United States Land Office at Visalia, California, under and pursuant to the Act of Congress approved February 25, 1920 (41 Stat. 437), and it is undisputed that this permit was in full force and effect on June 3d, 1926, and that Sheehan was empowered thereunder to enter into the agreement of that date, with defendant Vedder. The substance of such agreement is as follows:

"Said party of the first part does hereby grant and give unto said party of the second part the right to drill and prospect for oil and gas upon some portion of the land embraced in said permit, as above described, and said party of the second part does hereby covenant and agree that he will commence the actual drilling of a well thereon, on or before six months after oil has been discovered in paying quantities in a well which is to be drilled by said party of the second part on

either section in the above township and range they may elect. Said party of the second part is to commence operations for the drilling of said well on or before three years and the drilling thereof is to be conducted with diligence until oil or gas is encountered in commercial quantities on said land or until such time as said party of the second part is satisfied that no oil or gas exists under said land.

"Within sixty days after the completion of each well upon the above described property, as described in said Permit, said party of the second part shall commence the drilling of another well on said land and continuously prosecute the work of drilling the same until completed, until he has completed at least one well for each ten acres of land.

"Said party of the second part, in addition to the foregoing, agrees to comply with all the drilling requirements of said Permit and the drilling requirements of any and all leases which may hereafter be granted for said land by the United States, at least sixty days prior to the time when such drilling is required by the terms of said Permit and leases.

"Said party of the first part agrees, in the event the Secretary of the Interior so requires, to assign to the party of the second part, the area covered by this contract; said assignment, if made, shall not change or alter the royalties to be paid said party of the first part as hereinafter set forth.

"After the discovery of oil on said land in paying quantities the parties of the first part agree to make application for a lease thereof to the United States, and thereafter, and subject to the approval of the Secretary of the Interior, to sublet to the party of the second part or his successors in interest, the portion of the Permit area covered by this contract. Said party of the second part shall pay all taxes on all improvements and all taxes on his proportion of oil and gas taken from or stored on said land, and also all costs incurred by said party of the first part in securing a lease from the United States.

"After the discovery of oil in paying quantities, the party of the second part, in addition to satisfying the requirements as to royalties due the United States, agrees to pay to the parties of the first part the equivalent of five per cent (5%) of all oil and gas marketed from that portion of the said land upon which the royalty due the Government is five per cent (5%), in cash at the prevailing market price.

"Said party of the second part shall have the free use of so much of the oil, water or gas produced on said property as may be required in the operation of the property;

"It is further agreed that the party of the second part shall keep books of record, logs of wells, and all other data relating to the well or the drilling thereof, and relating to

oil, gas and gasoline produced on said land, and that the same shall be at all times available to the party of the first part in order that the required reports may be furnished to the United States and the State of California.

"Time is hereby declared to be the essence of this contract, and in the event the party of the second part for any reason fails to comply with the terms hereof, or with any extension hereof in writing, signed by the parties hereto, this contract may be at the option of the party of the first part, terminated and forfeited by giving the party of the second part thirty days' (30) written notice thereof by registered mail at his address at 551 Chamber of Commerce Building, Los Angeles, California, and said party of the second part covenants, promises and agrees that should such notice of forfeiture be given, he will, if the Permit issued to said Harry F. Sheehan has been assigned to him, re-assign the same to the said party of the first part within ten days after receiving such notice.

"If the party of the second part has completed one or more wells which are producing oil or gas, he shall be entitled to the lease of the legal subdivision of ten (10) acres upon which such well or wells is located, provided a lease shall have been granted to the party of the first part by the United States for such ten (10) acres, and forfeiture shall only extend to the remainder of said land upon which party of the second part has failed to drill, in accordance with the terms of this contract, but in event of any such forfeiture, no well shall be sunk for oil and gas within 500 feet of any well retained by the party of the second part.

"The party of the second part at any time before or after the discovery of oil on said premises may quitclaim said property or any part thereof to the parties of the first part, their successors or assigns, and thereupon all rights and obligations of the parties hereto, one to the other, shall thereupon cease and determine as to the premises quitclaimed.

"This contract shall inure to the benefit of, and be binding upon the heirs, assigns and successors in interest of the respective parties hereto.

"In witness whereof, the parties hereto have set their hands the day and year hereinabove first written.

"Harry F. Sheehan,

"Justine Sheehan,

"Parties of the First Part.

"D. G. Vedder,

"Party of the Second Part."

Defendant Vedder, by amended answer, after setting up this contract, alleges that on or about June 5, 1927, he, in writing, notified the plaintiffs that he then was ready, able, and willing to perform said contract and to commence and prosecute the work of prospecting and drilling for oil and gas, as pro-

vided in the contract, but that plaintiffs failed and refused, and have ever since failed and refused, to give defendant possession for said purposes, and then and ever since, have denied the validity and effect of said contract, although defendant at all times was and still is ready, able, and willing to perform on his part.

The amended answer further alleges that the only claim of right or interest in said premises of the plaintiff Elbe Oil Land Development Company, is by virtue of a contract practically identical in its terms with the Vedder contract entered into between the plaintiff Sheehan and one L. S. Barnes, of date April 7, 1927. That Barnes was, at the date of said contract, and ever since has been, the secretary and a member of the board of directors of the plaintiff Elbe Oil Land Development Company, and that the said Barnes took and received said contract as the agent of, and for the benefit of said corporation, and has transferred and assigned said contract to said corporation.

That although said contract is dated April 7, 1927, it was not executed until long after that date, namely on or about June 1, 1927. And that said Barnes and said Elbe Corporation, at the time of execution of the latter contract, were informed and knew of the contract of defendant Vedder.

On this alleged state of facts plaintiffs demanded judgment on the pleadings, which was granted, and it is from such judgment that this appeal is taken.

The judgment decrees: "It is hereby ordered, adjudged and decreed that the plaintiffs herein are the owners of and entitled to, and have the exclusive right and privilege to prospect the premises hereinafter described, for oil and gas, and to drill wells therein and therefor, and that said plaintiffs are entitled to the possession of said premises for such purpose and that the said defendants Dwight G. Vedder, sometimes known as D. G. Vedder, R. D. Vedder and Vedder Bros., Inc., a corporation, have not nor have any of them any estate or interest whatsoever in or to the right or privilege of prospecting said lands for oil or gas or in or to the oil or gas content of said premises or to the possession thereof for such purpose or for any purpose incident thereto; that the title of the said plaintiffs in and to the said right and privilege of prospecting said premises for oil and gas and in and to the exclusive possession of said premises for such purpose and in and to the oil and gas content thereof as against the said defendants herein specifically named, be and the same is hereby quieted as against the said specifically named defendants and the said defendants so specifically named are and each of them is hereby forever enjoined, debarred and restrained from asserting any right and from bringing any action against plaintiffs

in regard to plaintiffs' right, title or possession of said premises, for the purpose of prospecting the same for oil or gas and the rights and privileges of plaintiff incident thereto, adverse to plaintiffs; and that the agreement, set forth in the answer of defendants, alleged to have been entered into under date of June 3, 1926, between plaintiff Harry F. Sheehan and defendant D. G. Vedder, is declared null and void."

[1] In order to sustain a judgment on the pleadings, all the allegations of the answer must be taken as true.

The questions to be considered on this appeal are (1) the sufficiency of a showing of title in the plaintiffs to maintain the action; (2) the sufficiency of the answer to support defendants' adverse claim.

Assuming as we must, the truth of all the allegations of the answer, we are unable to find any evidence of title in the plaintiff Elbe Oil Land Development Company.

[2] In the first place the plaintiff in a quiet title action must recover, if at all, on the strength of his own title, not on the weakness of that of defendant. (22 Cal. Jur., p. 167 and citations.) *Rockey v. Vieux*, 179 Cal. 681, 178 P. 712.

[3] The complaint alleges by way of title that "the plaintiffs have and are entitled to have the exclusive right to prospect for oil or gas, and to drill for oil and gas in and upon the described premises."

The answer expressly denies that the plaintiffs or either of them are or is entitled to have the exclusive or any right to prospect for oil or gas, or to drill for oil or gas on said premises. This allegation of the answer raises a direct issue of fact material to the disposition of the action, excepting to the extent that the denial is modified by a subsequent admission of the answer that the plaintiff Sheehan is, and at all times mentioned was, the owner of the prospecting permit with prospecting and drilling rights thereunder, subject only to the subleasing agreement with the defendant Vedder.

The denial of any actionable interest of the plaintiff Elbe Corporation is only qualified by the statement in the answer that its only claim of right arises on the subleasing contract from plaintiff Sheehan to Barnes and assigned to the Elbe Corporation, which is declared to have been acquired subsequent to and with full knowledge of the Vedder contract, and to correspond in its terms with the previous Vedder contract.

In any event, the contract under which the Elbe Company claims is limited by the same clause as the Vedder contract, permitting the termination, at any time, of the rights of all parties by a quitclaim and release from the party of the second part.

It is this clause upon which plaintiffs rely as destroying mutuality of the Vedder contract, and rendering it invalid and ineffective to vest any property interest in the defendant.

If such is the effect upon the Vedder contract, it must likewise result that the same provision in the Barnes-Elbe contract defeats the claim of title or interest in the plaintiff Elbe Corporation.

If, on the other hand, this surrender clause does not invalidate the contracts in question, the right of action of the Elbe Corporation must fail, because of its contract being subsequent and subordinate to the Vedder contract.

Assuming the truth of the allegations of the answer in this regard, it must follow, in the absence of a trial of the issue, that the Elbe Corporation can have no claim in this action to a quiet title decree against the defendant on the pleadings.

As to the plaintiff Sheehan, however, the answer admits an actionable title, subject only to the rights, if any, vested in defendant under the contract of June 3, 1926.

As we understand the argument of respondent's counsel, they base their claim that the Vedder contract is invalid and vests no adverse rights in defendant, on the ground that there is a lack of mutuality in the agreement, in that the provision therein that the "party of the second part at any time before or after the discovery of oil on said premises, may quitclaim the property or any part thereof, to the parties of the first part, their successors or assigns, and thereupon all rights and obligations of the parties hereto, one to the other, shall thereupon cease and determine as to the premises quitclaimed."

They claim, that by reason of this release clause, the contract is not subject to enforcement of specific performance, and that a contract that is not capable of specific performance is not a defense to an action to quiet title. Citing *Archer v. Miller*, 73 Cal. App. 678, 239 P. 92; *Crane v. Roach*, 29 Cal. App. 584, 156 P. 375; *Jolliffe v. Steele*, 9 Cal. App. 212, 98 P. 544; *Valentine v. Streton*, 9 Cal. App. 640, 643, 99 P. 1107; *Dabney v. Key*, 57 Cal. App. 762, 207 P. 921.

These authorities seem to support respondents' position, but it seems to us they go further than the facts in this case would warrant.

All the cases cited are distinguishable in several particulars from the instant case.

Archer v. Miller, 73 Cal. App. 678, 239 P. 92, 94, is an action by plaintiff to quiet title against a contract of lease of real property. The pleadings admit that plaintiff is owner and in possession of land in question.

The answer sets up as adverse claim a contract executed by plaintiff Archer leasing to defendant Miller this property for a term of 10 years, at a total rent of \$40,000, payable in periodical installments, with an option to defendant "during the faithful performance of all covenants of this lease, to purchase the premises for the sum of \$40,000, any amounts paid on the rents to apply on purchase price."

The contract contained covenants for performance of various conditions at specified times by lessee, and a condition that should the lessee fail to make any of the payments agreed to be made, or to fulfill any of the obligations of this lease, then the party of the second part agrees and does hereby relinquish all rights and interest created under this agreement.

The lessee is by the contract also in consideration of \$50 paid to the lessor given the right to terminate the contract at any time before a specified date, by notice in writing to that effect.

The defendant pleaded this lease agreement, and asked, by way of cross-complaint, decree for specific performance of the option to purchase. Judgment was for defendant in trial court, and was reversed by the Second District Court of Appeal on the following grounds:

(1) That the answer was silent as to fairness of the contract, and adequacy of consideration.

(2) That the contract was lacking in mutuality of remedy, and containing covenants for personal services which could not be specifically enforced against the defendant and cross-complainant.

(3) That it appears from the pleadings that defendant was in default in the performance of some of the conditions prescribed.

On the question of sufficiency of the answer as a defense in a quiet title action, the opinion says: "It is sufficient on this proposition to refer to the rule, established by decision, that a contract of purchase and sale which is not specifically enforceable cannot be the basis of defense against an action to quiet title." Citing *Jolliffe v. Steele*, 9 Cal. App. 212, 98 P. 544; *Valentine v. Streton*, 9 Cal. App. 640, 99 P. 1107, 1108; *Crane v. Roach*, 29 Cal. App. 584, 587, 156 P. 375.

The following distinguishing points exist in the instant case. Here the lessee by his answer alleges the fairness of the contract and adequacy of consideration; that he was not in default but that this attempt and offer to perform was defeated by the lessor; and he is not applying for specific performance, but merely interposing his contract by way of defense to the action to quiet title.

Moreover we question if the rule as stated in the Archer Case that a contract "which is not specifically enforceable cannot be the basis of defense against an action to quiet title" is, at least in its application to the instant case, supported by the authorities cited. In the case of Jolliffe v. Steel, supra, the rule is stated by way of dictum, as the contract there relied upon by defendant was held to have been without consideration.

In Valentine v. Streeton, supra, the contract pleaded in the answer was not merely by way of defense to the quiet title action, but by cross-complaint seeking specific performance of an agreement to convey, and the appellate court held that the contract relied upon was unfair and inadequate as to consideration. It was admitted in the pleading that "the premises so contracted for were at the date of the contract worth nearly threefold the contract price." The court says: "This admission as to the inadequacy of the price is sufficient to defeat appellant's claim for specific performance."

In Crane v. Roach, supra, the defense was also by way of cross-complaint to enforce an agreement to convey property, under which the court found that the defendant had not performed, and was in default in the conditions of the agreement.

Not one of the cases cited involves a transaction where a defendant, merely standing on his unbreached contract by way of defense, and not seeking affirmative relief by way of specific performance, was denied the right to rely upon his contract.

Dabney v. Key, 57 Cal. App. 762, 207 P. 921. The only other case bearing with any force upon the proposition of specific performance, here involved, was an action brought by the plaintiffs to enforce a specific performance of a contract by defendant to execute a lease for the development of prospective oil lands. The relief sought was denied on the ground that the proposed lease was lacking in mutuality, one of the proposed conditions being that the lessee reserved the right to surrender the lease at such time as he might see fit, whereas the owners of the land were to be bound for twenty years.

[4] The rule is sufficiently established that equity will not grant the relief of specific performance to one who is not himself bound to perform his part of the contract, but it does not follow that one who holds an executed grant or lease to real estate, and who is not in default in the performance of his obligations under the contract, may not defend against an action of the grantor or lessor to quiet title by setting up such executed contract. Neither the Dabney Case nor the case of Sturgis v. Galindo, 59 Cal. 28, 42 Am. Rep. 239, on which the rule relied

on in the Dabney Case rests, were quiet title actions. The Galindo Case was one brought by a plaintiff to compel specific performance, in his favor, of an alleged contract for the sale of real estate. The consideration for the contract to sell was an agreement on the part of the plaintiff to render certain services in prospecting the land for coal, but provided that plaintiff might at any time cancel the agreement on his part if he became satisfied that it was useless to carry his prospecting further.

Holding that the contract was not specifically enforceable for want of mutuality, the court applies the general rule "that when, from personal incapacity, the nature of the contract, or any other cause, a contract is incapable of being enforced against one party, that party is equally incapable of enforcing it specifically against the other, though its execution in the latter way might, in itself, be free from difficulty attending its execution in the former."

None of the cited cases involve, as here, an executed grant wherein the right to possession and use of the premises was vested and only subject to revocation on the happening of conditions subsequent.

It may be admitted that the surrender clause destroys the resort to specific enforcement of the terms of the agreement against defendant Vedder. Any attempt to enforce the obligations assumed by Vedder by a decree of court could be defeated by his throwing up the contract under this surrender clause.

But do the authorities relied upon support the doctrine that a contract not mutually enforceable in all its terms, by decree for specific performance, is insufficient to support a defense in an action to quiet title?

The Vedder contract relied on here is something more than an option. In its operative clause, it is an express grant by the plaintiff to the defendant of the prospecting and development right on the premises in question. It provides that "Said party of the first part does hereby grant and give unto the said party of the second part the right to drill and prospect for oil and gas," upon the land covered by plaintiff's government permit. The party of the second part just as explicitly undertakes on his part to commence drilling on the premises within six months after the happening of future events to be postponed not longer than three years, but the happening of these conditions is not made to postpone the vesting in the defendant of a present right to enter upon, having possession of, and exploit said premises in search of oil. That right was created by the granting clause.

All the subsequent provisions of the contract are conditions subsequent and go to the manner of carrying on the work of pros-

pecting and developing, the interest to be enjoyed by the respective parties in any discoveries made, and reserving the right of the plaintiff to revoke, on notice, the grant to defendant, in case of failure to meet the conditions of the contract, and the right of defendant at any time in the future, to quitclaim his interest under the contract and restore possession to plaintiff.

This is an executed contract, so far as the vesting of the right to the specified use and possession of the premises in defendant is concerned, and is a very different matter from an executory option to purchase, or take a lease on property, dependent for its operative effect upon some future election of the parties.

In the case of an express grant of title to real estate, could the grantee be kept out of its use or possession, or be precluded from defending his title, because the instrument of conveyance provided for a reversion of title to the grantor if certain conditions subsequent provided for in the deed were not yet complied with, or because the grantee was permitted to relieve himself from further obligations to the grantor, by a quitclaim or surrender of the premises?

If we are right that the document here vested some sort of a present interest in defendant to the use and occupation of these premises, when did that vested right terminate?

The pleadings show that he has not defaulted in any of the conditions subsequent that he was to perform; that he, within the time specified, offered to perform, but was denied possession by plaintiff. There has been no claim or notice by plaintiff, of forfeiture, and no election to quitclaim and terminate the contract by defendant.

These various covenants and provisos in this contract are not made conditions to the vesting of defendants' rights under the grant, but conditions subsequent upon the failure or happening of which the grant may be revoked. These conditions of forfeiture have not happened, and may never happen, and until they do, we can see no good reason why defendant may not maintain his rights under the contract.

He alleges a good and adequate consideration, and that the transaction was fair and equitable. Even if some of the conditions subsequently to be performed may not be specifically and mutually enforced, does it follow that defendant would not be entitled to rely as a defense to plaintiff's action to quiet title, upon the specific terms of the grant which purport unconditionally to give him the present right to use and possession of the land?

It is conceded that the defendant may recover damages for the breach of this contract by plaintiff, but what becomes of even this

remedy under a judgment on the pleadings which declares his contract null and void. One may not even predicate an action for damages on the breaching of a void contract.

If defendant possesses any sort of an interest, legal or equitable, under his contract here, dependent upon the use and occupation of these premises, he should be permitted to set it up in defense of an action to quiet such title against him.

Section 738 of the Code of Civil Procedure does not confine the right to an action to quiet title to an adverse claim of any particular character. It was intended to embrace every description of claim, whereby the plaintiff might be deprived of the property, or whereby the title would be clouded, or its value depreciated, or whereby the plaintiff might be incommoded or damaged by the assertion of an outstanding title already held or to grow out of the adverse pretensions. Accordingly an action may be maintained to quiet title against a claim under a void tax deed, a forged deed, or one undelivered, a deed intended as a mortgage, or a recorded option to purchase, a claim of an easement granted on a condition subsequent and asserted after condition broken, and in short any adverse interest from a claim of title in fee to the smallest leasehold; whatever may be regarded by third persons as a cloud upon title. 22 Cal. Jur., pp. 115, 117; *Castro v. Barry*, 79 Cal. 443, 21 P. 946; *Withers v. Jacks*, 79 Cal. 297, 21 P. 824, 12 Am. St. Rep. 143; *Akley v. Bassett*, 68 Cal. App. 270, 228 P. 1057.

It must then, as a corollary to this proposition, be true, if either of such adverse claims exists and plaintiff's title cannot be unclouded until such claim is annulled, that the defendant may maintain the validity and potency of such claim as a defense to an attempt to avoid it.

If its existence constitutes a cloud, its removal can only be effected by showing that it is wrongfully maintained, or is invalid, or ineffective to create any right or interest in defendant to the possession or use of such premises.

The amended answer here pleads the equitable rule that he who seeks equity must do equity and must come into court with clean hands.

It has been repeatedly held that the owner of land may not quiet his title as against an unsatisfied mortgage without paying the mortgage debt, even though its collection is barred by the statute of limitations. *Faxon v. All Persons*, 166 Cal. 708, 137 P. 919, L. R. A. 1916B, 1209; *Bulson v. Moffatt*, 173 Cal. 685, 161 P. 259.

The mortgagee may plead the existence of his unsatisfied mortgage as a bar to the action of mortgagor to quiet title, but he can-

not compel the payment of the mortgage debt.

How can the plaintiff in this action equitably deprive the defendant of the benefits of this contract, on the ground that it is not specifically enforceable in his favor, when he has, by his own refusal to perform, denied the offer and prevented the efforts of defendant to perform his part of the agreement?

It is also alleged in the answer that the defendant by reason of fulfillment of conditions agreed upon between the parties as an inducement to entering upon the contract, has been placed in a position which renders it inequitable that the contract should be avoided.

[5] Even where the right to specific performance of a contract is involved, it is not always true that lack of mutuality prevents specific performance. The equity rule, set forth in Civil Code § 3386, as stated in *Pomero's Equity Jurisprudence*, 2191, is open to so many exceptions, it is of little value as a rule. *Wolleson v. Coburn*, 63 Cal. App. 315, 324, 218 P. 479.

One ground of exception is where a party to the contract has thereby been led to place himself in a position where it would be inequitable to deny him relief.

In this case it is alleged in the answer that one of the main inducements to this lease contract was the fact that defendant Vedder was a geologist and an experienced prospector of oil lands; that the lands in question were undeveloped and were in what is known as "Wild Cat Territory," and the advisability of sinking prospect shafts on them depended to a large extent upon the exploitation of the surrounding and adjacent country. The contract in question fixed the time at which defendant was to commence operations on the leased premises "on or before six months after oil has been discovered in paying quantities in a well which is to be drilled by said party of the second part" (the defendant) on any section in the township and range in which the leased lands are located. It is alleged that no well had previously been drilled within five miles of the land in question, and that in reliance on the acquiring of this lease defendant was induced and did expend much time and money in causing wells to be drilled in such locality, and that plaintiff knew of such facts, and knew that defendant relied upon and required said contract with plaintiff as one of the items which justified and made worth while said work and expense.

The nature and extent of this outside exploitation work is not very definitely pleaded, but, in the absence of any demand to make the pleading more definite and certain, it furnishes an additional reason why defendant should have been permitted to present his case to the court.

Again the plaintiff's hands are somewhat besmirched from an equitable standpoint, from the fact as alleged in the answer, that plaintiff Sheehan has joined with the plaintiff Elbe Corporation to sustain the Barnes contract which under the alleged facts is subsequent to and subordinate to the Vedder contract, and which is open to the same defense of want of mutuality, and have combined to permit the exploiting and developing of the land in question under the Barnes contract, to the exclusion of any rights of defendant under his prior contract.

[6] Defendant further alleges in his answer that plaintiff at no time prior to the bringing of this suit, or since, has returned or offered to return any part of the consideration paid by defendant upon the execution of his contract. The money consideration alleged was only the sum of \$10. It is, however, the general rule applicable to actions to quiet title, that one may not ask for a decree barring another from asserting a claim under an instrument executed by the former, without restoring the consideration received. 22 Cal. Jur., p. 134; *Chandler v. Chandler*, 55 Cal. 267; *Henry v. Phillips*, 163 Cal. 136, 124 P. 837, Ann. Cas. 1914A, 39.

We are satisfied that the pleadings in this case do not justify the decree quieting title in favor of the plaintiff Elbe Corporation, and while we are not entirely clear as to where the weight of authority lies as to the rights of defendant under the Sheehan-Vedder contract, we feel that the equities are with him, and decide accordingly.

The judgment is reversed as to both plaintiffs.

I concur: BARNARD, J.

MARKS, J. (concurring).

I concur in the foregoing opinion of the court. In reaching this conclusion I desire to particularly stress and rely upon the rule stated in the opinion, that he who asks equity must do equity. This is an action to quiet title, and not for the specific performance of a contract, and therefore section 3386 of the Civil Code and the cases decided under it are not necessarily involved in a decision of the case, as I view the issues framed by the pleadings.

The answer of respondents raises the direct question of whether or not the respondent Sheehan came into court with clean hands. This presents an issue which the trial court should decide. Sheehan made a lease with appellant Vedder, which the parties to this action admit was good in law. It appears from the answer that before Vedder entered upon the leased premises to perform his contract, and before he was required to do so under its terms, Sheehan made another lease to a third person and put his

assignee in possession of the leased property. Whether Sheehan did this as a result of a whim, or to acquire the personal gain of a larger profit from the transaction, or for some other reason, does not appear. A chancellor sitting in a court of equity should not relieve him of his first contract, to further either end, and not at all unless satisfied after a trial that fairness and equity are with him. To do so might put the stamp of approval upon a transaction tainted with fraud. The case should go to trial upon its merits, with the trial judge keeping in mind the mandate of equity that the hands of the respondents must be clean before a court of equity will grant them any relief.

ROGERS v. INTERSTATE TRANSIT CO.★
Civ. 3946.

District Court of Appeal, Third District,
California.

Feb. 21, 1930.

Hearing Granted by Supreme Court March 20,
1930.

1. Automobiles ⇨242(8)—Defendant, sued for injuries from automobile collision, had burden to prove contributory negligence.

Burden was on defendant, sued for injuries arising out of automobile collision, to prove contributory negligence on part of plaintiff.

2. Automobiles ⇨242(2)—Mere collision of automobiles does not destroy presumption that both drivers used ordinary care (Code Civ. Proc. § 1963).

There mere occurrence of collision between two automobiles does not destroy the presumption that both drivers used ordinary care, as declared by Code Civ. Proc. § 1963, to effect that person is presumed to take ordinary care of his own concerns.

3. Negligence ⇨121(1), 134(1)—Person charging negligence must prove it by preponderance of evidence.

The burden is upon one who charges negligence to prove it by preponderance of the evidence.

4. Negligence ⇨134(1)—Disputable statutory presumption that person takes ordinary care of own concerns is evidence that will support finding in accordance therewith, though there is evidence to contrary (Code Civ. Proc. § 1963).

Presumption, declared by Code Civ. Proc. § 1963, that person takes ordinary care of his own concerns, which is denominated disputable presumption, is in itself evidence that will support finding made in accordance therewith, even though there be evidence to contrary.

5. Automobiles ⇨245(2)—Regardless of which party in action for injuries sustained in automobile collision adduced evidence therefor, whether presumption that person takes ordinary care of own concerns was rebutted was for jury (Code Civ. Proc. § 1963).

Regardless of which party adduced evidence to rebut presumption declared by Code Civ. Proc. § 1963, that person takes ordinary care of his own concerns, it was province of jury, in action for injuries arising from automobile collision, to determine whether proof had sufficient weight or substance to dispel the presumption.

Appeal from Superior Court, Shasta County; Walter E. Herzinger, Judge.

On petition for rehearing.

Petition denied.

For former opinion, see 284 P. 499.

Jesse W. Carter, of Redding, and Annette Abbott Adams, of San Francisco (George Allan Smith, of Monterey, of counsel), for appellant.

Carr & Kennedy, of Redding, for respondent.

Devlin & Devlin & Diepenbrock, of Sacramento, amicus curiae.

PER CURIAM.

On petition for a rehearing elaborate briefs have been filed in support of appellant's assertion that it was error to instruct the jury it could consider, with other evidence adduced on that subject, the presumption declared by section 1963 of the Code of Civil Procedure "that a person takes ordinary care of his own concerns," in determining whether the plaintiff was guilty of contributory negligence.

[1-4] Under the circumstances of this case, we are satisfied the opinion of this court correctly states the law. The burden was on the defendant with respect to this issue as to contributory negligence. The plaintiff was fortified with the presumption that he exercised ordinary care for his own safety. The mere occurrence of a collision between two automobiles does not destroy the presumption that both drivers used ordinary care. The burden is upon him who charges negligence to prove it by a preponderance of the evidence. In the present case the plaintiff offered no evidence to refute this presumption. He claimed the benefit of this presumption. The presumption is declared by statute to be evidence. In the absence of any testimony to the contrary, it is controlling. Since it is some evidence of the fact as declared by statute, it becomes necessary for the jury to decide whether the opposing testimony is substantial and sufficient in character and weight to dispel the effect of the presumption. It has been repeatedly held that these rebuttable presumptions which are created by statute "are

of themselves evidence * * * and will support a finding made in accordance with them, even though there be evidence to the contrary." *People v. Siemsen*, 153 Cal. 387, 390, 95 P. 863, 865; *People v. Ellis* (Cal. Sup.) 274 P. 353; *Simonton v. Los Angeles T. & S. Bank* (Cal. Sup.) 270 P. 672, 675; *Estate of Wiechers*, 199 Cal. 523, 527, 250 P. 397.

In the case of *Smellie v. Southern Pac. Co.* (Cal. Sup.) 276 P. 338, 341, the court did say this presumption "that a person takes ordinary care of his own concerns" is weak and unsatisfactory evidence which will not stand against facts to the contrary; that upon proof of facts to the contrary the presumption will be deemed to have been overcome or dispelled. This case is still pending in the Supreme Court. Assuming, however, this language will be finally approved, it must be construed in the light of the facts of that case. In that case the plaintiff, who relied upon this presumption, produced evidence herself which was deemed to refute the presumption. Her own witness, Ireland, testified to facts which tend to dispute the presumption. Under such circumstances it has been held without conflict of California authorities that the presumption is dispelled. The *Smellie Case* may therefore be reconciled with the leading authority of *Mar Shee v. Maryland Assurance Corp.*, 190 Cal. 1, 9, 210 P. 269, 273, in which the cases upon this subject are collected and analyzed and reconciled in the following language: "From the foregoing we deduce that a fact is proved as against a party when it is established by the uncontradicted testimony of the party himself [who relies upon the presumption] or of his witnesses, under circumstances which afford no indication that the testimony is the product of mistake or inadvertence; and that, when the fact so proved is wholly irreconcilable with the presumption sought to be invoked, the latter is dispelled and disappears from the case."

[5] It may be reasonably said that, regardless of which party adduces the evidence, it is still the province of the jury to determine whether the proof has sufficient weight or substance to dispel the presumption. In determining whether substantial evidence upon this subject has in fact been adduced, it is proper to instruct the jury it may consider the presumption which is involved in the controversy. Otherwise the court will be usurping the function of the jury by passing on the weight of evidence.

The appellant relies on the case of *Western & Atl. R. R. Co. v. Henderson*, 279 U. S. 639, 49 S. Ct. 445, 73 L. Ed. 884, wherein a statute of Georgia (Civ. Code Ga. 1910, § 2780) was held to be unconstitutional which imposed a liability upon the railroad company for damages, resulting from injuries sustained

from the use of its equipment, "unless the company shall make it appear that their agents have exercised all ordinary and reasonable care and diligence, the presumption in all cases being against the company."

This Georgia statute was class legislation. It attempted to shift the burden contrary to the uniform rule of law and require a railroad company to affirmatively prove its freedom from negligence. It purported to create a presumption which was based upon neither reason nor justice and which was not uniform in its operation. It is little wonder the federal court said it was unreasonable, arbitrary and violative of the due process clause of the Fourteenth Amendment of the Constitution. The statute in that case is in no wise similar in effect to the one here involved. That case is not authority for the determination of this case.

The other points made by the appellant in the present case are fully covered by the opinion.

The petition for a rehearing is denied.

104 Cal. App. 218

DUNCAN v. SUPERIOR COURT, CITY AND COUNTY OF SAN FRANCISCO.
Civ. 7329.

District Court of Appeal, First District, Division 2, California.

Feb. 24, 1930.

1. Execution $\S$ 195—Order continuing, without showing as to good cause, hearing on petition to have title to automobile determined violated statute but was not in excess of jurisdiction.

Where petitioner caused writ of execution to issue and to be levied on automobile and third party claim was filed, whereupon petitioner filed verified petition to have title to automobile determined, order putting hearing over to November 19, after hearing had been set for November 13 and petitioner failed to appear, was in violation of terms of statute but not in excess of jurisdiction notwithstanding absence of showing as to good cause.

2. Sheriffs and constables $\S$ 90—Where property has been levied on, third party claimant may have it released unless plaintiff gives statutory undertaking (Code Civ. Proc. § 689, as amended by St. 1929, p. 661).

Where property has been levied on, third party claimant may make attempt to have it released and such attempt may be fully made and effectually accomplished within period of five days after levy unless plaintiff gives undertaking specified in Code Civ. Proc. § 689, as amended by St. 1929, p. 661.

3. Mandamus $\S$ 16(1)—Mandamus will not compel performance of idle act.

Writ of mandate will not issue to compel performance of an idle act.

4. *Mandamus* § 16(1)—*Mandamus* would not issue to compel hearing of action to determine title of automobile levied on where plaintiff did not give undertaking after filing of third party claim (Code Civ. Proc. § 689, as amended by St. 1929, p. 661).

Where property was levied on and third party claim was filed, but plaintiff did not give undertaking, under Code Civ. Proc. § 689, as amended by St. 1929, p. 661, court must assume that sheriff released automobile levied on, and, in absence of contrary showing, could assume that it was no longer within jurisdiction of court so that *mandamus* would not issue to compel court to hear and determine action to have title determined.

Application for writ of mandate prayed to be directed to the Superior Court, City and County of San Francisco; James G. Conlan, Judge.

Petition by Adele Duncan against the Superior Court of the State of California, City and County of San Francisco, James G. Conlan, Judge, to compel respondent to hear and determine an action to establish title to an automobile.

Writ denied.

Clarence A. Linn, of San Francisco, for petitioner.

Timothy Healy, of San Francisco, for respondent.

STURTEVANT, J.

This is an application for a writ of *mandamus*, directing the defendant to hear and determine a petition asking it to determine the title to an automobile on which the plaintiff had caused a writ of execution to be levied. An order to show cause was issued by this court, the defendant answered, and the application was submitted on the pleadings.

In her petition for a writ, the plaintiff alleged that heretofore she obtained a judgment against P. B. Cross and that the judgment has become final; that she caused a writ of execution to issue and to be levied on an automobile; that on October 1, 1929, C. E. Ryan filed with the sheriff a third party claim; that on October 2, 1929, the sheriff notified this plaintiff that said claim had been filed; that on October 15, 1929, this plaintiff filed a verified petition to have the title to the automobile determined; that the court fixed the date of the hearing on said petition for October 28, 1929, and issued an order to show cause returnable at said time. The defendant's answer admitted those allegations, but, continuing, it alleged that on November 4, 1929, the plaintiff filed an amended petition which was set for "Nov. 13, 1929, and that upon the failure of petitioner to appear at said time, the hearing of said amended petition was continued to Nov. 19, 1929, at which time the petition came on for

hearing and the said C. E. Ryan objected to the hearing of said petition and moved the said court to dismiss the petition on the ground that the Superior Court was without jurisdiction; * * *"; and that on December 31, 1929, the motion was granted on that ground.

On the argument the defendant called attention to the fact that a continuance was had from November 13, 1929, to November 19, 1929, and that the plaintiff did not appear on November 13, 1929. He also argued that "good cause" was not shown for that continuance, and, therefore, the order made December 31, 1929, dismissing the petition, was not improper.

[1-4] The order putting the hearing over to November 19, 1929, without any showing as to good cause was apparently in violation of the terms of the statute, but was not in excess of jurisdiction. *Moore v. Conley*, 163 Cal. 609, 610, 126 P. 492.

It therefore becomes necessary to ascertain the general scope of section 689, Code of Civil Procedure, as amended at the last session of the Legislature. St. 1929, p. 661, c. 341. Formerly that section provided for a trial by a sheriff's jury. Practice Act, § 281. When the statute was so worded it was held that the proceedings before the sheriff were not judicial and that as the statute assumed to specify its effects, the court would not presume other effects. *Perkins v. Thornburgh*, 10 Cal. 189. Later the statute was amended authorizing the sheriff to accept and act on a verified claim of an alleged third party. St. 1889, p. 20. The statute, as so amended, did not purport to do more than provide a method by which the sheriff could lay a basis to protect himself against subsequent suits for damages. *Kellogg v. Burr*, 126 Cal. 38, 42, 58 P. 306. The provisions as so amended, with some slight changes of no importance to the question before us, have ever since remained the law and are continued by the statute as amended. Inserting a number to each paragraph for our own reference, section 689, as amended in 1929, is as follows:

"1. Where property claimed by third party; Indemnity. If the property levied on is claimed by a third person as his property by a written claim verified by his oath or that of his agent, setting out his right to the possession thereof, and served upon the sheriff, the sheriff must release the property if the plaintiff, or the person in whose favor the writ of execution runs, fails within five days after written demand, to give the sheriff an undertaking executed by at least two good and sufficient sureties in a sum equal to double the value of the property levied on. If such undertaking be given, the sheriff shall hold the property. The sheriff, however,

shall not be liable for damages to any such third person for the taking or keeping of such property if no claim is filed by any such third party.

"2. Such undertaking shall be made in favor of, and shall indemnify such third person against loss, liability, damages, costs and counsel fees, by reason of such seizing, taking, withholding, or sale of such property by the sheriff.

"3. Exceptions to the sufficiency of the sureties and their justification may be had and taken in the same manner as upon an undertaking on attachment. If they, or others in their place, fail to justify at the time and place appointed, the sheriff must release the property; provided, however, that if no exception is taken, within five days after notice or receipt of the undertaking, the third person shall be deemed to have waived any and all objections to the sufficiency of the sureties.

"4. The sheriff may demand and exact the undertaking herein provided for notwithstanding any defect, informality or insufficiency of the verified claim served upon him.

"5. Hearing. Whenever a verified third party claim is served upon the sheriff, upon levy of execution, the plaintiff, or the person in whose favor the writ of execution runs, shall be entitled to a hearing within twenty days therefrom, before the court having jurisdiction of the action, in order to determine title to the property in question, which hearing must be granted by the said court upon the filing of an application or petition therefor. Ten days' notice of such hearing must be given to all parties claiming an interest in the property, or their attorneys, which notice must specify that the hearing is for the purpose of determining title to the property in question. The court may continue the hearing beyond the said twenty-day period, but good cause must be shown for any such continuance."

Paragraphs 1 and 4 are but re-enactments of what was formerly the law. The other paragraphs are new matter. Where property has been levied on it is clear that the third party claimant may make an attempt to have it released and that such attempt may be fully made and (unless the plaintiff gives the undertaking specified in paragraph 1) effectually accomplished within a period of five days after the levy. Nothing but the execution of the said undertaking will stay the sheriff's hand. If the plaintiff gives the undertaking provided for in paragraph 1, and if he also petitions for a hearing as provided in paragraph 5, important questions as to the legal effect of the hearing will arise which should not be passed on till they have been duly presented in a proper case. If he does not give the undertaking the statute contains

no provisions that the sheriff's hand will be stayed, nor that he may later retake the property, nor that the court may impound the property until a petition has been heard, nor that thereafter the court can make any order looking toward the retaking of the property. Under the facts last stated it is clear that a hearing of such a petition as is provided for in paragraph 5 would be an idle act. But a writ of mandate will not issue to compel the performance of an idle act. *Boyne v. Ryan*, 100 Cal. 265, 34 P. 707; *Moore v. Conley*, 163 Cal. 609, 610, 126 P. 492; *Fawkes v. City of Burbank*, 188 Cal. 399, 205 P. 675. The record before us does not show that plaintiffs gave the undertaking and therefore we must assume that the sheriff has released the automobile, and, nothing to the contrary appearing, we may further assume that it is no longer within the jurisdiction of the court. We have therefore concluded that the issuance of a writ will be of no appreciable advantage to the petitioners, and that the emergency is not serious enough to justify such action. *Moore v. Conley*, 163 Cal. 609, 610, 126 P. 492.

The writ is denied.

We concur: NOURSE, Acting P. J., and DOOLING, Justice pro tem.

GOLDWATER v. OLTMAN et al. ★

Civ. No. 6262.

District Court of Appeal, Second District, Division 2, California.

Feb. 21, 1930.

Rehearing Denied March 21, 1930. Hearing Granted by Supreme Court April 21, 1930.

1. Action $\S$ 48(1)—Plaintiff having several causes of action based upon same transaction involving same amount of money may set them forth in single action in varied counts.

If several causes of action are based upon the same transaction and involve the same amount of money, plaintiff has the right to set them forth in varied or even in inconsistent counts in a single action.

2. Payment $\S$ 16(1)—Promissory note generally does not discharge debt but extends period for payment.

Ordinarily, a promissory note is but an evidence of indebtedness and does not discharge the debt for which it is given but only operates to extend period of payment of debt until maturity of note.

3. Bills and notes $\S$ 447—Creditor taking note may, after note matures, sue either on original indebtedness or upon note.

Creditor receiving note as evidence of account has option either to sue on original indebtedness or upon the note given as evidence thereof, except that he may not pursue the former remedy until the expiration of the time of maturity as extended by the note.

4. Pleading ⚡369(1)—Plaintiff need not elect between causes of action on note, book account and account stated, set forth in single complaint, where all arose out of same transaction.

Plaintiff could join in single complaint causes of action on promissory note with counts setting up book account and account stated, where the note was given as evidence of the account and represented the same indebtedness; and court erred in requiring plaintiff to elect between such causes of action.

5. Pleading ⚡121(1)—Answer denying information and belief upon which to answer allegations contained in cause of action in verified complaint held insufficient to raise issue; specific denial of each allegation being required (Code Civ. Proc. § 437).

Answer setting up that defendants had no information or belief upon which to base answer to allegations contained in cause of action alleged in complaint held insufficient to raise an issue where complaint was verified, since under Code Civ. Proc. § 437, specific denial of each allegation intended to be controverted was required in order to raise issue thereon.

6. Pleading ⚡377—Plaintiff need not prove causes of action alleged where defendants denied allegations generally on information and belief (Code Civ. Proc. §§ 437, 462).

Allegations of causes of action, sought to be denied generally by answer on information and belief contrary to Code Civ. Proc. § 437, were deemed admitted under section 462, and plaintiff was not required to offer proof in support of such causes of action; motion for nonsuit by defendants being allowed under section 581 only when plaintiff fails to prove sufficient case for jury.

7. Pleading ⚡125—Where cause of action was based on note, allegation that defendants acquired properties of original debtor and agreed to pay amount owed by him was matter of inducement, rendering form of denial thereof immaterial.

Where cause of action was based on note, allegation that original debtor sold, transferred, and conveyed its business and properties to defendants who promised, assumed, and agreed to pay amount due was merely a matter of inducement and not material, and therefore, form of denial thereof was immaterial.

8. Bills and notes ⚡488—Allegations as to execution of note by individual defendants and form of denial thereof could be disregarded where note set out in complaint showed that such individuals did not execute it.

Where note set out in *hæc verba* in complaint showed on its face that it was executed by business organization by its president, contradictory allegations as to its execution by defendants individually must be disregarded under rule that specific averments must be given precedence over general averments in case of inconsistency between the two; and form of denial of execution of note by the individual defendants could, therefore, be disregarded.

9. Bills and notes ⚡489(1)—Denial that note sued on was delivered as evidence of defendants' obligation held insufficient to raise issue of delivery.

In action on note in which it was alleged that note was delivered and that such delivery was as evidence of the obligation of the defendants, denial that note was delivered "as evidence of any obligation at all of the said defendants or any of them" held insufficient to raise issue as to delivery of note.

10. Pleading ⚡121(3)—Defendants sued on note must deny delivery positively, not merely on information and belief.

Whether defendants delivered note sued on was matter presumably within their knowledge, and one, therefore, which they were called upon to deny positively rather than on information and belief if they wished to raise an issue on that point.

11. Pleading ⚡121(4)—Allegation that partnership had filed certificates required of partnership was not put in issue by denial on information and belief (Civ. Code §§ 2466, 2468).

Allegation that partnership had filed certificates required by Civ. Code, §§ 2466, 2468, in case of partnership transacting business under fictitious name or designation not showing names of persons interested as partners, was matter of record which could not be put in issue by defendants by denial on information and belief.

12. Pleading ⚡122—Denial of account stated and promise to pay to raise issue should be positive, not on information and belief.

In action on account stated, allegations that account had been stated and that defendants had promised to pay amount thereof were matters within defendants' knowledge which they were required to deny positively, and denial on information and belief as to such allegations was tantamount to an admission.

13. Joint-stock companies and business trusts ⚡1—Trusts may be organized in California for purpose of engaging in business (Civ. Code, § 2220).

Trusts can be organized in California for purpose of engaging in business under Civ. Code, § 2220, authorizing creation of express trusts in personalty for any purpose for which a contract may lawfully be made; personal property trust being subject to no restriction by statute, except rule against suspending power of alienation under section 715, and direction against accumulations under section 724.

14. Joint-stock companies and business trusts ⚡15(1)—Holders of certificates under declaration of trust, who had no control over investment of corpus but were merely entitled to net income under management of trustees, held not personally liable as partners for obligation incurred by trustees (Civ. Code, §§ 2220, 2395).

Where declaration of trust, entered into for carrying on business, provided that certificate holders were not associated together for pur-

pose of carrying on business in accordance with definition of partnership under Civ. Code § 2395, and had no control or direction over investment of corpus of trust, and were entitled only to receive net income not required for the operation of trust and proportion of the corpus of the trust upon its termination, the certificate holders were cestuis que trustant in "Massachusetts" or business trust and not members of partnerships or joint-stock associations under Civ. Code § 2220, authorizing creation of express trusts in personalty, and were not personally liable for obligation incurred by trustees.

15. Appeal and error $\Rightarrow$ 1170(3, 8)—Defects in answer and failure of one defendant to join in motion for nonsuit did not require reversal of judgment for defendants who on merits were not liable (Const. art. 6, § 4½).

Failure of defendants to make proper answer to some of counts of complaint and failure of counsel for one of defendants to join in motion for nonsuit did not warrant reversal of judgment for defendants who on the merits were not liable; and court in the interest of justice under Const. art. 6, § 4½, was required to affirm the judgment.

Burnell, Justice pro tem., dissenting.

Appeal from Superior Court, Los Angeles County; F. C. Valentine, Judge.

Action by Henry Goldwater against William Oltman and others. From a judgment entered in favor of certain defendants, following the granting of a motion for nonsuit, plaintiff appeals.

Affirmed.

John W. Rankin, Kimball Fletcher, and Albee & Watkinson, all of Los Angeles, for appellant.

Schweitzer & Hutton, of Los Angeles (H. F. Clary, of Los Angeles, of counsel), for respondents.

IRA F. THOMPSON, J.

This appeal is taken from a judgment entered in favor of certain of the defendants following the granting of a motion for nonsuit. An understandable presentation of the points presented for our consideration requires that we first review, as briefly as possible, the extremely voluminous pleadings in order that the issues between the plaintiff and various groups of defendants may be clarified.

The second amended complaint, on which the plaintiff went to trial, sets forth ten causes of action. The first, omitting matters not germane to any point in controversy and dispensing with the legal verbiage, may be summarized as follows, the Roman numerals referring to the paragraphs as numbered in the pleading:

II. Defendants Oltman and Morante are partners under the name "Morante Comedy Company."

IV. All defendants other than Morante and Morante Comedy Company are partners under the name "Drascena Productions."

V. Between October 15, and December 1, 1920, Bloom Film Laboratories, a copartnership (hereinafter for brevity referred to as "Laboratories"), "performed and furnished work, labor and materials, and expended money, all at the special instance and request of defendants" Morante, Oltman and Morante Comedy Company.

VI. \$3,822.94 was the reasonable value of this work, etc., of which \$3,000 is unpaid.

VII. February 9, 1921, an agreement was made between defendants Oltman and Morante and Morante Comedy Company as vendors and all the other defendants as vendees whereby the business and property of the vendors was transferred to the vendees, who, as part of the consideration, "promised, assumed and agreed to pay" to the Laboratories the debt due from the vendor. This agreement, the plaintiff, on information and belief, alleges was in writing.

VIII. January 3, 1921, one of the three partners composing the Laboratories assigned his interests to the other two, who continued in business under the firm name, and on June 7, 1922, assigned and transferred the claim in suit to the plaintiff.

IX. February 9, 1921, "as evidence of said obligation of the defendants, excepting only * * * Morante and Morante Comedy Company," the defendants other than these two executed and delivered to the Laboratories a note for \$3,000, dated as above, payable April 15, drawing seven per cent. interest and containing a provision for attorney's fees to be fixed by the court in case of suit for collection, and signed "Drascena Productions, by Charles M. Conant, President"; \$1,273.78 is a reasonable attorney fee.

X. No part of the \$3,000 "or any amount of principal, interest or attorney's fees, of said note" has been paid.

XII. None of the defendants has filed certificate of copartnership in the clerk's office.

The second, third, and fourth causes of action are identical with the first, with these exceptions: The second omits paragraph six, alleging reasonable value, and in lieu thereof alleges a promise to pay the Laboratories and a part payment, leaving a \$3,000 balance unpaid; the third omits paragraphs five and six, and substitutes an allegation of account stated between Morante Comedy Company and the Laboratories; and the fourth, with the same omissions as the third, alleges the original indebtedness to have been on a book account.

The remaining causes of action all plead that the defendants other than Morante and Morante Comedy Company are members of

and unit holders in an association known as "Drascena Productions," all the business of which is transacted and all the property of which is held in trust by five of the defendants as trustees under a declaration of trust of record in Los Angeles county, the provisions of which are, at least in part, set forth. It is further alleged that each of 72 named defendants owns the number of units or "shares of trust certificates" set opposite his name in the complaint. Except for the omission of the allegation as to partnership of those defendants connected with Drascena Productions found in paragraph four of the first cause of action, and by reference thereto incorporated in causes two, three, and four, and the substitution thereof of the allegation as to nature and membership of Drascena Productions above referred to, causes five to eight, both inclusive, contain the same allegations as do causes one to four, respectively; that is to say, five corresponds to one, counting on the reasonable value of the work done, etc., as the basis of the original indebtedness; six corresponds to two, counting on the promise of Morante Comedy Company to pay, and so on.

It is to be noted that, while the first eight causes of action differ in the details above enumerated, they all set up the note executed by Drascena Productions. The ninth and tenth causes of action do not. The ninth cause of action alleges indebtedness to the Laboratories on the part of all the defendants on a book account showing \$3,000 due and an assignment thereof to the plaintiff, while the tenth sets up an account stated between the Laboratories and all the defendants together with such assignment. With these exceptions the last two causes of action are but a repetition of the allegations of the first, with paragraphs four, six, and nine, hereinabove briefed, omitted.

Drascena Productions as a separate entity was not made a party to the action, the title of the same as it appears from the complaint listing all defendants other than Oltman and Morante as "Co-partners, doing business under the firm name and style of 'Drascena Productions.'" The transcript fails to show service on or appearance by some of the defendants, including Oltman, Morante, and the Morante Comedy Company; others who were served defaulted, and their defaults were duly entered. Therefore, in further reference to "the defendants," we are to be understood as meaning only those who answered. These may be divided into four groups. Group one was composed of thirteen defendants on behalf of whom an answer was filed by attorneys Schweitzer & Hutton and included the defendant Lars A. Dahl, specially mentioned for reasons which will appear later. The answer of this group failed to deny or in any way refer to the tenth cause of action set up in the complaint. Group two also consisted

of thirteen defendants, represented by attorney Winterer, and to these thirteen may be added defendants Apostol and Arnis, who had filed a separate answer by other counsel, but who were represented at the trial by Mr. Winterer. Group three was composed of defendants I. N. and Nellie M. Thompson, on whose behalf an answer was filed by attorney C. O. Morgan. The record indicates that Nellie M. Thompson died pending the proceedings, and that attorneys Bordwell & Mathews appeared for the executor at the trial. The fourth group (if merely for the purpose of classification we may be permitted to apply the word "group" to one individual) consisted of the defendant Howard C. Galloupe, who appeared in propria personam. The answers of the three last mentioned groups included denials as to the tenth cause of action.

During the progress of the trial, but before the plaintiff had rested his case in chief, the defendants composing groups one and two, as hereinabove designated, moved the court "that the plaintiff be required to elect as to which particular remedy and which particular cause of action in the amended complaint he will stand on." This motion the court granted, over the objection of the plaintiff, who thereupon elected to stand upon his fifth cause of action. No such motion was made on behalf of the other defendants.

Upon the plaintiff resting his case, Mr. Winterer, upon behalf of the fifteen defendants whom he represented, moved for a nonsuit. Mr. Clary, appearing for Schweitzer and Hutton, made a similar motion on behalf of twelve of the defendants represented by that firm, but did not so move on behalf of the defendant Dahl. No such motion was made as to defendants Galloupe and I. N. Thompson, or as to the executor of Nellie M. Thompson. True, the judgment recites that such a motion was made on behalf of said executor, but the bill of exceptions contained in the transcript shows this to be incorrect. These two separate motions were granted and judgment was entered against the plaintiff and in favor of all the defendants represented by Mr. Winterer, the twelve defendants represented by Schweitzer and Hutton on whose behalf the motion had been made, and also in favor of the executor of the last will and testament of Nellie M. Thompson, as to whom the bill of exceptions, certified by the trial judge as correctly setting forth all of the proceedings had during the trial, fails to show that any such motion was made.

Although we have concluded that the nonsuit was not erroneously ordered, we deem it essential under the special circumstances of the instant cause to discuss and determine the assignments of error.

[1] The first point relied on by appellant for a reversal of the judgment is that the

court erred in requiring him to elect as between his ten causes of action. This point is well taken, and except for the reasons later stated in this opinion would require a reversal of the judgment.

As we have noted, the first eight causes of action all count upon the note, the allegations of the nature of the original indebtedness which it evidenced, as arising upon a quantum meruit, a promise to pay, an account stated or a book account, being but matters of inducement. For the purpose of this discussion these eight causes of action may be grouped together and treated as one, namely, a cause of action on a promissory note. The ninth cause of action is not upon the note, which is neither pleaded therein by direct averment or by reference to other causes of action, but is upon a book account as to all the defendants, and the tenth is like the ninth except that it is upon an account stated. Assuming that these several causes of action are based upon the same transaction and involve the same amount of money, a fact which is conceded by all parties to this appeal, the plaintiff had a right to set them forth in varied or even in inconsistent counts (*Keller v. Hicks*, 22 Cal. 457, 83 Am. Dec. 78; *Wilson v. Smith*, 61 Cal. 209; *Stockton Combined Harvester, etc., Works v. Glen Falls Ins. Co.*, 121 Cal. 167, 53 P. 565; *Froeming v. Stockton Electric R. R. Co.*, 171 Cal. 401, 153 P. 712, Ann. Cas. 1918B, 408; *Tanforan v. Tanforan*, 173 Cal. 270, 159 P. 709, 711; *Turner v. Turner*, 173 Cal. 782, 161 P. 980; *Cameron v. Ah Quong*, 175 Cal. 377, 165 P. 961), nor could he properly be compelled to elect as to which count or cause of action he relied on. *Cowan v. Abbott*, 92 Cal. 100, 28 P. 213; *Rucker v. Hall*, 105 Cal. 425, 38 P. 962; *Estrella Vineyard Co. v. Butler*, 125 Cal. 232, 57 P. 980; *Murphy v. Crowley*, 140 Cal. 141, 73 P. 820; *Figlietti v. Frick*, 203 Cal. 246, 263 P. 534; *Van Lue v. Wahrlich-Cornett Co.*, 12 Cal. App. 749, 108 P. 717; *Rand v. Columbian Realty Co.*, 13 Cal. App. 444, 110 P. 322. As said in *Tanforan v. Tanforan*, supra: "Since, then, inconsistent causes of action may be pleaded, it is not proper for the judge to force upon the plaintiff an election between those causes which he has a right to plead. Plaintiff is entitled to introduce his evidence upon each and all of these causes of action, and the election, or in other words the decision as to which of them is sustained, is, after the taking of all the evidence, a matter for the judge or the jury." In that case the court held that the order compelling the plaintiff to elect was erroneous, but that the plaintiff was not injured thereby since at the time it was made all of the plaintiff's evidence had been submitted and "not one word of it substantiated" the count which, pursuant to the order to elect, he was compelled to abandon. But in the instant case the order was

made before the plaintiff had rested, and he was therefore precluded from offering evidence, if any he had, which might have substantiated the allegations set forth in the causes of action, or one of them, which he was compelled to abandon by reason of the erroneous ruling. Moreover, the court's order was not restricted to the plaintiff's various causes of action as against the defendants on whose behalf the motion for an election was made, but required him to elect as to all defendants whether joining in the motion or not.

[2-4] We do not, however, intend what we have said as to the right to plead inconsistent causes of action to be deemed a statement or even an implication that the counts in which the note is pleaded are inconsistent with those in which it is not. Ordinarily a promissory note is but an evidence of indebtedness. *Gregory v. Williams*, 106 Kan. 819, 189 P. 932. It "does not discharge the debt for which it is given unless such be the express agreement of the parties; it only operates to extend until its maturity the period for the payment of the debt" *The Kimball*, 3 Wall. 45, 18 L. Ed. 50. "Nothing is better settled than that accepting a note is not payment of an account" *Black v. Sippy*, 15 Or. 574, 16 P. 418, 419. The creditor, therefore, has his option either to sue on the original indebtedness or upon the note given as evidence thereof, except that he may not pursue the former remedy until the expiration of the time of maturity as extended by the note. *Holley v. Smally*, 50 App. D. C. 178, 269 F. 694; *Lake v. Fletcher*, 52 App. D. C. 46, 280 F. 1020; *Schreyer v. Turner Flouring Mills Co.*, 29 Or. 1, 43 P. 719; *Savage v. Savage*, 36 Or. 268, 59 P. 461; *Sullivan v. Rudisill*, 63 Iowa, 158, 18 N. W. 856; *Stalnaker v. Tolbert*, 121 S. C. 437, 114 S. E. 412; *First National Bank v. Larsen*, 146 Wis. 653, 132 N. W. 610. Having his option to sue either on the original indebtedness or on the note given and received as evidencing it, it is proper under our practice for him, if so advised, to join in the one complaint a cause of action on the former with a cause of action on the latter; and it being proper for him to plead his case in this manner, it follows that it is improper for the court to compel him to elect to proceed on the one count and to abandon the other.

[5, 6] Turning our attention next to the point that the court erred in granting the motions for nonsuit, we shall first consider the question thus presented with respect to the defendants represented by Schweitzer and Hutton. The answer interposed by this group failed, as we have already noted, to in any way mention the tenth cause of action set up in the amended complaint. As to the seventh cause of action the answer was as follows: "That these defendants have no information

or belief upon which to base an answer to the allegations contained in the seventh cause of action, and on that ground deny each and every allegation thereof." The eighth and ninth causes of action were treated in the same manner. As to these three causes of action the answer was entirely insufficient to raise an issue. The amended complaint was verified, and hence under section 437 of the Code of Civil Procedure as it stood during the period of the pendency of this case in the court below a specific denial of each allegation intended to be controverted was required in order to raise an issue thereon. This has always been the rule in this state. *Hensley v. Tartar*, 14 Cal. 508; *Levinson v. Schwartz*, 22 Cal. 229; *People v. Hagar*, 52 Cal. 171; *Fish v. Redington*, 31 Cal. 185; *Gay v. Winter*, 34 Cal. 153. In the absence of such specific denial the truth of the allegation is deemed admitted. Section 462, Code Civ. Proc.; *Pico v. Colimas*, 32 Cal. 578; *Kinney v. Maryland Casualty Co.*, 15 Cal. App. 571, 115 P. 456; *Hirons v. Clare*, 38 Cal. App. 608, 177 P. 291. The case therefore stood, as to the defendants in the first group, in exactly the same position as if they had actually in terms admitted the truth of the allegations contained, either by direct averment or by reference to paragraphs in preceding causes of action, in the last four counts. A motion for nonsuit made by a defendant may be granted only "when upon the trial the plaintiff fails to prove a sufficient case for the jury" (section 581, Code Civ. Proc.). These causes of action being thus deemed admitted, the plaintiff was not required to offer proof as to any of them. *Schwartz v. DeWit*, 1 Cal. Unrep. 40.

The provisions of section 462 of the Code of Civil Procedure above cited are but a restatement of those of section 65 of the Practice Act, which was the predecessor of the Code. In *Hensley v. Tartar*, supra, decided under the provisions of the Practice Act, the defendant had thus answered the allegations of the verified complaint: "And now comes Nicholas Tartar, one of the defendants, and makes his separate answer and says, that he denies generally and specifically each and every material allegation in the complaint, the same as if such allegation were herein recapitulated." This was followed by a separate denial of each allegation in the same form (subject to certain qualifications and exceptions). The court held that these denials raised no issue upon any fact stated in the complaint. We quote from the opinion: "The point in the present case is this: The plaintiff was nonsuited for failing to introduce evidence in support of certain allegations of the complaint. This he assigns as error, and contends that under the pleadings these allegations were to be taken as true, and that the evidence was therefore unnecessary. Sec. 65 of the Practice Act, provides

that 'every material allegation of the complaint, when it is verified, not specifically controverted by the answer, shall, for the purpose of the action, be taken as true.' (Wood's Dig. 175.) In this neither of the answers contains a specific denial of any material allegation in the complaint. The denials are in the most general form, and their legal effect is not changed by expressions showing that they were intended to be specific." Because of this error the judgment was reversed. Except for the reasons later discussed it would have been erroneous for the court in the instant case to have granted a nonsuit as to the last four causes of action: *Adams v. Tucker*, 6 Colo. App. 393, 40 P. 783; *Darlington v. Hamilton Bank* (Sup.) 112 N. Y. S. 1097.

The order here involved may be treated as a general order of nonsuit as to the whole of the plaintiff's case, including all causes of action set up in his amended complaint, since, as we have held, the order to elect was erroneous. The situation is similar to that in *Pacific Vinegar Works v. Smith*, 152 Cal. 507, 93 P. 85, 87, where it was urged that the trial court had erred in refusing to grant a nonsuit as to one of the plaintiff's twelve causes of action as to which the proof had failed. Passing on this contention the court said: "But the motion was directed 'to all the causes of action mentioned in the complaint,' and was not tenable unless, as to all, there was a failure of evidence." The same reasoning might well apply to the order compelling an election, heretofore discussed.

As to the defendants who appeared by Mr. Winterer (not including Apostol and Arnis, who had filed a separate answer) the situation is somewhat different, due to the fact that their answer does not omit reference to any of the causes of action and does contain specific denials of the matters alleged therein. Most of these denials, however, are on information and belief, and it is the contention of appellant that as to certain of these such form of denial was insufficient and raised no issue; that therefore this group of defendants must also be regarded as having admitted many of the facts alleged in the complaint, and hence are in the same category with the defendants in the first group. In discussing this point we shall confine our attention to matters which are specifically pointed out in the appellant's briefs.

[7] First: Paragraph seven of the first cause of action, which by reference is also incorporated in all other causes of action except the ninth and tenth, specifically alleges an agreement between the partnership known as Morante Comedy Company and all the other defendants, whereby the former sold, transferred, and conveyed all its business and properties to the latter, who "promised, assumed and agreed to pay" the amount due

to the Laboratories. As these eight causes of action are actually upon the note, this allegation is but a matter of inducement, and not material, and for that reason the form of the denial is also immaterial.

[8] Second: Paragraph nine of the first cause of action, similarly incorporated in the following seven counts, alleges the execution of the note and its delivery to Morante Comedy Company by all other defendants. This is met by a denial, on information and belief, "that on the 9th day of February, 1921, or at any other time, as evidence of any obligation at all of the said defendants, or any of them, the defendants, other than said Milburn Morante and Morante Company, or any of the said defendants, made, executed, and delivered, or made, executed or delivered, * * * that certain alleged promissory note set forth in said paragraph." Inasmuch as the note which is set out in *hæc verba* shows on its face that it was *executed* only by "Drascena Productions, by Charles M. Conant, President," it may be deemed that the note itself is contradictory of the allegation as to its *execution* by the defendants, in which case the note would govern as against the allegation, since specific averments must be given precedence over general averments in case of an inconsistency between the two. *Horton v. Travelers' Ins. Co.*, 45 Cal. App. 462, 187 P. 1070. Drascena Productions as an entity was not a defendant. We may, therefore, disregard the allegation as to execution of the note by the individual defendants and with it the form of the denial of its execution.

[9, 10] There still remains to be considered, however, the allegation that the note was *delivered* and that such delivery was as evidence of the obligation of the defendants. This allegation is met only by denial on information and belief, and it will be observed that even this is merely a denial that the note was delivered "*as evidence of any obligation at all of the said defendants or any of them,*" and that it does not deny the *fact* of delivery. This is not a sufficient denial to raise an issue as to the delivery of the note. Whether or not the defendants delivered the note was a matter presumably within their own knowledge, and one, therefore, which they were called upon to deny positively if they wished to raise an issue on that point. *Mulcahy v. Buckley*, 100 Cal. 484, 35 P. 144; *Zany v. Rawhide Gold Mining Co.*, 15 Cal. App. 373, 114 P. 1026; *Jensen v. Dorr*, 159 Cal. 742, 116 P. 553.

[11] Third: Paragraph ten of the first cause of action, made a part of the other causes of action, alleges that Bloom Laboratories had filed the certificate required by sections 2466 and 2468 of the Civil Code. This was a matter of record which the defendants could not put in issue by denial on informa-

tion and belief. *Santa Barbara Lumber Co. v. Ross*, 183 Cal. 657, 192 P. 436, and cases cited in 21 Cal. Jur., p. 150.

[12] Fourth: The tenth cause of action alleges that an account was stated between the defendants and the Laboratories "wherein and whereby it was shown that the defendants and each of them were indebted to said Bloom Film Laboratories in the amount of \$3,000, which amount the defendants and each of them promised and agreed to pay. * * *" Whether or not an account had been stated, and whether or not the defendants had promised to pay the \$3,000, were most certainly matters within their knowledge and which they were called upon to positively deny unless they desired to be deemed to have admitted them. A denial on information and belief as to these allegations is tantamount to an admission (see cases cited under "Second" above).

[13] Thus we find that the answer of these defendants, like that of those in the first group, raises no issue whatever as to certain material allegations, and the latter being therefore deemed admitted, the plaintiff was required to offer no proof thereon and the court was not justified in granting a nonsuit against him on the theory that the answer was sufficient if, as the record indicates, there was evidence tending to support those material allegations which were properly denied.

Some of the grounds advanced in the motion for the nonsuit were not sufficiently stated, but one of them was based on the theory of the defendants that the declaration of trust under which Drascena Productions was created did not constitute a partnership and that the defendants holding interests therein were not liable personally as partners.

The "Agreement and Declaration of Trust" is set out in full as an exhibit attached to the answer of the defendants represented by Schweitzer and Hutton, and the same was by stipulation admitted in evidence. At the outset it recites that it is an agreement and declaration of trust made and entered into by and between certain named persons "and all other parties who may become parties to this agreement, herein designated as the 'subscribers,'" and certain others designated as trustees. It then witnesses that the subscribers "are now engaged in the business of producing motion picture films under the title and designation of Drascena Productions," have acquired the ownership of certain picture rights, leaseholds, and contracts, and have paid into a common fund the sum of \$25,000, "to be used in defraying the costs and expenses of said business," and that they have individually signified their intention to form a permanent organization under the same name to carry on the said business and to transfer to such organization all their monies, properties, etc. It then provides, among

other things, that the five trustees shall have full authority and control; that title to the property shall be vested in them; that they shall fill vacancies and name successors; that they shall have full authority to borrow money and to execute notes therefor, and that they are authorized to issue 2,500 shares of trust certificates each of a par value of \$100 to the several subscribers, and from time to time issue and sell up to 2,500 additional shares. There is also a provision as to liability of trustees and subscribers. The beneficiaries or certificate holders have no control of the affairs of the organization.

Appellant very frankly admits his inability to define the legal relationship between the subscribers to this agreement. Respondents insist that it constitutes what is known as a "Massachusetts Trust" and argue that, as held by the courts of that state with regard to such entities, the unit or certificate holders, or, as they are called in the instrument here involved, "the subscribers," are not individually liable for the debts of the trust as in the case of members of a copartnership. To this point they cite the cases of *Williams v. Milton*, 215 Mass. 1, 102 N. E. 355, 357; *Frost v. Thompson*, 219 Mass. 360, 106 N. E. 1009, and *Bouchard v. First People's Trust*, 253 Mass. 351, 148 N. E. 895, as well as a number of cases from other jurisdictions, all of which support their contention. On the other hand, the appellant relies upon *Stitzinger v. Truitt*, 81 Cal. App. 502, 253 P. 971, 972, and *Old Rivers Farms Co. v. Roscoe Haegelin Co.* (Cal. App.) 276 P. 1047, 1050. For reasons we shall point out, these cases do not assist in a solution of the present problem. In the *Stitzinger Case* it is said: "It is pointed out that, when the members of a so-called business trust reserve to themselves such a large measure of power and control over the trustees as is done in this case, then the trustees are merely agents of the members and the members are personally liable for debts as general partners. Appellants have not replied to these authorities, having filed no closing brief; but in their opening brief appellants claim the articles constitute a joint-stock company. 'At common law joint-stock companies were regarded as commercial partnerships, and in the absence of express provisions, statutory or otherwise, the rights and liabilities of their members are to be determined by substantially the same rules.'" In the present instance, the absolute and entire control of the affairs is vested in five trustees without power of removal or election of new trustees by the members. There is, therefore, no question such as is mentioned in the first part of the quotation. Further, it is not contended that the organization is a joint-stock company. The perfected arrangement has every indication of being a valid trust and the question reduces itself to this: Can a trust be organized in this state for the

purpose of engaging in business? If it can, then the law respecting the liability of beneficiaries would seem to answer the remaining question. There is a statement in the second case relied upon by appellant which, taken by itself and separated from the facts upon which it is predicated, seems to answer the question asked in the negative. It follows: "The law has anticipated that individuals may desire to embark in business ventures without risking their entire capital, and has provided for just such cases by ample statutory enactments and by direct constitutional provisions. Appellants, however, attempt to disregard all of these wise and salutary laws, and ask us to hold them as naught. This we decline to do." When applied to the question in that case the language is unobjectionable and apt, but we are not ready to accord to the statement an unlimited application. The argument advanced by appellant in that case was, that "Roscoe Haegelin Company is a corporation as such term is defined in section 4 of article 12 of the Constitution of the state of California." The section referred to reads: "The term corporations, as used in this article, shall be construed to include all associations and joint-stock companies having any of the powers or privileges of corporations not possessed by individuals or partnerships." It was argued that the Haegelin Company was a joint-stock company, hence a corporation under the quoted section. The language employed by the court in its application to the questions before it simply means that the state, in the exercise of its legislative function, has adopted wise and salutary laws providing for the method of organizing a corporation by those who desire to engage in business under a corporate form for the purpose of avoiding the risk of their entire capital in the enterprise, which laws we are asked to set aside by a declaration that the steps there outlined are not prerequisite to the lawful organization of a corporation. And the court concludes: "This we decline to do." When interpreted in the light of the questions involved in that case, the statements have quite another meaning from the one which might ordinarily attach if they were unrelated thereto. In other words, we do not read the words of the District Court of Appeal to mean that it is impossible in California for men to intrust their capital to one or more trustees in whom they have implicit confidence and over whom they seek to exercise no control without assuming any greater risk than the loss of the funds placed in the trust. Our laws expressly recognize the right of men to relieve themselves of the burden of personally supervising their affairs by placing their capital in the hands of trustees for management, reserving, to themselves or others, income therefrom. It is true that until the legislative session of 1929 certain limitations were placed upon the purposes for which

estates in real property might be held in trust by section 857 of the Civil Code, but no such restrictions were laid against the creation of trusts in personal property, such as we are dealing with in the present action. Section 2220 of the Civil Code authorizes the creation of express trusts in personalty for any purpose for which a contract may lawfully be made. And our courts have recognized the right there declared. In *Re Walk-erly*, 108 Cal. 627, 656, 41 P. 772, 778, 49 Am. St. Rep. 97, we find the following: "The essential difference in this state between trusts in real property known as 'express trusts' and those in personal property are: First, the former can only be of the kinds permitted by the statute, and no others (Civ. Code, § 857), while the latter may be created generally for any purpose for which a contract may be made (Civ. Code, § 2220);" and in *Estate of Hinckley*, 58 Cal. 457, 482, we read: "Here, as in New York, 'trusts in personal estate are subject to no statutory restriction; in other words, the Legislature has never attempted to define and enumerate the lawful occasions for such trusts.' (Gilman v. Red-dington, 24 N. Y. 12.) They stand, therefore, as at the common law, subject only to the statutory rule of section 715, and to the direction against accumulations. (§§ 724, 2220.)" In *Toland v. Toland*, 123 Cal. 140, 55 P. 681, 682, it is said: "A trust in personal property may be created for any purpose for which a contract may lawfully be made (Civ. Code, § 2220), and the creation of a trust does not of itself suspend the power of alien-ation, unless a trust term in the property is created, within which a sale or other alien-ation by the trustee would be in contravention of the trust." The same principle is again recognized in *Stephens v. Lemoore Canal & Irrigation Co.*, 22 Cal. App. 579, 135 P. 707. See, also, *Hellman v. McWilliams*, 70 Cal. 449, 11 P. 659; 25 Cal. Jur. p. 302.

It is obvious, therefore, that the settled leg-islative policy of this state is to lay no re-strictions against the formation of trusts in personalty, but rather to leave open to such organizations the conduct of any lawful en-terprise.

[14] Having established the proposition of law that individuals have the right to for-mulate a trust in personalty for any legiti-mate purpose, can it be doubted that the ar-rangements here perfected constitute a trust rather than a partnership or joint stock as-sociation? We have already noted that the authorities relied upon by respondents sup-port their contention. In view of the im-portance of the question under consideration, we deem it proper to quote at some length from *Williams v. Milton*, supra, the reason-ing of which is in accord with the other au-thorities mentioned and a portion of which has been quoted with approval in the case of *Crockett v. Malley*, 249 U. S. 223, 39 S. Ct.

270, 63 L. Ed. 573, 2 A. L. R. 1601. The ex-cerpt follows: "*Williams v. Boston*, 208 Mass. 497, 94 N. E. 808, was a similar case. The trust agreement in that case provided that the trust was established 'for the pur-chase, development and disposition of' the former site of the Museum of Fine Arts in Boston. The property was to be held by trustees, but the shareholders had a right to remove the trustees, and meetings of the shareholders were to be held at which the shareholders might authorize or instruct the trustees in any manner and alter or amend the declaration of trust, or direct the trustees to end the trust, sell the property and dis-tribute the proceeds. The original papers in the case show these to have been the facts in the case, although they are not stated in the report of that decision. The property of this association was held to be taxable as partnership property.

"In *Mayo v. Moritz*, 151 Mass. 481, 24 N. E. 1083, on the other hand, it was held that certificate holders under the declara-tion of trust there in question were not part-ners. In that case an inventor transferred his invention to trustees to whom by the terms of the trust indenture the patent was to be issued when it was issued. The trust indenture provided for the issue of scrip to those who should furnish to the trustees the money necessary for the more advantageous disposition of the invention. The trust on which the trustees were to hold the inven-tion and the money produced by the issue of scrip was to hold, manage and dispose of the invention or any part thereof or interest therein upon such terms as to them (the trust-ees) or a majority of them should seem best, the net proceeds to be paid one-half to the inventor and the other half to the holders of the scrip or certificates. The scrip, called in the trust indenture scrip or certificates, was transferable. *Vacancies in the office of trustees were to be filled by the remaining trustees.* It was held that the scrip holders were not partners, and in that respect the case was 'unlike *Gleason v. McKay*, 134 Mass. 419, and *Phillips v. Blatchford*, 137 Mass. 510.'

"The difference between *Hoadley v. Coun-ty Commissioners*, 105 Mass. 519 (involving the same indenture as that in *Gleason v. Mc-Kay*, 134 Mass. 419), *Whitman v. Porter*, 107 Mass. 522, *Phillips v. Blatchford*, 137 Mass. 510, *Ricker v. American Loan & Trust Co.*, 140 Mass. 346, 5 N. E. 284, and *Williams v. Boston*, 208 Mass. 497, 94 N. E. 808, on the one hand, and *Mayo v. Moritz*, 151 Mass. 481, 24 N. E. 1083, on the other hand, lies in the fact that in the former cases the certificate holders are associated together by the terms of the 'trust' and are the principals whose instructions are to be obeyed by their agent who for their convenience holds the legal title to their property, the property is their

property, they are the masters; while in Mayo v. Moritz, on the other hand, there is no association between the certificate holders, the property is the property of the trustees and the trustees are the masters. All that the certificate holders in Mayo v. Moritz had was a right to have the property managed by the trustees for their benefit. They had no right to manage it themselves nor to instruct the trustees how to manage it for them. As was said by C. Allen, J., in Mayo v. Moritz, 151 Mass. 481, 484, 24 N. E. 1083: 'The scrip holders are cestuis que trust, and are entitled to their share of the avails of the property when the same is sold,' and that is all to which they were entitled. In Mayo v. Moritz the scrip holders had a *common interest in the trust fund in the same sense that the members of a class of life tenants and the members of a class of remaindermen* (among whom the income of a trust fund and the corpus are to be distributed respectively) *have a common interest*. But in Mayo v. Moritz there was no association among the certificate holders just as there is no association although a common interest among the life tenants or the remaindermen in an ordinary trust. * * *

"This brings us to the question of the character of the Boston Personal Property Trust. It is plain that it is a trust and not a partnership. By the terms of the indenture of trust the property contributed by the certificate holders, or that bought with money contributed by them (the original trust property could be acquired in both ways by the terms of the indenture of trust), was to be held by the trustees in trust to pay the income to the holders of the certificates, and on the termination of the trust to divide the trust fund or the proceeds thereof among them. The certificate holders are throughout called 'cestuis que trustent.' The certificate holders, or 'cestuis que trustent,' are in no way associated together, nor is there any provision in the indenture of trust for any meeting to be held by them. The only act which (under the trust indenture) they can do is to consent to an alteration or amendment of the trust created by the indenture or to a termination of it before the time fixed in the deed. But they cannot force the trustees to make such alteration, amendment or termination. It is for the trustees to decide whether they will do any one of these things. All that the certificate holders or 'cestuis que trustent' can do is to give or withhold their consent to the trustees taking such action. And the giving or withholding of consent by the cestuis que trust is not to be had in a meeting, but is to be given by them individually. As we have said, no meeting of the cestuis que trust for that or any other purpose is provided for in the trust indenture. The trustees of the Boston Personal Property

Trust have a right to sell the trust securities and reinvest the proceeds, and also a limited power to borrow on the security of the trust property. The certificate holders, or 'cestuis que trustent,' as they are called in the trust deed, have a common interest in precisely the same sense that the members of a class of life tenants (among whom the income of a trust fund is to be distributed) have a common interest, but they are not socii, and it is the trustees, not the certificate holders, who are the masters of the trust property. The sole right of the cestuis que trust is to have the property administered in their interest by the trustees, who are the masters, to receive income while the trust lasts, and their share of the corpus when the trust comes to an end." (Italics ours.) The reasoning here employed meets with our approval. The sum and substance of the declaration of trust under consideration is, that the certificate holders are not associated together for the purpose of carrying on business in accordance with the definition of a partnership as found in section 2395 of the Civil Code as it existed prior to its repeal in 1929; they have no control or direction over the investment of the corpus of the trust; the trustees are the masters; the cestuis que trustent are entitled only to receive the net income not required for the operation of the trust and the proportion of the corpus of the trust upon its termination. Were we to hold that such an arrangement of affairs made of the certificate holders copartners, we would be assuming a function which belongs exclusively to the legislative department of government.

[15] The appellant seeks to fasten liability upon the defendants solely by reason of their ownership of certificates of beneficial interest. Not only one, but all of his causes of action are founded upon this theory. It would constitute a perversion of justice for us to say, under such circumstances, that the failure of the defendants to properly answer some of the counts of the complaint demanded that we should reverse the judgment. There can be no doubt that section 4½ of article 6 of the Constitution of California applies in this instance as well as in others, and not only authorizes but also requires us, in accordance with our own sense of natural justice, to refrain from making a mockery of the law by an over-indulgence in the refinements of pleadings with an attendant loss of substantive fairness. For like reasons the failure of counsel for the executor of the last will and testament of Nellie M. Thompson to join in the motion for nonsuit is of no serious import.

There are other reasons advanced by the respondents why the judgment should be affirmed. We are of the opinion that they are not well taken, and in view of the conclusion

to which we have come it is not necessary to discuss them.

Judgment affirmed.

I concur: CRAIG, Acting P. J.

BURNELL, Justice pro tem. (dissenting).

I dissent. I am unable to concur with the majority of the court in the view that the error which they concede was committed in forcing the plaintiff to elect as between his causes of action does not necessitate a reversal of the judgment.

As stated in the majority opinion, in its most clear and able resumé of the issues as made by the pleadings, the answers of the defendants represented by the firm of Schweitzer and Hutton do not in any way mention, much less do they deny, the allegations contained in the tenth cause of action, and, as further pointed out therein, the answers of this group of defendants to the seventh, eighth, and ninth causes of action were so drafted as to amount to admissions of the allegations thereof. As well and clearly stated by my learned brethren, "The case therefore stood, as to the defendants in the first group, in exactly the same position as if they had actually in terms admitted the truth of the allegations contained, either by direct averment or by reference to paragraphs in preceding causes of action, in the last four counts." The answer of the group represented by Mr. Winterer, as held in the majority opinion, "raises no issue whatever as to certain material allegations, and the latter being therefore deemed admitted, the plaintiff was required to offer no proof thereon." Among the material allegations thus held by it to be admitted the majority opinion points out the allegation in the tenth cause of action that an account had been stated "between the defendants" and the plaintiff's assignor, "wherein and whereby it was shown that the defendants and each of them were indebted to (the assignor) in the amount of \$3,000, which amount the defendants and each of them promised and agreed to pay. * * *" (Italics are my own.) At the time, therefore, when the court below forced the plaintiff to elect to stand upon but one of his ten causes of action and to abandon the remaining nine, there were four causes of action which in contemplation of law were as much admitted by one group of defendants as though they had filed a written stipulation admitting the truth of the facts alleged, while as to the other main group of defendants the situation was the same with respect to the tenth cause of action. It is indulging in mere judicial jugglery to say that plaintiff had but one *real* cause of action and that that depended upon the theory of the liability of the defendants by reason of their membership in and ownership of certificates of the organization known as "Drascena Productions." It

goes even, in my opinion, beyond this, since, as to the tenth cause of action at least, the complaint alleged as a *fact*—which the majority opinion rightly holds was admitted by all the defendants of these two groups—that *an account had been stated between plaintiff's assignor and all of the defendants and that each and all of the individuals named as defendants had promised and agreed to pay the amount so stated.* Irrespective of their legal liability as subscribers to the agreement under which Drascena Productions was organized, the defendants might, and it is an alleged and admitted fact as held by my learned associates that they did, severally and individually, "promise and agree to pay" the \$3,000 representing the indebtedness assumed by their organization when it took over the business, assets, and liabilities of the Morante Comedies and for which there had been an account stated. How, then, can it be said that the plaintiff was not prejudiced by being forced to abandon a cause of action based upon a statement of facts sufficient to warrant a judgment in his favor, which facts were not denied but were in contemplation of law admitted by his adversaries?

I am also compelled to disagree with the majority opinion as to the ruling of the court below on the motions for nonsuit. What has just been said with respect to the order compelling plaintiff to elect applies with equal force to this branch of the case. It seems to me self-evident that where a cause of action states facts sufficient to support a judgment, and those facts are admitted by the defendants to be true, it is error of the most flagrant and prejudicial character to grant a nonsuit. The order granting the nonsuit applied to each and every one of the plaintiff's causes of action, including the tenth the allegations of which were, as the majority opinion so clearly points out, admitted to be true by the defendants of both the Schweitzer and Hutton, and Winterer groups. The prevailing opinion so holds in the unmistakably clear language which I now quote: "The order here involved may be treated as a general order of nonsuit *as to the whole of the plaintiff's case, including all causes of action set up in his amended complaint, since, as we have held, the order to elect was erroneous.*" * * * *Pacific Vinegar Works v. Smith*, 152 Cal. 507, 93 P. 85." (Italics mine.)

Confining the discussion to the tenth cause of action, does it allege facts sufficient, if proved or as in this case *admitted*, to have supported a judgment for the plaintiff? That, it seems to me, is an absolute test of the correctness or prejudicial erroneousness of the order granting a nonsuit as applied to the instant case. As pointed out, the tenth cause of action alleges an account stated and the promise of "the defendants *and each of them*" to pay the amount thereof, an allegation as

to which, as the majority opinion correctly holds, "the plaintiff was not required to offer proof," since its truth was admitted. Suppose that a judgment on the pleadings had been given as to this cause of action. Bearing in mind that each cause of action must be separately stated (Code Civ. Proc. § 427; *Cosgrove v. Fisk*, 90 Cal. 77, 27 P. 56) and must be complete in itself (*Hopkins v. Contra Costa County*, 106 Cal. 566, 39 P. 933; *Reading v. Reading*, 96 Cal. 4, 30 P. 803), could this court hold on an appeal from such judgment that the admitted fact that an account had been stated and that the defendants *and each of them* had promised and agreed to pay the amount thereof was insufficient to warrant and support such judgment? Would the fact that the pleading also contained an averment that the defendants were members of a so-called trust, of the Sons and Daughters of I-Will-Arise or of the Hole-in-One club be regarded as having any bearing on the question of the liability of those who had admittedly promised and agreed to pay a certain sum? As to that cause of action, regarded, as it must be, as though it were the only cause of action set up, would not the averment of membership in Drascena Productions necessarily be treated as mere surplusage—as a statement which could not have the remotest bearing on the admitted fact that the defendants and each of them had promised and agreed to pay a certain sum of money? Or if not so regarded would it not be deemed, as to this cause of action, a mere matter of inducement, explanatory, possibly, of the *reason* for the promise of the individual defendants to pay? In attempted justification of their attitude on this question the majority of the court says: "The appellant seeks to fasten liability upon the defendants *solely* by reason of their ownership of certificates of beneficial interest (in Drascena Productions). Not only one but *all* of his causes of action are founded upon this theory. It would constitute a perversion of justice for us to say under such circumstances that the failure of the defendants to *properly* answer some of the counts of the complaint demanded that we should reverse the judgment." (Italics are mine.) And this in the face of their positive statement that one group of defendants did not answer the tenth cause of action *at all* and that the answer of another group amounted to an express admission of the truth of its allegations! We are not concerned here with answers that merely failed to traverse averments of the complaint with scrupulous adherence to the rules of perfect pleading, but with answers which, to again quote the words of the majority opinion, placed one group of defendants "in exactly the same position as if they had actually in terms admitted the truth of the allegations" and another group in the position of having raised "no issue whatever as

to certain material allegations." I cannot agree that, at least as to the tenth cause of action, the appellants sought to fasten liability upon the defendants solely or at all by reason of their ownership of certificates in Drascena Productions. As I have pointed out, the gravamen of that cause of action was the promise and agreement of each and all of the defendants to pay the amount of the account stated. Is this court to hold as a matter of law that the allegation of the complaint which it says was admitted as true by the defendants is in fact false? And without proof, or the opportunity for proof, is it to rule that the individual defendants did *not* nor did any of them promise and agree to pay? If this is the law it certainly was not the law until the majority of this court spoke. Having ruled in effect that persons engaged in a common business enterprise, without complying with those provisions of our law which enable individuals to escape full personal liability, may render themselves immune from their obligations by signing a paper called a trust agreement, are we to further hold that the fact of membership in this extra-legal organization negatives the admitted fact that the individual members and each of them "promised and agreed to pay"? The "perversion of justice," in my humble opinion, consists of the affirmation of a judgment of nonsuit as to a cause of action alleging facts sufficient to support a judgment in the face of the admission of those facts by the defendants, and in the assumption, in the face of the pleaded and admitted promise and agreement of the defendants and each of them to pay the amount of the account stated and without one word in the record to support such assumption, that the plaintiff, at least as regards the tenth cause of action, relied *solely* upon the membership of the defendants in Drascena Productions. Even if the defendants had not placed themselves as the majority opinion puts it, "in exactly the same position as if they had actually in terms admitted the truth of the allegations" as to the promise of each and all of them to pay the \$3,000, had the court below the right to assume, without allowing an opportunity for the plaintiff to offer proof as to this cause of action, that he would have been unable to substantiate the truth of his averments therein contained? In my opinion the question answers itself.

I am convinced that the errors of the trial court, first in forcing the plaintiff to elect to proceed on one of his causes of action and to abandon the others and second in granting the motion for nonsuit, absolutely demand a reversal of the judgment irrespective of all question as to the liability of the defendants as members of Drascena Productions. Upon that question, which I do not admit is necessarily involved in the decision of the appeal

I again find myself not in accord with the opinion of my learned brethren.

The majority opinion clearly and succinctly describes the provisions of the instrument under which Drascena Productions was organized, although it fails to note that this "Agreement and Declaration of Trust," in addition to the provisions reviewed, contains the following, which it seems to me somewhat negatives the apparent theory of my associates that the subscribers or members retained no control whatever over the business of the organization, namely, a clause reading: "Any changes, additions or alterations in any way affecting the rights, privileges, and interest of the 'Cestui,' shall only be made by the consent of the owners and holders of two-thirds of all the outstanding shares of trust certificates;" a clause providing for the termination of the trust by a two-thirds vote of all of the members at a meeting called for that purpose, in which event the assets are to be liquidated and the proceeds distributed in cash to the members "pro rata to each, according to their respective interests thereon [sic]," and a provision requiring the written consent of the holders of two-thirds of the issued certificates before any except a purchase-money mortgage can be placed on the property of the trust.

The agreement itself recites the fact that the subscribers had theretofore been engaged in a certain business, to wit, the production of motion picture films, and that they had been carrying on this business under the same name as that under which they were to continue to operate after signing the agreement. It further recites their acquisition of ownership in certain personal property and the existence of a common fund of \$25,000, contributed by the subscribers, "to be used in defraying the costs and expenses of said business." It seems evident that these subscribers were previously and at the time of their execution of the so-called trust agreement engaged in a joint adventure, a common business enterprise, each being individually liable under the law for the debts incurred in carrying out such enterprise. *Leake v. City of Venice*, 56 Cal. App. 462, 195 P. 440. That is made clear by the recitals of their agreement, as follows: "Whereas, the subscribers are now engaged in the business of producing motion picture films under the title and designation of 'Drascena Productions' * * * and whereas the said subscribers at a meeting held on the 25th day of August, 1920, individually signified their purpose to form a permanent organization to be known as 'Drascena Productions,' and to engage in and carry on the business of producing motion picture films. * * *" (Italics mine.) Individuals engaged in a business venture and charged by law with liability to the creditors of the business may not, by the terminology they elect to employ or by any agreement among them-

selves, divest themselves of the obligations imposed by law with regard to their dealings with those who are not members of their organization or parties to their agreements. *Streeter v. Bacon*, 49 Cal. App. 327, 193 P. 285. Had these associates desired to continue to carry on their business under conditions whereunder their individual liability might have been legally limited, the Constitution and laws of the state provided the means whereby this end could have been attained, as, for example, by forming a corporation. The policy of our law has always been, as I understand it, that when two or more persons are engaged in a common business enterprise, under whatever name they may choose to label it, each is charged with liability for the debts incurred in its prosecution unless they see fit to organize their enterprise pursuant to and in accordance with laws which provide for a limited liability. In *Old River Farms Co. v. Roscoe Haegelin Co.* (Cal. App.) 276 P. 1047, 1050, a case in which this identical question was presented to this court, it was said of the subscribers to or members of just such a trust agreement: "The law has anticipated that individuals may desire to embark in business ventures without risking their entire capital, and has provided for just such cases by ample statutory enactments and by direct constitutional provisions. Appellants, however, attempt to disregard all of these wise and salutary laws, and ask us to hold them as naught. This we decline to do." It may be here noted in passing that the Supreme Court denied a hearing in the case just referred to, after judgment in the District Court of Appeal. The liability of such persons under the law is recognized by section 388 of the Code of Civil Procedure, which provides: "When two or more persons, associated in any business, transact such business under a common name, whether it comprises the names of such persons or not, the associates may be sued by such common name, the summons in such cases being served on one or more of the associates; and the judgment in the action shall bind the joint property of all the associates, and the individual property of the party or parties served with process, in the same manner as if all had been named defendants and had been sued upon their joint liability." Here the members of Drascena Productions were named as defendants, and the transcript shows that they not only were served with process, but that most of them appeared and answered.

My brethren pro tempore lay particular stress upon the proposition that a trust may be formed in personal property. This may readily be granted, but the question of the legal liability to creditors of the associates engaged in, and forming a permanent organization for the purpose of continuing to engage in, a certain business is what we are dis-

curring, not the legality of their organization. We may concede that these associates in a common business venture could form a trust without violating any statutory law of the state and transfer the legal title to their common property used in such business to the trustees thereof, and still leave undetermined the question of the power of such associates to escape from their obligations to the creditors of their business by agreement among themselves that sole liability should rest with the fictitious entity thus evolved. I can find no authority in the decisions of the courts of this state, whatever conclusion those of other jurisdictions may have arrived at, which sanctions such facinorous vermiculation toward the destruction of the foundation of the bulwark which the law has erected for the protection of those who in good faith pay over their money, deliver their goods, or furnish the labor of their hands, or the work of their brains to an enterprise organized for the enrichment of others, unless those others bring their organization within the purview of statutory provisions expressly providing for limitation of their individual liability. On the contrary, I find that our courts have heretofore uniformly set the seal of their disapproval upon such attempted evasions. Thus in *Shorb v. Beaudry*, 56 Cal. 446, certain individuals had, to quote from the opinion, "associated themselves together for the purpose of uniting in one owner certain lands and water rights, some of which they then owned, and some of which were to be obtained from other parties, for the purpose of developing and selling the same, and dividing the proceeds of the sales between themselves, according to * * * their agreements in writing." For this purpose they agreed to form a corporation to which should be conveyed the property above referred to. Looking through the shadow thus projected by these associates to the substance behind it, the Supreme Court said: "That the corporation was formed as a mere agency for more conveniently carrying out the agreements between Temple, Beaudry, and Wilson, is sufficiently apparent. As a corporation, it paid nothing, incurred no liability, and was not to receive any part of the proceeds of the sales of land, except for the purpose of developing and improving the property held by it. All the profits were to be distributed among the three members of the association, in the proportion fixed by their contract. * * *

The relation which the corporation sustained to Wilson, Temple, and Beaudry was substantially, if not technically, that of a trustee. As was said by this court in *Chater v. S. F. S. R. Co.*, 19 Cal. 246, 247: "The truth is, the corporation, under our system, following such an agreement, would be the mere agency of the associates, created for the sake of convenience in carrying out the agreement, as between those who made the bargain, the dif-

ferent characters or forms in which or by which the bargain was made, and the order in which the several parts of it were executed, making no substantial difference in the obligation." Substantial justice can be administered in this case by treating the parties in the light of their agreements between themselves, independently of their incorporation, and in no other way that we have been able to discover can this be done. Laying aside the act of incorporation, their relations to each other were those of partners. * * *

If this can be said where the persons engaged in carrying on a business and desirous of forming a permanent organization through which to continue to carry it on have gone through the form of organizing a corporation, how greater the application to those who have not even attempted to take refuge behind the skirts of a constitutional provision for limited personal liability! *Shorb v. Beaudry* has frequently been cited as authority in later decisions, among which are *Conover v. Smith*, 83 Cal. App. 227, 256 P. 835, 836, holding that "equity will look through form to substance where corporations are but the mere instrumentalities through which the associates acted"; *Wittmann v. Whittingham*, 85 Cal. App. 140, 259 P. 63; *Conway v. Citrus Belt Land Co.* (Cal. App.) 271 P. 525, 527, and *Continental Securities, etc., Co. v. Rawson* (Cal. Sup.) 280 P. 954. In *Conway v. Citrus Belt Land Co.*, supra, the court held that the "assumed corporate personalities" of corporations may be regarded as those of the individuals of which they may be composed, where the rights of creditors are involved, and quoted this language from *Hunt v. Davis*, 135 Cal. 31, 66 P. 957: "The corporation was formed as a mere agency for more conveniently carrying out the agreements of the parties; and the relation sustained by it to them is 'substantially, if not technically, that of a trustee.'" I fail to see in what way or by what magic the individual liability that may exist, even where the form of a corporation is erected as a screen and the relation of the corporation is, as to its members, "that of a trustee," can be made to vanish into thin air by the selection by those associated in a business enterprise of five of their number to act as their trustees in a continuation of the same business.

Approaching the question from a somewhat different angle, a well-established principle of law is well stated in *Wenban Estate, Inc., v. Hewlett*, 193 Cal. 675, at page 696, 227 P. 723, 731: "While it is the general rule that a corporation is an entity separate and distinct from its stockholders, with separate, distinct liabilities and obligations, nevertheless there is a well-recognized and firmly settled exception to this general rule, that, when necessary to redress fraud, protect the rights of third persons, or prevent a palpable injustice, the law and equity will intervene and cast aside the legal fiction of independent corporate ex-

istence, as distinguished from those who hold and own the corporate capital stock, and deal with the corporation and stockholders as identical entities with identical duties and obligations. Accordingly it has been held that upon a sufficient showing that a corporation is but the instrumentality through which an individual, who is the sole owner of all of the corporate capital stock, for convenience transacts his business, equity, looking to the substance rather than the form of the relation, and the law as well, will hold such corporation obligated for the acts of the sole owner of the corporation to the same extent and just as he would be bound in the absence of the existence of the corporation. *Llewellyn Iron Works v. Abbott Kinney Co.*, 172 Cal. 210, 155 P. 986; *Commercial Security Co. v. Modesto Drug Co.*, 43 Cal. App. 162, 184 P. 964; *Minifie v. Rowley*, 187 Cal. 481, 202 P. 673. Thus proof that an individual owns all of the stock of a corporation and that the corporation is in truth and in fact but the corporate double of the owner of the stock will, in conjunction with a further showing that as a result of the double relationship fraud or injustice will inure to a third person, suffice to dissipate the separate identity of the corporation. *Minifie v. Rowley*, supra. In such a situation, where, as here, the rights of third persons are involved, the law will have no compunction in holding the contract of the owner of the corporation dealing with the corporate assets to be the contract of the corporation. *Porter v. Lassen County Land Co.*, 127 Cal. 261, 59 P. 563; *Schuyler v. Pantages*, 54 Cal. App. 83, 201 P. 137; *Swartz v. Burr*, 43 Cal. App. 442, 185 P. 411." I submit that the same principle applies where the entity, be it in the guise of a corporation or a "trust," under which the business is carried on, is but the alter ego of a group of associates instead of but a single individual.

In the opinion of the majority much stress is placed upon the fact that the subscribers to the trust agreement retained little or no control over the management of the business, that being delegated, as they say, entirely to the board of trustees by the terms of the agreement. But was this not also true as to the form of corporate organization employed in the cases above referred to?

There is much, although not unanimous, authority outside of the state for holding that the beneficiaries of a trust of the character commonly referred to as a "Massachusetts Trust" are not personally liable where, by the terms of the declaration of trust, all title to the assets and all control of business is vested in the trustees with no reservation of control power in the membership at large. See *Rand v. Morse* (C. C. A.) 289 F. 339; *Simson v. Klipstein* (D. C.) 262 F. 823; *Baker-McGrew Co. v. Union Seed, etc., Co.*, 125

Ark. 146, 188 S. W. 571; *Thompson v. Schmitt*, 115 Tex. 53, 274 S. W. 554; *Marchionis v. Adams*, 97 W. Va. 517, 125 S. E. 340; *Roller v. Madison*, 172 Ky. 693, 189 S. W. 914; *Hollister v. McCamey*, 115 Tex. 49, 274 S. W. 562; *Howe v. Keystone Pipe & Supply Co.*, 115 Tex. 158, 274 S. W. 563, 278 S. W. 177, and *Medlin v. Ebenezer Methodist Church*, 132 S. C. 498, 129 S. E. 830, which hold members of such associations individually liable. But even if we were to concede that individuals initiating a *new* business venture and starting, so to speak, with a clean slate, might contribute money or other property into such a trust without incurring personal liability for debts thereafter incurred by the trustees, a different case is presented when those *already* engaged in the conduct of a certain business venture, for the debts incurred in the prosecution of which they are individually liable as partners or as joint adventurers, merely continue the same business under a different label.

Reverting to *Old River Farms Co. v. Roscoe Haegelin Co.*, supra, I am unable to follow the reasoning of my associates in their construction and application of the decision in that case. As I read the opinion of the majority of the court it seems to be based upon the theory that the question under discussion here was not involved there, and that the factor of absolute control in the hands of the trustees was not presented to the court. The reverse is true. The "Agreement and Declaration of Trust" under which the Roscoe Haegelin Company was organized was before the court, being included in the appendix to appellants' opening brief. Irrespective, therefore, of the *name* by which the parties to the appeal referred to that organization, whether as an "unincorporated association," a "joint stock company," a "Massachusetts Trust" or a "corporation," its exact nature and legal status was ascertainable to the court from an inspection of the instrument of its creation. Parenthetically it may be noted that such business organizations seem to be referred to indiscriminately in the digests and decisions either as joint-stock companies or as Massachusetts trusts. For instance, the heading under which the cases relating to them are collated in the *American Digest, Decennial Edition*, is "Joint Stock Companies and Business Trusts." Moreover, the question of the individual liability of the members *was directly presented to the court*, both upon the appeal and upon the petition for hearing in the Supreme Court, which petition the last-named tribunal denied. One of the four points urged by appellants is thus stated in bold-faced capitals in their opening brief: "Defendants' articles of association and the evidence without contradiction show that the shareholders of the association, other than the trustees had no voice in the management

of the company and no title or interest in the property of the association. The trustees, therefore, were without power to create a personal liability against the shareholders, of which fact plaintiff had notice." (The trust agreement was recorded and the lease on which the action was brought was signed "Roscoe Haegelin Company, No personal liability, by Roscoe Haegelin, President.") In their petition for a hearing in the Supreme Court after the judgment of the District Court of Appeal, the appellants, under the caption "Question Presented," said: "The chief question presented by this appeal is one that has never been answered by this Honorable Court so far as research of counsel has been able to determine. We therefore believe that we are justified in asking the court to pass upon it. That question is, what is the liability of a stockholder of a joint stock association, who is not one of the trustees or directors of the association, to a creditor of the association?" * * * The Honorable District Court of Appeal * * * has held that such stockholder is liable as a general partner for the entire debt of the association, not for his proportionate share." And the petition points out that according to the terms of the trust agreement "The trustees *held the legal title to all property* at any time belonging to the company and *had the absolute control, management and disposition thereof* and of the business; they had a right to adopt a seal, elect their own officers, appoint their own agents, etc.; they were required to keep a record of their meetings and other records as in the case of corporations; to issue certificates for shares and transfer the same. As to the shareholders, it was provided that the owners of shares *held no title in or to the trust property* or had they any right in or to a partition, or division of the same, or to an accounting, and it was further provided that the trustees had no power to bind the shareholders personally." (Italics mine.)

Turning to the trust agreement which the court had before it when preparing its decision in the Haegelin Case, it will be found that it corresponds in all respects to that under which the business which had been theretofore known as Drascena Productions was to be carried on under the same name. The Roscoe Haegelin agreement first recites that the parties to it are five named persons "together with their successors herein designated as 'Trustees'" and certain other named individuals "together with their legal successors or assigns, hereinafter called 'Subscribers.'" It provides that there shall be five trustees who shall be designated as the Roscoe Haegelin Company and under that name shall "conduct all business and execute all instruments in writing, in the performance of their trust," and that "The trus-

tees shall hold the legal title to all property at any time belonging to this trust, and subject only to the specific limitations herein contained, *they shall have the absolute control, management and disposition thereof* and shall likewise have the *absolute control of the conduct of all the business of the trust.*" (Italics mine.) The "specific limitations" on the otherwise absolute authority of the trustees are the following, and these only: The number of shares "with the consent of not less than two-thirds of such of the shares as are represented and voted upon at any meeting called for that purpose" may be increased or diminished; the consent of the holders of at least two-thirds of the outstanding shares is required before the trustees can mortgage or pledge any of the property of the trust (the Drascena Productions agreement contains an almost identical provision); the trust agreement may be amended "except as regards the exemption from personal liability of the trustees, officers and shareholders" and "the priorities of the preferred shares, if any," at a special meeting of the shareholders, called for that purpose, with the consent of the holders of at least two-thirds of the outstanding shares. (The Drascena Productions agreement requires consent of the holders of two-thirds of all the outstanding certificates as a prerequisite to any change in the trust agreement which shall in anywise "affect or change the status of the cestuis qui trust in any particular manner.") The trustees are authorized: "(a) To purchase, lease or otherwise acquire lands and holdings in the State of California, or elsewhere, for the erection and establishment of a pickling, preserving and canning plant, together with the necessary appurtenances, engines and machinery, with a view to manufacture, buy, sell, import or otherwise deal in, either directly or indirectly, green, dried, pickled, preserved and canned meats, fruits, vegetables or other food products, through medium of agents or otherwise, and to purchase or otherwise acquire patents, patent rights, copyrights and privileges, improvements or secret processes of whatsoever nature or in anywise relating to all or any of the subjects aforesaid and to grant licenses for the use of or to sell or otherwise deal in any patents, patent rights, copyrights and privileges, improvements or secret processes, acquired by the company. (b) To engage in horticulture, viticulture or agriculture, and conduct and manage experimental farms for the encouragement of the growing of various food products necessary in said business in such localities in the state of California, or elsewhere, as they deem proper. To erect, maintain, purchase or rent, hire, lease, let or otherwise acquire or dispose of all real or personal property necessary or convenient to such business, in the manner provided in the eleventh paragraph

hereafter. To acquire the good will, rights and property of any person, firm, association or corporation, and pay for the same in cash or stock of this company, bonds or obligations of this company, or otherwise, and to hold or in any manner dispose of the whole or any part of the property so acquired. (c) To engage in any business similar in character to that above mentioned which the trustees may deem expedient and to acquire, hold and dispose of the stocks, shares or securities of corporations, associations or persons doing business of a character similar to any business above described." It is provided that the enumeration of specific duties and powers "shall not be construed in anywise as a limitation upon the general powers intended to be conferred upon them." Among the specific powers conferred are: "* * * to adopt and use a common seal; to make all such contracts as they may deem expedient in the conduct of the business of the trust; from time to time to release, sell, exchange or otherwise dispose of, at public or private sale, any or all of the trust property, whether real or personal, for such price and prices, either in cash or in the stocks, shares or securities of corporations or associations, and upon such terms as to credit or otherwise as they may deem expedient; to guarantee the obligations of corporations or associations, and to enter into such agreement by way of indemnity, or otherwise, as they deem expedient in connection with the acquisition of property from the subscribers as hereinafter provided, or otherwise, to confer, by way of substitution such power and authority upon the president, treasurer and secretary and other officers and agents appointed by them, as they may deem expedient; to borrow money for the purpose of the trust, and give the obligations of the trustees therefor; to loan any money from time to time in the hands of the trustees, with or without security, on such terms in the furtherance of the business of the trust as the trustees may deem expedient; to subscribe for, acquire, own, sell or otherwise dispose of real and personal property, including the stocks, shares and securities of any corporation, trust and associations as they may deem expedient, in connection with the purpose of the trust; to vote in person or proxy on all shares of stock at any time held by them, and to collect and receive the income, interest and profits of any such stock or securities, to collect, sue for, receive and receipt for all sums of money at any time becoming due to said trust; to employ counsel and to begin, prosecute, defend and settle suits at law, or in equity, and to compromise or refer to arbitration any claims in favor of or against the trust; and in general, to do all such matters and things as in their judgment will promote or advance the business which they are authorized to carry on,

although such matters and things may be not specifically authorized."

They are further empowered to adopt, amend, and repeal by-laws, to elect from among their number a president, vice-president, secretary, and treasurer, and "to appoint such other officers, agents and attorneys as they may deem necessary or expedient in the conduct of said business," to fix the compensation thereof and to "remove any officer or agent elected or appointed by them." Transferable shares were to be issued to the subscribers as in the case of Drascena Productions, and the agreement provided: "The ownership of shares hereunder shall not entitle the shareholders to any title in or to the trust property whatsoever, or right to call for a partition or division of the same or for any accounting, and no shareholders shall have any right or further rights than the right of a stockholder in a corporation so far as the same may be applicable. The trustees shall have no power to bind the shareholders personally, or to call upon them for the payment of any sum or sums of money or any payment whatever other than such sums as they may at any time personally agree to pay by way of subscription to any new shares or otherwise. All persons or corporations extending credit to, contracting with or having any claim against the trustees shall look only to the funds and property of the trust for the payment of any such contracts or the claim or claims, or for the payment of any debt, damage, mortgage, judgment or decree or any money that may otherwise become due or payable to them from the trustees. In every written order, contract, or obligation which the trustees or officers shall give, authorize or enter into, it shall be the duty of the trustees and officers to stipulate or cause to be stipulated, that neither the trustees, officers nor shareholders shall be to any personal liability under or by reason of such order, contract or obligation, and on all statements, letter-heads, stationery, used by the trustees in the conduct of the business of said trust, shall be printed the words 'No personal liability.'" The duration of the trust was to be "for the term of ten years after the death of the last survivor of the persons whose names are signed hereto," at which time the trustees were required to liquidate its assets and distribute the proceeds to the then shareholders. (The Drascena Productions trust was to continue during the natural life of the subscribers who signed the agreement, with a like provision as to liquidation and distribution.)

I have quoted at length from the trust agreement of the Roscoe Haegelin Company in order to make it plain, to the point of demonstration, that the court was considering the liability of the members of an organization identical in every way with Dra-

scena Productions. There are other clauses in one trust agreement that are almost word for word like those in the other, as for example those dealing with "Strangers to the Trust," declaration of dividends, trustee's liability for errors of judgment, and trustee's lack of power to bind shareholders personally.

The court in deciding the case of *Old Farms Company v. Roscoe Haegelin Company* squarely and unequivocally passed on the precise question here presented, and in closing its opinion with the language which I have quoted held that those choosing to conduct their business ventures under the guise of a trust could not limit or escape from their liability to the creditors of the business. The point was an important one, never before squarely presented in this state and with authority on both sides of the question in other states. Are we to place no importance at all in the fact that the highest court of the state, its attention called to the novelty and importance of the point at issue, declined to accord a further hearing after reading and considering the ruling of the District Court of Appeal?

For the reasons herein set forth, the judgment should be reversed.

ADAMS v. KAISER et al. ★

Civ. 6933.

District Court of Appeal, First District, Division 2, California.

Feb. 25, 1930.

Rehearing Denied March 27, 1930. Hearing Granted by Supreme Court April 24, 1930.

1. Evidence ⇨528(2)—Sustaining objections to questions asked of medical witness to determine whether prior ailments or automobile accident shortened plaintiff's life held error.

In pedestrian's action for personal injuries sustained when struck by automobile, sustaining objections to questions asked of medical witness as to whether he had any opinion as to how many years injured pedestrian would have lived with diseases and troubles which existed before accident, disregarding accident, and whether he had opinion about how long she would live in her present condition, *held error*.

2. Evidence ⇨528(2)—Medical experts may give opinion as to probable expectancy of life of injured party who is suffering from ailment or disability.

Where plaintiff, in action for personal injuries, is suffering from ailment or disability which has tendency to shorten his life, medical experts may properly express an opinion as to probable expectancy of life of plaintiff.

3. Automobiles ⇨245(72)—Evidence in pedestrian's action for injuries sustained when struck by automobile held not to establish contributory negligence as matter of law.

In pedestrian's action for injuries sustained when struck by automobile while crossing street,

where there was evidence that motorist passed another machine moving in same direction on its right-hand side in violation of statute at speed of 35 to 40 miles per hour, and that pedestrian was struck as she stepped out from in front of other machine, evidence *held not to establish* that pedestrian was guilty of contributory negligence as matter of law.

4. Damages ⇨173(2)—Admission of evidence that injured party had been teacher in other states, and was qualifying herself to become teacher in state, held not error.

In pedestrian's action for injuries sustained when struck by automobile while crossing street, admission of evidence that pedestrian had been school teacher in other states, and was qualifying herself to become teacher in schools of state, *held not error*, since jury is entitled to know, not only what occupations pedestrian was able to engage in, but also any occupation which she might have reasonable probability of engaging in in future.

Appeal from Superior Court, Alameda County; Leon E. Gray, Judge.

Action by Sally C. Adams against Edgar Kaiser and others. Judgment for plaintiff, and defendants appeal.

Reversed.

Cooley, Crowley & Gallagher, of San Francisco, for appellants.

Ford & Johnson, of San Francisco, and Crosby & Crosby, of Oakland, for respondent.

DOOLING, Justice pro tem.

Plaintiff, while crossing the street in the city of Piedmont was struck and injured by an automobile driven by defendant and appellant Edgar Kaiser. She brought suit against Kaiser, who was a minor, and his parents, and after a jury trial recovered a judgment, from which this appeal was taken.

[1] Respondent was a woman about 57 years old, and mortality tables were introduced to show her expectancy of life. Appellants, after introducing testimony that prior to the accident respondent had been suffering from certain functional disorders, asked the following questions of a medical witness:

"Have you any opinion as to about how many years this lady would have lived with those diseases and those troubles that you say existed before the accident, disregarding the accident?"

"Have you an opinion, at the present time, about how long this lady will live in her present condition?"

To these questions objections were sustained.

We believe that the sustaining of these objections was prejudicial error. While the question has never been decided in the appellate courts of this state, the weight of au-

thority is in favor of the admission of testimony of this character. The Supreme Judicial Court of Massachusetts in the case of *Fournier v. Zinn*, 257 Mass. 575, 154 N. E. 268, said: "A physician called by the plaintiff was allowed, subject to the defendant's exception, to state his opinion of the probable duration of the plaintiff's life. He said that, taking into account the plaintiff's physical condition if he had not received the injury complained of, he would live about nine years; that because of the accident, he would probably live about four years from that time. This evidence was admissible."

The Court of Appeals of the state of New York, in passing upon a similar question in *Alberti v. N. Y., etc., R. Co.*, 118 N. Y. 77, 23 N. E. 35, 37, 6 L. R. A. 765, used the following language: "He [Dr. Lewis] was then asked to state the length of time that the plaintiff may live, in the natural and ordinary course of events. This was objected to, and the court ruled that he might answer if he could speak with reasonable certainty in reference thereto. The doctor answered that he could only give the probability from the history of other similar cases, and this he was permitted to do, under the objection and exception of the defendant. It will be observed that as to the latter answer the answer was as to the probability, and that in the former question he was called upon to express his opinion in reference to the result of the disease in the natural and ordinary course. It is claimed that this evidence is objectionable, under the case of *Strohm v. New York, Lake Erie and Western Railroad Co.*, 96 N. Y. 305. In that case the question was as to what might or may develop, and was not as to what would probably or was reasonably certain to develop. This question was considered in the case of *Griswold v. N. Y. C. & H. R. R. Co.*, 44 Hun, 236, affirmed 115 N. Y. 61, 21 N. E. 726, 12 Am. St. Rep. 775, and was again considered by us in the case of *McClain v. Brooklyn City R. Co.*, 116 N. Y. 459, 22 N. E. 1062, and under the rules laid down in these cases we consider the evidence competent."

In *Buell v. Park Auto Transportation Co.*, 132 Wash. 92, 231 P. 161, at page 164, the Supreme Court of Washington, in holding admissible testimony of physicians that the injuries received by respondents had a tendency to shorten their lives, said: "Such testimony is of the ordinary nature of opinion evidence of medical experts." To similar effect see *Larsen v. Home Telephone Co.*, 164 Mich. 295, 129 N. W. 894, 905; *Moses v. Mathews*, 95 Neb. 672, 146 N. W. 920, 922, Ann. Cas. 1915A, 698; *Memphis St. R. Co. v. Berry*, 118 Tenn. 581, 102 S. W. 85, 90.

It has been recognized by our own Supreme Court in *Townsend v. Briggs*, 99 Cal. 481, 34 P. 116, that mortality tables are only *prima facie* evidence of the expectation of

life of a particular person, and that evidence of conditions tending to decrease the expectation of life of such person is admissible. Respondent in her briefs and on oral argument cited only one case in support of the ruling of the trial court excluding this evidence, *Chicago, etc., v. Long*, 26 Tex. Civ. App. 601, 65 S. W. 882, and our independent research has not discovered any other. This case apparently stands alone, and is further weakened as an authority by the fact that the same court which decided it, in *Houston Electric Co. v. McDade*, 34 Tex. Civ. App. 497, 79 S. W. 100, 101, held that a medical witness was properly allowed to testify that the injury to plaintiff would probably shorten her life expectancy one-half. The court, without referring to its previous decision relied on by appellants here, disposed of this point by saying: "The objection that this evidence was only the conclusion of the witness is not tenable, as against expert testimony."

[2] We are satisfied with the rule laid down generally in other jurisdictions that, where the party to an action is suffering from some ailment or disability which has a tendency to shorten his life, medical experts may properly express an opinion as to the probable expectancy of life of such party. As said by the Supreme Court of Michigan in *Denman v. Johnston*, 85 Mich. 387, 48 N. W. 565, 568: "Such testimony must necessarily be problematical, but perhaps it is the best that is attainable to establish the probability."

The judgment recovered by respondent was a large one, and, in view of the fact that the amount of her recovery depended upon her expectancy of life as determined by the jury, the error in excluding the testimony herein discussed was prejudicial.

[3] We find nothing in appellants' claim that respondent was guilty of contributory negligence as a matter of law. While the evidence was to the effect that respondent did not look in the direction from which appellants' automobile was coming while she was crossing the street, there is evidence from which the jury could reasonably find that appellants' machine passed another machine moving in the same direction on its right-hand side, in violation of the statute, at a speed of from 35 to 40 miles per hour, and struck respondent as she stepped out from in front of the other machine. Under these circumstances, conceding respondent's failure to look was negligence, the jury could find that, if she had been looking, she would not have been able to avoid the automobile which appeared suddenly and unexpectedly at a place where it was not entitled to be. Under such a finding respondent's negligence, if it existed, would not be a proximate cause of her injury. The court properly instructed the jury as to the speed at which an automobile may be driven in a residential district; there

being sufficient evidence to support a finding that the place at which she was injured was such a district.

[4] Appellants complain of the admission of evidence that respondent had been a school teacher in other states, and that, while she was not qualified to teach in the public schools of California, she was at the time of her injury qualifying herself to become a teacher in the schools of this state by taking summer school courses at the University of California. We cannot find error in the admission of this evidence, since the jury is entitled to know, not only what occupations the respondent was able to engage in, but also any occupation which she might have a reasonable probability of engaging in in the future.

The failure of the court to give two proposed instructions as to certain admissions in the pleadings was apparently erroneous (*Tevis v. Hicks*, 41 Cal. 123, 126), but this error is not likely to recur on a second trial. Because of the error first herein discussed, the judgment is reversed.

We concur: NOURSE, Acting P. J.; STURTEVANT, J.

104 Cal. App. 133

PEOPLE v. OSGOOD et al.
Civ. 6915.

District Court of Appeal, First District, Division 2, California.

Feb. 19, 1930.

1. Limitation of actions ⇨11(1)—It is not policy of commonwealth not to be bound by any statute of limitations, but commonwealth when consenting to be sued will claim protection thereof (Code Civ. Proc. §§ 315, 317, 345; *St. 1893*, p. 57; *St. 1929*, p. 890).

It is not policy of commonwealth not to be bound by any statute of limitation, in view of Code Civ. Proc. §§ 315, 317, 345, but commonwealth will, even when it consents to be sued, claim protection of certain statutes of limitation, in view of *St. 1893*, p. 57 and *St. 1929*, p. 890.

2. States ⇨192, 208—State generally when suing is bound by rules for administration of justice between individuals, and pleadings are governed by ordinary rules.

Generally when state as plaintiff voluntarily comes into court and invokes its aid, state is bound by all rules established for administration of justice between individuals, and pleadings in action by state are generally governed by ordinary rules of pleading.

3. Executors and administrators ⇨91, 222(1), 288—Representatives of decedents must proceed immediately after decedents' death to administer estate, request presentation of all claims, and distribute estate.

On death of decedents, representatives are under duty to proceed at once with administra-

tion of estates and complete administration as speedily as possible and to ask for presentation of all claims arising on contracts whether same be due, not due, or contingent, and, after liquidating claims and after full settlement of affairs of estate had been effected, to obtain decree distributing estate to those entitled thereto.

4. Executors and administrators ⇨231—State failing to assert claim on bail bond executed by decedents within statutory time for presenting claims held barred by statute of limitations (Code Civ. Proc. §§ 1490-1514, 1500).

Code Civ. Proc. §§ 1490-1514, 1500, providing that no holder of claim against estate shall maintain action thereon, unless claim is first filed with clerk or presented to executor, read in connection with other statutes germane to subject, cannot be said to not expressly include state, and hence state failing to assert claims on bail bond executed by decedents within time specified in section 1491 was barred from presentation of claims by statute of limitations.

5. Executors and administrators ⇨228(5), 231—Claims not duly presented after administrator gives due notice are barred, and bar cannot be waived (Code Civ. Proc. §§ 1490 et seq., 1500).

Under Code Civ. Proc. § 1490 et seq., providing for presentation of claims due, not due, or contingent, against estate, if administrator complies with statute and gives due notice, claims not duly presented are barred, and bar cannot be waived, nor action maintained, under section 1500.

6. Executors and administrators ⇨529—State as holder of valid claim against deceased may bring action on bond against administrator failing to give due notice (Code Civ. Proc. §§ 1645, 1648, 1650).

If administrator does not give due notice and does not comply with statute, state, as holder of valid claim against decedents, may bring action against administrator on bond, under Code Civ. Proc. § 1650, or pursue other remedies granted by sections 1645, 1648.

7. Courts ⇨200—Superior court, in exercising probate powers, is administering certain statutes, and its jurisdiction is limited, and refusal to exercise power not granted is not error.

In exercising probate powers, superior court, a court of general jurisdiction, is but administering certain statutes, and its jurisdiction is limited and special, and court does not err in declining to exercise power not granted to it.

Appeal from Superior Court, Alameda County; T. W. Harris, Judge.

Action by the People on bail bond in criminal case against Priscilla A. Osgood, as executrix of the estate of F. S. Osgood, also known as Fred S. Osgood, deceased, and another. Judgment for defendants, and plaintiff appeals.

Affirmed.

Earl Warren, Dist. Atty., and James H. Oakley, Deputy Dist. Atty., both of Oakland, for appellant.

Donahue, Hynes & Hamlin, of Oakland, for respondent Beatrice L. Rohan.

STURTEVANT, J.

The plaintiff commenced an action against the defendants to recover a judgment against the defendants as the representatives of two decedents who had executed a bail bond in a criminal case. The plaintiff pleaded its claim in two separate counts. In one count it pleaded that it had presented its claim to the defendant executrices. In the other count it omitted all allegations regarding presentation. The defendants demurred to each count, both generally and specifically. The demurrers were sustained, and from a judgment entered thereon the plaintiff has appealed.

The plaintiff does not assert that the claims were presented within the times specified in section 1491, Code of Civil Procedure, but the plaintiff contends that the statute on the subject of times for the presentation of claims against the estates of deceased persons does not expressly include the state, and therefore the state is not included. The defendants contend that the statute is written in such broad language that it applies to all persons, both natural and artificial, including the state.

[1, 2] Before we turn to the particular sections of the Code of Civil Procedure it is very necessary to construe the general body of the laws of which those sections are a part. That it is not the policy of this commonwealth not to be bound by any statute of limitations is made clear by certain enactments which date back to the first session of the state Legislature. Code Civ. Proc., §§ 315, 317, 345. Moreover, it is the policy of this commonwealth that it will, even when it consents to be sued, claim the protection of certain statutes of limitation. St. 1893, c. 45; St. 1929, c. 516. As said in *People v. Kings County Dev. Co.*, 48 Cal. App. 72, 75, 191 P. 1004, 1005: "The general legislative policy of California is that the state shall be bound by its statute of limitations with respect to the bringing of actions for the enforcement of any and all such rights as may accrue to the state." There is another proposition that is equally well settled, "As a general rule subject to certain exceptions in matters touching the sovereignty of the state, when a state, as plaintiff, voluntarily comes into court and invokes its aid, she is bound by all the rules established for the administration of justice between individuals and the suit is governed by the same rules as private suits; * * * The pleadings in an action by the state are in general governed by the ordinary rules of pleading. Thus the declaration or complaint must set forth such facts as constitute a cause of action or it will be demurrable. * * *" 36 Cyc. 907, 909.

[3] If during the life of the decedents the bail bond had been forfeited and the action had been commenced, there is not a doubt but what under a certain set of facts the decedents would have been entitled to plead the statute of limitations. Code Civ. Proc. § 340. On the death of the decedents it became the duty of their representatives to proceed at once with the administration of the estates and complete the administration as speedily as possible, and in this behalf to ask for the presentation of all claims arising upon contracts, whether the same be due, not due, or contingent, and, after liquidating the claims and after a full settlement of the affairs of the estate had been effected, to obtain a decree distributing the estate to those entitled thereto. If, however, the contention of the plaintiff is sound, then it is possible for the plaintiff by reason of its delays and laches to indefinitely delay the settlement of estates or to request that the probate proceedings be opened and additional proceedings be had even after the estate has been distributed. If such is the law, we may reasonably expect to find clear expressions on the subject. In the case of *State v. Certain Lands in Redwood County*, 40 Minn. 512, 42 N. W. 473, an analogous controversy was before the court. On page 478 of 42 N. W., the court said: "It is elementary that time never runs against the state unless there is an express provision or necessary implication to that effect; but our statute provides 'that the limitations prescribed for the commencement of actions shall apply to the same actions when brought in the name of the state or in the name of any officer, or otherwise for the benefit of the state, in the same manner as to actions brought by citizens.' * * * The legislature having adopted the policy of making the statutes of limitation applicable to the state, we ought to give them as liberal construction against the state as against citizens."

[4] Claims against the estates of deceased persons are provided for in the Code of Civil Procedure, §§ 1490-1514. Section 1500 provides: "No holder of any claim against an estate shall maintain any action thereon, unless the claim is first filed with the clerk, or presented to the executor or administrator. * * *" The language is very broad, and, when read in connection with the rest of the statutes germane to the subject, it may not be said that the state is not expressly included.

The point has never been directly ruled upon in this state. In the state of Washington the statutes are very much the same as ours. The point was before the court in *State v. Evans*, 143 Wash. 449, 255 P. 1035, 53 A. L. R. 564. It was held that the language of the statutes included the state. A similar ruling was made in *State v. Crutcher's Adm'r*, 2 Swan (Tenn.) 504; *Hill, Ex., v. State*, 23 Ark.

604; *State v. Edwards*, 11 Ind. App. 226, 38 N. E. 544; *Mahone v. Central Bank*, 17 Ga. 111; *In re Mitchell*, 2 Watts (Pa.) 87; *In re Jacob's Estate*, 119 Iowa, 176, 93 N. W. 94.

[5-7] The plaintiff earnestly contends that the state is not included within the terms of the general language used in a statute. *Miller v. Pillsbury*, 164 Cal. 199, 204, 205, 128 P. 327, Ann. Cas. 1914B, 886. That proposition may be conceded, but it is beside the point. There is no statute which gives to the superior court sitting in probate the jurisdiction to entertain in behalf of this plaintiff or in behalf of any other litigant such a claim at such a time. Our statute commands that claims for debts " * * * due, not due, or contingent * * *" be presented. Code Civ. Proc. § 1490 et seq. If the administrator complies with the statute and gives due notice, claims not duly presented are barred. The bar cannot be waived. *Harp v. Calahan*, 46 Cal. 222, 232. If, nevertheless, a court allows the claim, its action is reversible error. *Morrow v. Barker*, 119 Cal. 65, 66, 51 P. 12. No action may be maintained. Code Civ. Proc. § 1500. Hence no court would have jurisdiction. *Modoc v. Superior Court*, 128 Cal. 255, 60 P. 848. If the administrator does not give due notice and does not comply with the statute, the holder of a valid claim is given an action against him on his bond. Code Civ. Proc., § 1650. But the section last cited contains a proviso to the effect that it does not cover claims "not due or contingent." As to claims presented, but not due or contingent, the statute provides a complete remedy. Code Civ. Proc. § 1648. The same remark may be made as to claims due. The administrator is authorized to pay in the following order: (1) Funeral expenses; (2) the expenses of the last illness; (3) debts having preference by the laws of the United States; (4) judgments rendered against the decedent in his lifetime and mortgages and other liens in the order of their date; (5) all other demands against the estate. If the estate is insufficient to pay all the debts of any one class, each creditor must be paid a dividend in proportion to his claim, and no creditor of any one class shall receive any payment until all those of the preceding class are fully paid. Code Civ. Proc. § 1645. The state may claim under any one of the foregoing statutes. If it does not do so, the statute is silent as to any other remedy. If it be asserted that the statute thus fails to protect the state, the clear reply is that there is a legislative omission. *San Francisco, etc., L. Co. v. Banbury*, 106 Cal. 129, 39 P. 439. But that fact is for the consideration of the Legislature. In exercising probate powers a superior court, a court of general jurisdiction, is but administering certain statutes, and its jurisdiction is limited and spe-

cial. 7 Cal. Jur. 698, § 81. It does not err in declining to exercise a power not granted to it.

We find no error in the record.

The judgment is affirmed.

We concur: NOURSE, Acting P. J.; DOOLING, Justice pro tem.

209 Cal. 92

FORISTIERE v. ÆTNA INS. CO., HARTFORD, CONN.★

SAME v. CALIFORNIA INS. CO., OF SAN FRANCISCO.
S. F. 13176.

Supreme Court of California.
March 12, 1930.

Rehearing Denied April 10, 1930.

- 1. Insurance** ⇨378(1)—Insurers against fire held charged with knowledge as to condition of title of insured property in view of agent's admissions as to his knowledge.

Where agent of fire insurance company admitted applications for loan through him as broker to lift mortgage on insured property and knew foreclosure proceedings were threatened, insurers were charged with knowledge of condition of title or at least of all facts shown by records of court respecting mortgage and sale.

- 2. Insurance** ⇨393—Insurer against fire, by executing consent to assignment of policy with knowledge policy was void at its option, was estopped to assert such defense.

Where insurer against fire with full knowledge of facts, actual or imputed, and especially with knowledge that policy was void at its option, executed consent to assignment thus allowing original insured and assignee to alter positions to their prejudice in event insurer should assert such defense, insurer held estopped to assert such defense.

- 3. Insurance** ⇨282(1)—Provisions of fire policy requiring unconditional and sole ownership speak of date of issuance.

In policy of fire insurance, such provisions as that requiring unconditional and sole ownership of property by insured speak only of date of issuance of policy.

- 4. Insurance** 282(6)—Fire policy could not be held invalid because of foreclosure proceedings or notice of sale under mortgage or trust deed.

Invalidity of fire policy could not be asserted because of foreclosure proceedings commenced, or notice of sale by virtue of mortgage or trust deed, since applicable provisions of policy relate to matter arising subsequent to issuance of policy, which at most comes under head of "Matters Suspending Insurance."

- 5. Insurance** ⇨393—Insurer against fire having approved transfer of property cannot show, as defense to action on policy, that transfer was mortgage.

Where property insured by fire insurance company has been transferred by assignment duly approved by insurance company, such company cannot show, as defense to action on policy, that quitclaim deed under which assignee claimed ownership was in reality mortgage and not conveyance.

In Bank.

Appeal from Superior Court, Fresno County; Charles R. Barnard, Judge.

Actions by A. Foristiere against the Ætina Insurance Company, Hartford, Conn., and against the California Insurance Company of San Francisco. Judgment for defendants, and plaintiff appeals.

Reversed.

George G. Graham, of Fresno, for appellant.

R. G. Retallick, of Fresno, and Orrick, Palmer & Dahlquist, of San Francisco, for respondents.

PRESTON, J.

Action in assumpsit on a policy of insurance for a loss by fire. Judgment for defendant. Plaintiff appeals. Two causes are presented on one record. Both policies are of the standard form. The facts in each case are identical except as to the name of the defendant and the amount of insurance, together with an immaterial difference as to the date of the beginning of the period of insurance. We shall, therefore, deal with the facts of but one cause.

One Catania owned four adjoining city lots in Fresno upon which was situated an olive oil factory with fixed and movable machinery therein. Certain buildings thereon were also used for mercantile and residence purposes. Two of the lots were mortgaged to the Bank of Italy. On August 6, 1924, foreclosure proceedings were instituted. On October 22, 1925, judgment in foreclosure was entered and a sale of the property ordered. On November 18, 1925, the bank purchased the property at the sheriff's sale. Prior to sale and on November 6, 1925, defendant issued to Catania, as owner, its policy of insurance, not to exceed \$5,000, against loss by fire, upon said buildings, said machinery and said merchandise, the term to be one year from and after September 1, 1925. The policy recited: "It is understood and agreed that the within described property is mortgaged without prejudice to this insurance."

On March 1, 1926, Catania executed and delivered to the plaintiff a quitclaim deed conveying the four lots. No bill of sale or written transfer was made of the movable machinery. On April 15, 1926, Catania assigned said policy of insurance to plaintiff by indorsing on the policy the usual written recital as to the transfer of ownership of the property and the assignment for value received of all interest in the policy subject to the terms and conditions therein mentioned. Beneath the above assignment appeared the following: "The ownership of the property herein insured having actually passed to A. Foristiere this Company hereby consents that the interest of Santa Catania in the within policy, subject to all the terms and conditions herein mentioned and referred to, be assigned to A. Foristiere. April 27, 1926. Madison-Yurk Co. by D. J. Yurk, Agent."

On July 9, 1926, the buildings and their contents were destroyed by fire. On October 5, 1926, plaintiff redeemed said property from said sale. Due proofs of loss were made, followed by this suit. Touching the foreclosure proceedings and the sale thereunder, as recited above, the court found: " * * * all of which was done without the knowledge of the defendant herein and that no redemption of said property so sold was made until on or about October 5th, 1926."

[1] Touching the knowledge of the defendant respecting the title and condition of the property on April 27, 1926, at the time of the assent to the assignment of the policy, the court made no finding. But the evidence is such that had a finding been made upon this issue, it would have been that defendant knew or had imputed knowledge of the exact condition of the title. Both Catania and plaintiff testified positively that they discussed it frequently with Mr. Yurk, the agent of defendant in the matter, and told him of the foreclosure proceeding and sale thereunder.

The agent admits applications by plaintiff and Catania for a loan through him as broker to lift the mortgage, and also admits that foreclosure proceedings were threatened, but he testified: "I had assumed right along that Mr. Foristiere had just come to Mr. Catania's rescue and settled the thing before they ever got a foreclosure." This must be held sufficient to have charged the defendant with knowledge of the condition of the title on April 27, 1926, at least of all the facts shown by the records of the court respecting said mortgage and sale. *Sharp v. Scottish Union, etc., Co.*, 136 Cal. 542, 545, 69 P. 253, 615; *Raulet v. Northwestern, etc., Ins. Co.*, 157 Cal. 213, 228, 107 P. 292; *Kavanaugh v. Franklin Fire Ins. Co.*, 185 Cal. 307, 314, 197 P. 99. Whether knowledge of the existence of the mortgage alone would impute knowledge of the records of the court as of the day the policy was issued to defendant need not be determined (see authorities last above cited), as we are of the mind that such knowledge on April 27, as the time of the consent to the transfer, creates an estoppel against the defendants as to the two points relied upon by it to sustain the judgment of the court below.

[2-4] These points are: First, that the record shows that at the time of the loss the title was in the Bank of Italy by virtue of the sale under foreclosure; hence neither plaintiff nor Catania was the sole and unconditional owner of the property as required by this and all other standard forms of policy; hence the policy was void or at least suspended at the time of the loss by fire. The second point is that from any standpoint plaintiff cannot maintain the action because, as the court found, Catania, in fact, never had transferred said property to plaintiff, the effect of the finding in this behalf being that it was a con-

veyance as security and not a sale of the property.

As above indicated, it is our view that defendant, by the written consent given, estopped itself to assert either of these contentions. It stood by and allowed the rights of plaintiff to accrue without an objection and without a cancellation of the policy or a rebate upon the premium paid. With full knowledge of the facts, actual or imputed, and especially with knowledge that the policy was void, at its option, it executed its consent to the assignment, thus allowing both Catania and plaintiff to alter their positions to their prejudice in the event that it should assert such defense.

Invalidity of the policy could not be claimed because the interest of Catania was not that of "unconditional and sole ownership." Such provisions speak only of the date of issuance, and this requirement existed on that day. Neither could invalidity be asserted because of foreclosure proceedings commenced, or notice of sale by virtue of a mortgage or trust deed for these provisions relate to matter arising subsequent to the issuance of the policy. At most, this contention comes under the head of "Matters Suspending Insurance," for example, subdivision g: "While the interest in, title to or possession of the subject of insurance is changed excepting: (1) by the death of the insured; (2) a change of occupancy of building without material increase of hazard; and (3) transfer by one or more several copartners or coowners to the others."

Respondent reduces its position largely to a reliance upon *Breedlove v. Norwich, etc., Ins. Soc.*, 124 Cal. 164, 56 P. 770, which contains a discussion of the effect of a sale under foreclosure and the location of the title during the period of redemption. It must be admitted that such case is authority for the proposition that the owner of a mere right of redemption from a sale under foreclosure is not the sole and unconditional owner of the property involved. See, also, *Pollard v. Harlow*, 138 Cal. 390, 71 P. 454, 648; 11 Cal. Juris. 127. But this pronouncement does not control the question before us.

The real question is: May an insurer waive the suspension of the policy due to a foreclosure or execution sale? The above-cited cause is express authority for an answer in the affirmative, for in that case the owner of the equity of redemption, with only eighteen days left to redeem, collected full value of buildings on the property destroyed by fire during said period upon the ground that the local agent knew of the condition of the title at the time the policy was issued. In this case, too, the redemption from the foreclosure sale was never made.

Ample authority for our conclusion may also be found elsewhere. Speaking of a similar situation, the court in *Mortt v. Liverpool*

& London, etc., Co., 192 N. C. 8, 133 S. E. 337, 340, 47 A. L. R. 645, 650, said: "Defendant, with knowledge that the entire policy was void on June 19, 1924, consented to its assignment to plaintiff, and retained the unearned portion of the premium. It cannot be supposed that defendant consented to the assignment of a policy which it knew to be void and retained the unearned portion of the premium on a policy under which it had no liability to the assignee, the owner of the property insured by the policy." Citing *Forward v. Continental Ins. Co.*, 142 N. Y. 387, 37 N. E. 615, 25 L. R. A. 637. See, also, 20 R. C. L., § 372. The rule is stated in 5 Cooley Briefs on Insurance (2d Ed.) p. 4313, as follows: "By consenting to an assignment of a policy with knowledge of facts violating the terms of the policy, an insurance company waives the invalidity of the policy."

[5] What has been said applies as well to the contention that the quitclaim deed under which plaintiff claimed ownership was in reality a mortgage and not a conveyance. Defendant is clearly estopped by its own act in certifying to the contrary with knowledge or presumed knowledge of the existing facts. As against the claim of respondent, the deed must be held sufficient to pass title to the property involved. In addition to the authorities cited above the case of *Clark v. Svea Fire Ins. Co.*, 102 Cal. 252, 36 P. 587, seems to be in point. The syllabus correctly states the holding, as follows: "Where the property insured by a fire insurance company has been transferred by an assignment duly approved by the insurance company, the company cannot show, as a defense to an action upon the policy, that the property was transferred for the purpose of defrauding the creditors of the party originally insured."

These views require a reversal of both judgments and it is so ordered.

We concur: WASTE, C. J.; CURTIS, J.; RICHARDS, J.; SEAWELL, J.

209 Cal. 82

HAMMOND LUMBER CO. v. RICHARDSON
BUILDING & ENGINEERING CO.,
Inc., et al.
L. A. 10031.

Supreme Court of California.
Feb. 28, 1930.

I. Appeal and error ⇨1011(1)—Where evidence conflicted, finding that plaintiff received and accepted note was conclusive on appeal.

Where finding that materialman received and accepted note, alleged to constitute extension of time of payment, was based on conflict-

ing evidence, such finding was conclusive on appeal.

2. Subrogation ⇨31(1)—Surety is entitled to benefit of securities held by creditor upon satisfying obligation of principal (Civ. Code, §§ 2848, 2849).

Upon satisfying obligation of plaintiff, a surety is, under Civ. Code, §§ 2848, 2849, entitled to benefit of securities held by creditor.

3. Account stated ⇨1—"Account stated" is unperformed promise of one party to pay stated sum to another.

An "account stated" is unperformed promise of one party to pay a stated sum to another and, if complete, it contains a signed and written acknowledgment of present, unqualified indebtedness or liability.

[Ed. Note.—For other definitions, see Words and Phrases, First, Second, and Third Series, Account Stated.]

4. Account stated ⇨4—Execution and acceptance of note for balance of unsettled account constitutes "stating of account."

Execution and acceptance of note for balance of an unsettled account constitutes stating of an account between parties.

5. Mechanics' liens ⇨315—Execution and acceptance of note as account stated did not release sureties on contractor's bond.

Execution and acceptance of note as account stated did not release sureties on contractor's bond given for materials furnished to contractor.

6. Sales ⇨82(2)—Where contract was silent as to time of payment, presumption arose that it was due immediately or on demand when contract was completed.

Where contract to furnish material was silent as to time of payment, presumption arose that it was due and payable immediately or on demand when plaintiff's contract was completed.

7. Mechanics' liens ⇨315—Materialman's acceptance of note held not extension of time so as to release sureties on contractor's bond (Code Civ. Proc. § 1183).

Where contract to furnish material was silent as to time of payment, taking of ninety-day note was not an extension of time so as to release sureties on contractor's bond given for payment of material under Code Civ. Proc. § 1183, but merely established maturity of obligation which theretofore had been indefinite.

8. Principal and surety ⇨112—Sureties are not entitled to reduction of liability on account of payments made to creditor on another contract.

Sureties on one contract are not entitled to a reduction of their liability on account of partial payments made to their creditors on another debt.

In Bank.

Appeal from Superior Court, Los Angeles County; L. T. Price, Judge.

Action by the Hammond Lumber Company against the Richardson Building & Engineering Company, Incorporated, and others. From the judgment, plaintiff appeals.

Reversed in part with directions.

For opinion of District Court of Appeal, see 280 P. 158.

R. L. Horton, of Los Angeles (Horton, Anderson, Horton & Armstrong, Joseph K. Horton, C. S. Anderson, and M. M. Armstrong, all of Los Angeles, of counsel), for appellant.

Overton, Lyman & Plumb and Joseph L. Call, all of Los Angeles, *amicus curiae*, for appellant.

G. C. De Garmo and Stephens & Stephens, all of Los Angeles, for respondents.

PER CURIAM.

In this case petition for hearing after decision by the District Court of Appeal, Third Appellate District, was granted so that this court might have an opportunity to carefully consider the questions involved. After a study of the record, we are satisfied with the opinion of the District Court of Appeal (280 P. 158), written by Finch, P. J., and hereby adopt the same as and for the opinion of this court, as follows:

This action was brought against Richardson Building & Engineering Company, a building contractor, and Ella W. Richardson, E. Will Richardson, and W. C. B. Richardson, the sureties on the contractor's bond, given pursuant to the provisions of section 1183 of the Code of Civil Procedure, for materials furnished by the plaintiff to the contractor and used in the construction of a building for Edward A. Geissler. The plaintiff was given judgment against the contractor, but was denied any relief against the sureties. The plaintiff has appealed from the judgment.

As required by section 1183, the bond provides that "the same is hereby expressly made to inure to the benefit of any and all persons who perform labor upon or furnish materials to be used in the work described in the said contract, or in any modification thereof; and any and all such persons shall have and are given a right of action to recover upon this bond against the said principal and sureties, or either of them, in any suit brought to foreclose mechanic's liens, which may be filed by such persons, or any of them upon the property mentioned in said contract, or in a separate suit brought upon this bond, and may recover in such action or actions the value of such labor done or materials furnished, or both, not exceeding, however, in the aggregate of such recoveries, the amount of this bond as above specified."

The only defense relied on by the sureties is that they were discharged from liability by alleged acts of the plaintiff, found by the

court, substantially in the language of the answer, to be as follows:

"That on the 26th day of December, 1923, said defendant Richardson Building and Engineering Co. Inc., as contractor, was indebted to said plaintiff for and on account of building materials furnished by said plaintiff to said Richardson Building and Engineering Co. Inc. for use in various buildings theretofore constructed by said contractor, including the materials furnished by said plaintiff for use in the building described in plaintiff's complaint; that to evidence said entire indebtedness said Richardson Building and Engineering Co. Inc., did on the 26th day of December, 1923, execute to said plaintiff and said plaintiff did accept and receive from said Richardson Building and Engineering Co. Inc., a promissory note for the sum of \$23,192.82 payable on or before 90 days after date thereof, with interest at the rate of seven per cent. per annum; and said note by its terms provided that the execution and acceptance of said note constituted evidence of said debt as a stated account.

"That said note was secured by an assignment to said plaintiff of certain securities belonging to said contractor; and since said time said note and securities have been and are now retained by and are in the possession of said plaintiff.

"That prior to the 26th day of December, 1923, the indebtedness referred to in plaintiff's complaint and sued on in this action was an ordinary book account and the same was and had been payable on or before the 28th day of September, 1923; that subsequent to the execution of said note there was a novation of indebtedness sued on herein and said book account was closed, discharged and liquidated and the same was, subsequent to the 26th day of December, 1923, merged into and became and was an account stated, which account stated included debts other than the one herein sued on.

"That at the time of the execution of said note, it was agreed between said plaintiff and said contractor that five per cent. should be added to said book account of \$4,756.03, making a total of \$5,003.40, as alleged in plaintiff's complaint, and said sum of \$5,003.40 became and was made a part of said promissory note hereinbefore referred to and described.

"That the extension of time given by said plaintiff to said contractor for the payment of said original debt, under and by virtue of the execution of said note, and the substitution of said new account for said original book account, as aforesaid, were given and made by the parties thereto, without the knowledge or consent of the defendant sureties, or either of them; that said defendant sureties did not at any time assume, promise or agree to pay said account stated or said note or any part thereof."

The promissory note referred to in the findings contains the following: "This note is not given or accepted as payment of said amount due said payee, but as evidence of said debt as a stated account only." It is not found that the note was given or accepted as payment, and the note itself states that it was not so given or accepted. "In the absence of an agreement to this effect, the acceptance is not a payment of the debt." *National Lumber Co. v. Whalley*, 162 Cal. 224, 226, 121 P. 729, 730.

[1] The finding that the plaintiff received and accepted the promissory note is based on sharply conflicting evidence, and is therefore conclusive on appeal.

[2] The collateral securities referred to in the findings consisted of a large number of shares of preferred stock of the Jennings Corporation and the contractor's promise to deliver in pledge a large number of shares of the common stock of the First Mortgage Corporation "when, and only when, permission has been received from the corporation commissioner." Such permission has never been given. It appears without contradiction, from affidavits used on plaintiff's motion for a new trial, that "on or about December 26, 1923, preferred stock of Jennings Corporation * * * was absolutely worthless"; that "soon after December 26, 1923, the Jennings Corporation became defunct and went out of business"; that "the common stock of the First Mortgage Corporation was valueless on December 26, 1923"; that, "In fact, it was a liability at that time"; and that "since then, the First Mortgage Corporation was acquired by another corporation and the common stockholders realized nothing for their stock." Upon satisfying the obligation of his principal, a surety is entitled to the benefit of securities held by the creditor. Civ. Code, §§ 2848 and 2849. The sureties in this case, however, tendered no such issue, and if the alleged securities are of any value the sureties still may enforce their right of subrogation. *Cawston Ostrich Farm v. Salomon*, 72 Cal. App. 550, 237 P. 808.

[3-5] It is not perceived on what theory it can be held that the sureties were discharged by the alleged stated account between the plaintiff and the contractor. The obligation of the sureties is not to pay the purchase price of the materials originally agreed upon by the plaintiff and the contractor, or the amount agreed upon in the stated account, but the reasonable value of such materials. "An account stated is a mere unperformed promise by one party to pay a stated sum to another." *Bennett v. Potter*, 180 Cal. 736, 744, 183 P. 156, 159. "It is a complete account stated if it contains a signed and written acknowledgment of a present, unqualified indebtedness or liability with a promise to

pay a named sum." *Gardner v. Watson*, 170 Cal. 570, 574, 150 P. 994, 995. The execution and acceptance of a promissory note for the balance of an unsettled account constitute the stating of an account between the parties. *Kinley v. Thelen*, 158 Cal. 175, 183, 110 P. 513; *Bledsoe v. Stuckey*, 47 Cal. App. 95, 98, 190 P. 217. If stating an account in a case such as this discharges the sureties, then they would be discharged in all cases where a promissory note is accepted for the balance of an account, contrary to a long line of decisions, a few of which are hereinafter cited.

[6, 7] Respondent contends that the giving and acceptance of the note constituted an extension of the time of payment and that by reason thereof the sureties were discharged. It is neither alleged nor found that the plaintiff and the contractor made any specific agreement as to the time of payment for materials prior to December 26, 1923, when the note was executed. The finding, in the language of the answer, that the indebtedness "was an ordinary book account and the same was and had been payable on or before the 10th day of August, 1923," the day on which the plaintiff's contract was completed, does not imply a specific agreement to make payment at any particular time. Neither does the evidence show that any definite agreement as to the time of payment was made prior to the execution of the note. The time of payment not being fixed, the presumption arises that it was due and payable immediately or on demand when plaintiff's contract to furnish the materials was completed. Civ. Code, § 1657; *Newhall v. Sherman, Clay & Co.*, 124 Cal. 509, 511, 57 P. 387; *Sunset Lumber Co. v. Smith* (Cal. App.) 272 P. 1038. This presumption applied, of course, in the cases hereinafter cited, where the time for payment had not been specifically agreed upon prior to the acceptance of notes payable at a future date. In construing statutory provisions similar to those of Code Civ. Proc. § 1183, it is said:

"Decisions of this court have made it clear that the statute and bonds given under it must be construed liberally, in order to effectuate the purpose of Congress as declared in the act. In every case which has come before this court, where labor and materials were actually furnished for and used in part performance of the work contemplated in the bond, recovery was allowed, if the suit was brought within the period prescribed by the act. Technical rules otherwise protecting sureties from liability have never been applied in proceedings under this statute." *Illinois Surety Co. v. John Davis Co.*, 244 U. S. 376, 37 S. Ct. 614, 616, 61 L. Ed. 1206.

In the leading case of *United States Fidelity & Guaranty Co. v. United States*, 191 U. S. 416, 24 S. Ct. 142, 144, 48 L. Ed. 242, the Cir-

cuit Court of Appeals had certified to the Supreme Court of the United States the question whether the act of the company which had furnished materials in taking two promissory notes of the contractor for the amount of its account, "then due and payable, one of said notes running for thirty days and the other for sixty days," operated to discharge the surety. In answering the question in the negative the court said:

"In an ordinary guaranty the guarantor understands perfectly the nature and extent of his obligation. * * * In such cases he contracts in reliance upon the exact terms of his principal's undertaking, and has a right to suppose that no change will be made without his consent; and the courts have gone so far as to hold that any change will exonerate him, though it really redound to his benefit.

"This covenant, however, is inserted for an entirely different purpose from that of securing to the government the performance of the contract for the construction of the building. * * * The guarantor is ignorant of the parties with whom his principal may contract, the amount, the nature, and the value of the materials required, as well as the time when payment for them will become due. These particulars it would probably be impossible even for the principal to furnish, and it is to be assumed that the surety contracts with knowledge of this fact. Not knowing when or by whom these materials will be supplied, or when the bills for them will mature, it can make no difference to him whether they were originally purchased on a credit of sixty days, or whether, after the materials are furnished, the time for payment is extended sixty days, and a note given for the amount maturing at that time. If a person deliberately contracts for an uncertain liability, he ought not to complain when that uncertainty becomes certain. * * * The rule of strictissimi juris is a stringent one, and is liable at times to work a practical injustice. It is one which ought not to be extended to contracts not within the reason of the rule, particularly when the bond is underwritten by a corporation which has undertaken for a profit to insure the obligee against a failure of performance on the part of the principal obligor."

In *First Congregational Church of Christ v. Lowrey*, 175 Cal. 124, 126, 165 P. 440, 441, it is said:

"Neither our statute law nor our decisions under it have ever recognized that there is any distinction between a compensated and uncompensated surety or guarantor, nor between a corporate surety and an individual surety, nor between a corporation or an individual engaging in the business of suretyship or guarantyship for compensation and a corporation or individual who enters into a like contract without compensation."

The decision in *United States Fidelity & Guaranty Co. v. United States*, supra, has been followed generally by federal and state courts. *Maryland Casualty Co. v. Ohio River Gravel Co.* (C. C. A.) 20 F.(2d) 514; *United States Fidelity & Guaranty Co. v. United States* (C. C. A.) 178 F. 692; *Chaffee v. United States Fidelity & Guaranty Co.* (C. C. A.) 128 F. 918; *State v. Adams*, 187 Ind. 165, 118 N. E. 680; *George H. Sampson Co. v. Commonwealth*, 202 Mass. 339, 88 N. E. 916; *Watanabe v. Ota*, 137 Wash. 368, 242 P. 379, 43 A. L. R. 1368. In several of the cases cited stress is laid upon the fact that the surety was not prejudiced by the extension of the time of payment. In an action by the owner against the sureties on a building contractor's bond, it is said that if there has been "a change in the contract in any material respect, the inquiry there ends and the guarantor is exonerated, and that it is not a subject of inquiry whether the alteration has or has not been to his injury." *First Congregational Church of Christ v. Lowrey*, supra. This holding, however, was expressly limited in its application by the decision in *Roberts v. Security Trust & Savings Bank*, 196 Cal. 557, 565, 238 P. 673, which also was an action between the owner and the sureties on a building contractor's bond. No case in this state has been cited which holds, in a suit by laborers or materialmen against the surety on a bond in the terms of the one involved herein, that "It is not a subject of inquiry whether the alteration has or has not been to his injury."

In a case similar in principle to this, in which the defendant surety claimed a discharge from liability for the purchase price of grapes by reason of the taking of trade acceptances by the creditor, it is said:

"The bond was given to insure payment of the grapes received by Herman and which he sold on credit. The agreement between the parties with reference to payments to be made by Herman was silent as to any particular due date. At most, the trade acceptances definitely fixed such date. There never was an extension of the time of payment, for without a due date a subsequent agreement fixing such date is not an extension. Such an agreement merely establishes the maturity of the obligation which theretofore had been indefinite." *Earl Fruit Co. v. Herman* (Cal. App.) 266 P. 592, 594; *Tyson v. Reinecke*, 25 Cal. App. 696, 145 P. 153.

Respondents rely on *American Bonding Co. v. United States* (C. C. A.) 233 F. 364, 368. In that case, however, there was a definite agreement as to the time of payment, but the terms of the agreement were not observed. The company furnishing the materials "accepted numerous notes from Wells [the contractor] for such amounts as were agreed

upon from time to time * * * and discounted the notes at several banks. These notes were often renewed, the extension sometimes being as much as a "year."

The finding that "subsequent to the execution of said note there was a novation of indebtedness sued on herein" is without support in the evidence.

[8] The answer alleges that the "note was secured by the assignment to plaintiff of certain accounts due and to become due said contractor, * * * and * * * that said plaintiff has collected and received sufficient money from said accounts and securities to pay the claim herein sued on in full." The court made no finding responsive to this allegation, but the evidence in relation thereto is undisputed. As found by the court, the amount of the note was made up of the balances due for materials used "in various buildings theretofore constructed by said contractor." Collections were made by the plaintiff from the owners of two of these buildings and credited in part payment of the balances due for materials used therein. No collection was made by the plaintiff from Geissler. It seems too clear for argument that the sureties on one contract are not entitled to a reduction of their liability on account of partial payments made to their creditor on another contract.

The court found that the reasonable value of the materials furnished by the plaintiff and used by the contractor in the Geissler building is \$4,756.03. All other facts are found in the plaintiff's favor except those from which the court concluded that the sureties were discharged from liability. Since the facts found in favor of the sureties are not sufficient to warrant the conclusion reached, there appears to be no good reason to send the case back for a retrial.

The judgment in favor of the plaintiff against defendant Richardson Building & Engineering Company, Inc., is affirmed. The judgment in favor of defendants Ella W. Richardson, E. Will Richardson, and W. C. B. Richardson against the plaintiff is reversed and the trial court is directed to enter judgment on the findings in favor of the plaintiff

against said defendants Ella W. Richardson, E. Will Richardson, and W. C. B. Richardson, for the sum of \$4,756.03 and costs of suit.

209 Cal. 781

HAMMOND LUMBER COMPANY (a Corporation), Plaintiff and Appellant, v. **RICHARDSON BUILDING & ENGINEERING COMPANY**, Incorporated (a Corporation), et al., Defendants and Respondents.

L. A. 10032.

Supreme Court of California.

Feb. 28, 1930.

In Bank.

Appeal from Superior Court, Los Angeles County; L. T. Price, Judge.

R. L. Horton, of Los Angeles (Horton, Anderson, Horton & Armstrong, Joseph K. Horton, C. S. Anderson and M. M. Armstrong, all of Los Angeles, of counsel), for appellant.

Overton, Lyman & Plumb and Joseph L. Call, all of Los Angeles, amicus curiae, for appellant.

G. C. De Garmo and Stephens & Stephens, all of Los Angeles, for respondents.

PER CURIAM.

The questions involved in this case are in all respects the same as those in Hammond Lumber Co. v. Richardson Building & Engineering Co., Inc., et al., 285 P. 851, this day decided by this court, except that the court found in this case that the reasonable value of the materials furnished by the plaintiff is \$7,936.68.

On the authority of the decision in that case, the judgment herein in favor of the plaintiff against defendant Richardson Building & Engineering Co., Inc., is affirmed. The judgment in favor of defendants Ella W. Richardson, E. Will Richardson, and W. C. B. Richardson against the plaintiff is reversed, and the trial court is directed to enter judgment on the findings in favor of the plaintiff against said defendants Ella W. Richardson, E. Will Richardson, and W. C. B. Richardson for the sum of \$7,936.68 and costs of suit.

104 Cal. App. 196

ROBBINS v. FUNGE et al.*
Civ. 7290.District Court of Appeal, First District,
Division 1, California.
Feb. 21, 1930.Rehearing Denied March 22, 1930. Hearing De-
nied by Supreme Court April 21, 1930.

1. Appeal and error ⇨353, 356—Failure to comply with requirements of statutory method of appeal within proper time will result in dismissal of appeal, court having no power to extend time.

Where appellant has failed to comply with essential requirements of either method of appeal from superior court within time limited by statute, appellate court has no power to extend time, and hence is compelled to dismiss appeal.

2. Appeal and error ⇨1—Appellant must comply with statute with substantial strictness.

Statutory method of appeal must be followed with substantial strictness.

3. Appeal and error ⇨607(1)—Exceptions, bill of ⇨36(1)—Appeal was dismissed because of failure to settle bill of exceptions or file request for preparation of transcript within statutory time (Code Civ. Proc. §§ 650, 953a).

Where no bill of exceptions was proposed or settled pursuant to Code Civ. Proc. § 650, and no request was filed for preparation of transcript pursuant to section 953a, appeal was dismissed, time for doing those acts having expired.

Appeal from Superior Court, City and County of San Francisco; Edward I. Butler, Judge.

Action by Fred S. Robbins against William W. Funge, Jr., and another. From judgment for plaintiff, defendants appeal. Motion by plaintiff to dismiss appeal.

Motion granted.

W. W. Funge, Jr., for appellants.

William T. Eckhoff, of San Francisco, for respondent.

TYLER, P. J.

[1] Plaintiff recovered judgment against defendants in an action for personal injuries in the sum of \$750. The judgment was entered September 20, 1929. Defendants filed their notice of appeal and a stay bond on October 19, 1929. No request was ever made to the clerk to prepare a transcript and none has been filed, nor has any bill of exceptions been prepared or filed. No notice of intention to move for a new trial was made. Appellants, who appear in propria persona, attempt to excuse their delay in the preparation of the transcript on the ground that they relied upon their belief that respondent would join in a stipulation granting a new trial, and also that family sickness prevented them from properly attending to the litigation; and they

pray that the time to file the transcript be extended to the month of May, 1930. We have no such power. Where an appellant has failed to comply with the essential requirements of either method of appeal from a superior court, and the legal time for doing so has expired, the appeal must be dismissed. General Motors, etc., Corp. v. Holman, 63 Cal. App. 17, 217 P. 1086.

[2] The method of taking and perfecting appeals to the appellate courts is regulated by statute, and the method so prescribed must, in order that the appeal may be effectual, be followed with substantial strictness. If not so followed the right of appeal is forever lost.

[3] There having been no bill of exceptions proposed or settled as provided for in section 650 of the Code of Civil Procedure, and no request having been filed for the preparation of a transcript in accordance with the provisions of section 953a, and the time within which such proceedings might be instituted having long since expired, the appeal must be dismissed. It is so ordered.

We concur: KNIGHT, J.; CASHIN, J.

PEOPLE v. LOPEZ.†
Cr. 1114.District Court of Appeal, Third District,
California.
March 7, 1930.

Rehearing Denied March 22, 1930.

Hearing Granted by Supreme Court March 31,
1930.

1. Criminal law ⇨884—Verdict of guilty was not invalidated by recommendation that sentence be suspended.

Where defendant was found guilty of driving automobile while he was intoxicated, jury's recommendation that sentence be suspended was mere surplusage, and did not invalidate verdict.

2. Criminal law ⇨884—Jury's recommendation that defendant be sentenced to county jail, without specifying term of imprisonment, sufficiently complied with statute authorizing jury to recommend punishment (California Vehicle Act § 112, as amended by St. 1927, p. 1436).

Where defendant was found guilty of driving automobile while he was intoxicated, jury's recommendation "that he be sentenced to the county jail," without specifying term of imprisonment, was sufficient compliance with California Vehicle Act (St. 1923, p. 553) § 112, as amended by St. 1927, p. 1436, which fixes term of imprisonment (including term in county jail), and provides that jury shall recommend punishment, and court shall have no authority to impose sentence "greater" than that recommended.

Appeal from Superior Court, Merced County; Stanley Murray, Judge.

P. Lopez was convicted of driving an automobile while intoxicated, and he appeals.

Affirmed.

Andrew R. Schottky, of Merced, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

R. L. THOMPSON, J.

The defendant was convicted of the offense of driving an automobile while he was intoxicated. The jury rendered the following verdict: "We the jury in the above entitled cause, find the defendant, P. Lopez, guilty of the crime as charged and recommend that he be sentenced to the County Jail, and further recommend the sentence be suspended." The defendant was sentenced to one year in the county jail.

The appellant contends that the verdict is void for the reason that, (1) the court disregarded the recommendation of the jury to suspend the sentence, and (2) the jury failed to recommend a specific term of imprisonment.

Section 112 of the California Vehicle Act, as amended by St. 1927, p. 1436, provides in part:

"It shall be unlawful for any person * * * who is under the influence of intoxicating liquor * * * to drive a vehicle on any public highway within this state.

"Any person violating the provisions of this section shall upon conviction be punished by imprisonment in the county jail for not less than ninety days nor more than one year or by imprisonment in the state prison for not less than one nor more than three years, or by a fine of not less than two hundred dollars (\$200), nor more than five thousand dollars (\$5,000), and upon every verdict of 'guilty' under this section, the jury shall recommend the punishment and the court in imposing sentence shall have no authority to impose a sentence greater than that recommended by the jury."

[1] The recommendation of the jury in this case that the sentence be suspended is not authorized by statute, and is an invasion of the province of the court. That portion of the verdict, however, is mere surplusage and may be disregarded. It does not invalidate the verdict. *People v. Lee*, 17 Cal. 76; *People v. Sykes*, 10 Cal. App. 67, 101 P. 20; 16 C. J. 1110, § 2601; *Freeman v. State*, 151 Ala. 10, 44 So. 46.

[2] The recommendation of the jury in the present case that the defendant "be sentenced to the county jail," without specifying the term of imprisonment, is a sufficient compli-

ance with the mandate of the statute. The discretion of determining the extent of the punishment is vested in the court.

The exact question which is presented here was decided in the case of *People v. Ray*, 92 Cal. App. 417, 268 P. 382, 384, in which a hearing was denied in the Supreme Court. In that case, which was a prosecution under section 112 of the California Vehicle Act, as amended, for driving an automobile while intoxicated, the verdict found the defendant guilty and recommended that he be imprisoned in the county jail, without specifying the term of commitment. The court likewise sentenced him to one year in the county jail. On appeal the judgment was affirmed. The court said: "Had it been intended that the jury should fix the exact term of imprisonment, it seems clear that the provision would have so stated by depriving the court of 'authority to impose a sentence other than that recommended,' whereas a discretion now remains with the trial judge to pronounce a sentence within that recommended by the jury."

Upon the authority of the *Ray* Case, supra, the judgment and the orders in this case are affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

104 Cal. App. 334
PEOPLE'S FINANCE & THRIFT CO. OF
PORTERVILLE v. PHOENIX ASSUR.
CO., LIMITED, OF LONDON et al.
Civ. 98.

District Court of Appeal, Fourth District,
California.

March 5, 1930.

I. New trial $\S$ 138—Time for notice of intention to move for new trial does not begin to run until notice of entry of judgment (Code Civ. Proc. § 659).

Under Code Civ. Proc. § 659, requiring party moving for new trial to file and serve on adverse party notice of intention either before entry of judgment or within ten days after receiving notice of entry of judgment, or within ten days after verdict, time for notice of intention to move for new trial does not begin to run until notice of entry of judgment has been given.

2. Judgment $\S$ 143(1)—Law does not favor setting aside defaults resulting from inexcusable inadvertence, surprise, or neglect of attorneys in performance of duties.

Law does not favor setting aside defaults or judgments resulting from inexcusable inadvertence, surprise, or neglect of attorneys in performance of their duties to clients, such

failure being ordinarily imputable to clients unless their default can be excused on statutory grounds as being result of accident or surprise, that which ordinary prudence on their part could not have avoided.

3. Appeal and error $\S$ 977(3)—Trial court's discretion in granting new trial will not be disturbed on appeal, except for manifest abuse.

Order granting new trial will not be disturbed on appeal, except in cases of manifest abuse of wide discretion granted to trial court in such cases.

4. Judgment $\S$ 143(11)—Mere negligence of client's attorney to appear at trial does not under ordinary circumstances constitute excusable neglect or inadvertence warranting setting aside default.

Under ordinary circumstances, mere negligence of attorney in failing to appear in interest of client on trial of case does not constitute excusable neglect or inadvertence warranting setting aside of default judgment.

5. Judgment $\S$ 143(11)—Attorneys' complete abandonment of case before trial without defendants' knowledge held to constitute accident and surprise that could not be reasonably guarded against, warranting setting aside default.

Where defendants retained attorneys of established reputation and standing to represent them, but attorneys after filing answer failed to appear at trial or notify defendant thereof, and defendant had no notice or knowledge of trial and rendition of judgment, attorneys' conduct in completely abandoning case held to constitute accident and surprise which ordinary prudence could not have guarded against, warranting setting aside default and granting new trial.

Appeal from Superior Court, Tulare County; J. A. Allen, Judge.

Action by the People's Finance & Thrift Company of Porterville against the Phoenix Assurance Company, Limited, of London, and another. From an order vacating judgment and granting a new trial after judgment for plaintiff, the latter appeals.

Affirmed.

Max B. Jamison, of Porterville, for appellant.

Feemster & Cleary, of Visalia, and Orrick, Palmer & Dahlquist, of San Francisco, for respondents.

SLOANE, P. J.

The appellant in this action presents his case on an unsupported theory as to both the law and the facts. We might be disposed to grant the relief prayed for were it not for the broad discretion given the trial court in the matter of granting new trials.

Appellant in his opening statement treats the judgment vacated by the trial court, from

which order vacating the judgment and granting a new trial this appeal is taken, as a judgment by default. There is nothing in the record to show that a default was ever entered or a judgment by default rendered.

On the contrary, the record shows an answer on file, a setting of the cause for trial upon due notice to defendants' counsel of record, and a trial had before the court without a jury, in which evidence oral and documentary was introduced by the plaintiff, and judgment in plaintiff's favor given thereon.

Appellant attacks the proceedings for a new trial on the ground that the court was without jurisdiction to entertain the same for the alleged reason that the notice of intention to move for a new trial was not served or filed until nearly sixty days after entry of judgment.

[1] Since it does not appear that notice of entry of judgment was ever served on defendants, the statutory time for notice of intention to move for a new trial did not commence to run, and consequently had not expired when the notice of intention was finally served.

Section 659, Code of Civil Procedure, in force at the time, and applicable to this proceeding, required the party moving for a new trial to file with the clerk and serve on the adverse party his notice of intention either before the entry of judgment or within ten days after receiving notice of the entry of judgment, or within ten days after verdict, if the trial was by jury. The authorities are conclusive to the point that until such notice of entry of judgment has been given the time for notice of intention does not begin to run. *Mallory v. See*, 129 Cal. 356, 61 P. 1123; *Steward v. Spano*, 82 Cal. App. 306, 255 P. 532; *Bates v. Ransome-Crummey Co.*, 42 Cal. App. 699, 184 P. 39.

The only tenable ground for granting a new trial presented on defendants' motion therefore was that of alleged "accident and surprise which ordinary prudence could not have guarded against," namely, the absolute abandonment of the defendants' case by their attorneys without notice to defendants or knowledge on their part that their attorneys of record were not looking after their interests. Affidavits filed in support of the motion to vacate the judgment and grant a new trial show without contradiction that the defendant assurance company had retained attorneys of established reputation and standing to represent them. That these attorneys after conference with defendants' agents had advised that defendants had a good and valid defense to the action, had filed an answer to the complaint. That notice of the time set for the trial was afterwards served upon the attorneys, but that they and each of them

failed to appear at the trial, and failed to notify defendants of the date of trial, and that defendant Phoenix Assurance Company had no notice or knowledge of the trial until long after the date thereof, and the rendition and entry of judgment against them.

That said attorneys failed and refused, after request therefor, to give any explanation of their conduct or to return on demand the records and papers in the case to defendants. Their conduct was a complete abandonment of the case, and was an accident and surprise so far as defendants' conduct was concerned, which they could not in the exercise of ordinary prudence have guarded against. It must be conceded that defendants had every right to assume that their attorneys were attending to their duties and would give them timely notice of the trial.

[2] It is true that the law does not look with favor upon setting aside defaults or judgments resulting from inexcusable inadvertence, surprise, or neglect of attorneys in the performance of their duties to their clients. Such failure on the part of attorneys is ordinarily imputable to their clients, unless their default can be excused on the statutory grounds as being the result of accident or surprise, that which ordinary prudence on their part could not have avoided. *McGuire v. Drew*, 83 Cal. 225, 23 P. 312; *Gray v. Sabin*, 87 Cal. 211, 25 P. 422.

[3-5] The rule is well established that an order granting a new trial will not be disturbed on appeal, excepting in cases of manifest abuse of the wide discretion granted to the trial court in such cases, and while it is true that under ordinary circumstances the mere negligence of an attorney to appear in the interest of his client on trial of the case, unless under circumstances of excusable neglect or inadvertence, the question in this case arises, if the entire and unauthorized abandonment of the case by respondent's attorneys does not present circumstances to take it out of the ordinary rule of imputed negligence. A client has a right to assume and rely upon his attorneys of record to make the necessary appearances for the protection of his rights, and counsel cites a number of authorities in this case where in cases of abandonment of the client's interests by the attorney without notice or any ground for anticipating such abandonment by the attorneys exists, has been held to create an exception to the rule, and to excuse the client on the ground of accident and surprise which he could not be expected to reasonably guard against. We think that this case presents such an exception to the rule of imputed negligence. As far as respondent Phoenix Assurance Company is concerned, it is true that the defendant Alec. B. Baird, the duly authorized agent of the insurance company, had notice of the trial, and was present thereat, and was sworn

as a witness on the part of the plaintiff and testified. It appears that he was called under the provisions of section 2055 of the Code of Civil Procedure, but that he made no appearance, and did not testify in behalf of the respondent Phoenix Assurance Company, and that the respondent Phoenix Assurance Company was entirely unrepresented at the hearing of the case, and that the trial was had without any notice to said respondent or knowledge on their part of the abandonment of their case by their attorneys of record.

It is held in the case of *Harrison v. Sutter Street Ry. Co.*, 116 Cal. 156, 161, 47 P. 1019, 1020: That the discretion of the trial court in granting new trials, "will not be disturbed except upon the disclosure of a manifest and unmistakable abuse, has become axiomatic, and requires no citation of authority in its support. It is true that such discretion is not a right to the exertion of the mere personal or arbitrary will of the judge, but is a power governed by fixed rules of law, and to be reasonably exercised within those rules, to the accomplishment of justice. But, so long as a case made presents an instance showing a reasonable, or even fairly debatable, justification under the law for the action taken, such action will not be here set aside, even if, as a question of first impression, we might feel inclined to take a different view from that of the court below as to the propriety of its action. More especially is this true where, as here, the question rests largely in fact, and involves the proper deduction to be drawn from the evidence. The opportunities of the trial court in such instances for reaching just conclusions are, as a general thing, so superior to our own that we will not presume to set our judgment against that of the former where there appears any reasonable room for difference."

In *McLaughlin v. Nettleton*, 69 Okl. 74, 183 P. 416, at page 419, the court said:

"The unquestionable weight of authority is that, when an attorney has been employed to conduct legal proceedings, he undertakes to conduct them to their determination, and cannot abandon the services of his clients without cause and upon reasonable notice. The evidence in this case shows that there was no notice given plaintiffs that their local counsel intended to abandon the cause, or terminate his services, or that he had done so, and while we are loath to disturb this verdict, on account of the fact that this is the second proceeding of this kind in this cause, nevertheless we are constrained to believe that, if this judgment should stand, it would have the effect of denying litigants their day in court and arouse an unjust resentment against the approved procedure in our tribunals of justice. It is the policy of the law and courts of Oklahoma to allow each litigant the right to be heard upon the merits of his cause, free from technical pitfalls.

"After a careful consideration of all the evidence, we are of the opinion that the petition to set aside the judgment entered on February 8, 1912, should be sustained, and said judgment set aside and cause heard upon its merits; and it is so ordered."

A number of other citations made by respondents in this case seem to support the rule that the failure of parties to appear at the trial, occasioned by the abandonment of the cause by their attorneys, may be considered as creating conditions of accident and surprise that could not be reasonably guarded against. Among these is the case of the Kentucky Supreme Court in *Ray v. Arnett*, 106 S. W. 828, 829, from which the following language is quoted:

"* * * If the appellant is entitled to a new trial at all, it must be for the cause mentioned in subsection 7 of section 518, which authorizes the granting of a new trial 'for unavoidable casualty or misfortune preventing the party from appearing or defending.' The casualty or misfortune that will authorize the granting of a new trial must be 'unavoidable.' A mere ordinary 'casualty or misfortune' is not sufficient. It must be such casualty or misfortune as could not by the exercise of reasonable skill and diligence have been avoided. * * *

"Tested by this rule, the question is: Was appellant by unavoidable casualty or misfortune prevented from prosecuting her suit? Appellant intrusted her case to an attorney, who brought this suit for her. She depended, and had a right to depend, upon him to look after her interests and advise her of the steps taken in her case; but, without any notice to her or any fault on her part, he abandoned her case. Appellant lived in a part of the county remote from the county seat, was unacquainted with the manner and method of hearing and disposing of cases in court, and did not learn that her suit had been dismissed until 1907, when she at once took steps to have it reinstated. We express no opinion as to the merits of the controversy. It may be that appellant will not succeed; but she is entitled under the circumstances to a hearing, which she has not had. We think that, under the fair meaning of the Code provision, appellant was prevented by 'unavoidable casualty' from prosecuting more diligently her suit, and that she is entitled to a new trial."

To the same effect are cited *Peterson v. Koch*, 110 Iowa, 19, 81 N. W. 160, 80 Am. St. Rep. 261; *Ennis v. Fourth Street Building Ass'n*, 102 Iowa, 520, 71 N. W. 426; *Hovey v. Halsell-Arledge Cattle Co.* (Tex. Civ. App.) 176 S. W. 897; *Kansas City, M. & O. Ry. Co. v. Imboden* (Tex. Civ. App.) 176 S. W. 900; *Donnelly v. McArdle*, 14 App. Div. 217, 43 N.

Y. S. 560; *Adams v. Rathbun*, 14 S. D. 552, 86 N. W. 629.

We think these authorities justify the ruling of the court granting a new trial under the circumstances of this case.

The judgment is affirmed.

We concur: MARKS, J.; BARNARD, J.

104 Cal. App. 340

LANE v. SUPERIOR COURT IN AND FOR
FRESNO COUNTY et al. ★
Civ. 291.

° District Court of Appeal, Fourth District,
California.

March 5, 1930.

Rehearing Denied March 31, 1930.

1. Divorce ⇨156—Court may exercise discretion in refusing final divorce decree where parties cohabit for considerable time after interlocutory decree.

Where wife has been granted an interlocutory decree of divorce on account of fault of her husband and reconciliation has been effected and cohabitation resumed for considerable length of time, court may exercise discretion in granting or refusing final decree of divorce.

2. Mandamus ⇨51—Mandamus does not lie to compel entry of final divorce decree, where events occur changing status of parties after interlocutory decree.

Where, after rendition of interlocutory decree of divorce, events occur to change status or relation of parties, such as condonation and resumption of marital relation by parties, entry of final decree is not a ministerial act only, and becomes judicial act in performance of which trial court may use its discretion, and mandamus will not lie.

3. Contracts ⇨16—Words of offer accepted by words, actions, or conduct form an express contract (Civ. Code, § 1620).

Express contract under Civ. Code, § 1620, must be expressed in words, but one party may use words and the other party may accept by words, actions, or conduct, and until accepted, words form an offer, but when accepted they form an express contract.

4. Divorce ⇨156—Where husband requested wife, after interlocutory divorce decree, to return, and she lived with him for about eight months thereafter, there was "express agreement to condone" within statute (Civ. Code, §§ 118, 1620).

Where affidavit of wife seeking to compel entry of final decree of divorce stated that upon urgent solicitation, request, and entreaty of her husband, she returned to him and resumed marital relations with him and lived and cohabited with him for about eight months after interlocutory decree, there was express agreement under Civ. Code, § 1620, to condone within mean-

ing of section 118, providing that cohabitation shall not be evidence of condonation unless accompanied by express agreement to condone.

5. Divorce $\Rightarrow$ 156—Court held justified in using discretion in refusing final divorce decree, where wife's affidavit indicated condonation, in that she returned and lived with husband for about eight months after interlocutory decree.

Affidavit of wife seeking to compel entry of final divorce decree, stating that upon urgent solicitation, request, and entreaty of her husband she returned to him and resumed marital relations with him and lived and cohabited with him for about eight months, and then alleging acts of cruelty during that time, held to indicate condonation and change in relations of parties since rendition of interlocutory decree of sufficient character to justify court in using discretion in granting or refusing final decree of divorce.

6. Divorce $\Rightarrow$ 127(3)—Divorce cannot be granted on uncorroborated testimony of a party.

Uncorroborated testimony of a party is insufficient to support a divorce decree.

7. Divorce $\Rightarrow$ 141—In divorce case, equity court has inherent power to do equity.

Court of equity has inherent power to do equity in its decision of cause submitted to it in divorce case.

8. Divorce $\Rightarrow$ 171—Final judgment against wife in divorce suit would not affect right to bring another action based on acts of cruelty after interlocutory decree.

If final judgment went against wife in divorce suit, it would not affect her right to bring another action based upon acts of cruelty occurring subsequently to trial and rendition of interlocutory decree of divorce.

Application by Madeline M. Lane against the Superior Court of the State of California, in and for the County of Fresno, the Honorable S. L. Strother, Judge, for a writ of mandamus to compel the entry of a final decree of divorce.

Writ denied.

B. M. Benson, of Fresno, for petitioner.

Glenn M. De Vore, of Fresno, for respondents.

MARKS, J.

On August 17, 1928, petitioner was granted an interlocutory decree of divorce from Elbert K. Lane, Jr., by the superior court of Fresno county. On October 18, 1929, she moved the respondent court and respondent judge thereof to enter a final decree of divorce, which motion was not granted. She thereupon instituted an original proceeding in this court to secure a peremptory writ of mandate to compel respondents to enter such final decree. On their return to the alternative writ, the respondents filed a general demurrer, thereby admitting the truth of the

allegations of the petition for the purpose of this hearing, and upon these pleadings the cause was submitted for decision.

Prior to the motion to have made and entered her final decree of divorce, petitioner served on her husband a copy of her notice of motion and a copy of her supporting affidavit. He did not appear or contest the motion. The material parts of her affidavit are as follows:

"Madeline M. Lane, being first duly sworn, deposes and says: That she is the plaintiff in the above entitled action; that she has read this affidavit and knows the contents thereof and that the same is true of her own knowledge.

"1. That the interlocutory judgment was granted by this court on the 17th day of August, 1928, and entered in judgment book number 61, page 54, on the 17th day of August, 1928.

"2. That since the granting of said interlocutory decree;

"(a) Said parties have attempted a reconciliation, but same has not been successful as hereinafter set forth;

"(b) That said parties have lived and cohabited together since the entry of the said interlocutory decree but are not now living or cohabiting together as is more fully set forth hereinafter.

"(c) Both parties to said action are now living.

"(d) All the requirements therein have been fully complied with on the part of the moving party herein and she is not in default in any thereof.

"(e) No motion to set aside or annul said interlocutory judgment or suit has been brought or is pending or undetermined, and no appeal has been taken or is pending therefrom, and said judgment has become final.

"3. That after the entry of the said interlocutory decree and in the month of January, 1929, this plaintiff, at the urgent solicitation, request and entreaty of the defendant, returned to defendant and resumed marital relations with the defendant and lived and cohabited with defendant until on or about the 15th day of September, 1929.

"4. That this defendant has not treated plaintiff with marital nor conjugal kindness, but since the attempted reconciliation has treated plaintiff in a cruel, harsh, thoughtless and inconsiderate manner, specifically as follows, to-wit:

"(a) That on or about the 15th day of August, 1929, defendant told plaintiff to 'go to hell' in front of the house where plaintiff and defendant were residing at 1315 Olive Avenue, in the city of Fresno, California, and in the presence of neighbors and passers by,

and without any just cause or provocation and thereby caused plaintiff great humiliation, sorrow, chagrin and mental anguish.

"(b) That on or about the 5th day of September, 1929, defendant publicly and in a loud and insolent tone of voice, reprimanded plaintiff in a certain grocery store in the City of Fresno, California, for not having money to pay for groceries and thereby caused plaintiff great humiliation, sorrow and chagrin.

"(c) That during the month of September, defendant without just or any cause and in a loud and violent manner reprimanded plaintiff for driving plaintiff and defendant's automobile too much and getting dirt upon the said car, all of which caused plaintiff much sorrow, humiliation and chagrin.

"(d) That during the month of May, 1929, while plaintiff and defendant were entertaining company in their home, defendant upbraided plaintiff in a loud and violent manner and without any just cause, addressed plaintiff in a sarcastic manner and caused plaintiff great humiliation, sorrow and chagrin.

"(e) That defendant on a certain occasion in the month of August, 1929, harshly and violently upbraided plaintiff for returning a certain bathing suit belonging to a lady friend of the plaintiff's, without the knowledge of the defendant, and defendant at said time and place told plaintiff that unless defendant knew where plaintiff was going and the purpose of her errands she could not use defendant's car, but should walk on such errands, all of which caused plaintiff keen sorrow, humiliation and chagrin.

"5. Plaintiff therefore alleges that defendant has by his acts revoked any condonation which plaintiff may have extended to defendant by reason of her return to defendant and attempted reconciliation, and plaintiff alleges that there never at any time, was any express agreement of condonation made by plaintiff to the defendant; plaintiff further alleges that defendant did not accept the conditions of condonation in good faith and has not fulfilled same, for the reason that defendant has not treated plaintiff with conjugal kindness but has continuously since said attempted reconciliation treated plaintiff in a harsh, unkind and inconsiderate manner as specifically set forth above.

"6. That defendant has on many occasions and repeatedly threatened to take the minor child of plaintiff and defendant and deprive plaintiff of its care, custody and control, and has thereby caused plaintiff great sorrow, humiliation and chagrin."

The foregoing affidavit substantially sets forth the material facts before us, and upon these facts we must determine whether or not the writ of mandate shall issue. Two questions immediately present themselves for

our consideration, namely: First, is rule 26 of the Rules for the Superior Courts, adopted by the Judicial Council of the State of California, invested with the force and authority of a statute; and, second, under the facts set forth in the affidavit of petitioner, does any discretion exist in the trial court to grant or refuse a final decree of divorce?

The Judicial Council of California, created under section 1a, article 6, of the Constitution of California, adopted by the people at the general election held on November 2, 1926, is given the authority in subdivision 5 of this amendment to "adopt or amend rules of practice and procedure for the several courts not inconsistent with laws that are now or that may hereafter be in force." The rule-making power of the Judicial Council would seem to be limited by any existing law, the Constitution reserving to the Legislature and the people the primary and higher right to provide rules of procedure for our courts, with the secondary right in the Judicial Council, to adopt rules only, when and where the higher authority of the Legislature and the people has not been exercised. It is urged that the rule in question violates the provisions of section 132 of the Civil Code. It is admitted that if the rule is valid, and if it has the force and effect of law, the writ of mandate must be denied, as the affidavit of petitioner did not conform to the requirements of this rule. We do not desire to decide this question here, but will assume for the purposes of this case that the rule does not control and will pass to what we believe is the main issue before us.

[1] The exact question, of whether or not the trial judge had any discretion in acting upon the motion of petitioner under the facts presented here, does not seem to have been decided in this state. The converse of the situation has, however, been decided. It has been held that where a wife has been granted an interlocutory decree of divorce on account of the fault of her husband, and a reconciliation has been effected and cohabitation resumed for a considerable length of time, the court may exercise a discretion in granting or refusing a final decree of divorce upon the application of the husband. *McGuinness v. Superior Court*, 196 Cal. 222, 237 P. 42, 40 A. L. R. 1110; *Olson v. Superior Court*, 175 Cal. 250, 165 P. 706, 707, 1 A. L. R. 1589.

[2] A study of the decisions in the state, upon the question of the right of the trial judge to exercise his discretion in granting or refusing a final decree of divorce, leads to the conclusion that judicial opinion, if not judicial decision, has established two very general rules into which the cases fall. Where an interlocutory decree has been granted, and upon the application for a final decree no intervening facts appear to show a change

in the status or relation of the parties, the entry of a final decree becomes something in the nature of a ministerial act on the part of the court, and mandamus may be invoked to compel it to perform its duty; but where, after the rendition of the interlocutory decree, events occur to change the status or relation of the parties, such as condonation and a resumption of the marital relation by the parties, the entry of the final decree ceases to be a ministerial act only, and becomes a judicial act in the performance of which the trial court may use its discretion, and mandamus will not lie. *McGuinness v. Superior Court*, supra; *Gloyd v. Superior Court*, 44 Cal. App. 39, 185 P. 995; *Olson v. Superior Court*, supra; *Dell v. Superior Court*, 53 Cal. App. 436, 200 P. 85; *Carp v. Superior Court*, 76 Cal. App. 481, 245 P. 459; *O'Connell v. Superior Court*, 74 Cal. App. 350, 240 P. 294; *Weeks v. Superior Court*, 187 Cal. 620, 203 P. 93; *Stauter v. Carithers*, 185 Cal. 160, 196 P. 37; *London Guarantee & Accident Co., Ltd., v. Industrial Accident Commission*, 181 Cal. 460, 184 P. 864. With these general rules in mind we must next pass to a consideration of the facts set forth in the affidavit of petitioner to determine whether there was such a change in the relation of the parties after the rendition of the interlocutory decree as would give the trial court a right to use its discretion in passing upon the motion of petitioner to enter the final decree of divorce.

There are two major reasons why the law requires a year to intervene between the interlocutory and the final decree of divorce. One is to permit the determination of the paternity of the children, and the other, not less of interest to society, is to permit, if possible, the husband and wife to compose their difficulties and become so reconciled to one another that the marital relations may be resumed and no final decree of divorce become necessary. If the marriage relation found its inception in a civil contract of the two parties in the performance, existence, and termination of which they alone be concerned, our task would be a simple one. But in every such contract there is a third party vitally interested, the society in which we live, and representing it, the government which gives that society the permanence upon which its existence depends. For this reason the rules of marriage are prescribed by law, and the right of dissolution should be jealously guarded.

About five months after the entry of the interlocutory decree in the case of *Lane v. Lane* the parties resumed cohabitation and lived together as husband and wife for a period of about eight months, when the petitioner here, the prevailing party in the divorce action, left her husband. The exact length of time over which the resumption of the marital relation extended should in

principle make no difference. If a reconciliation be effected and a condonation take place, no line should be drawn whether the period be eight months or eight years. The duration of the cohabitation should be merely a circumstance to be considered by the trial judge in weighing the rights of the parties, and a measure to be applied in determining the effect of their acts and conduct.

[3, 4] Petitioner earnestly contends that her affidavit showed no condonation of the former cruelty of her husband. She calls attention to section 118 of the Civil Code and its provisions, to the effect that cohabitation, passive endurance, or conjugal kindness shall not be evidence of condonation unless it is accompanied by an express agreement to condone. She asserts in her affidavit that there was no express agreement to condone.

It will be observed in paragraph 3 of petitioner's affidavit that she states that upon the urgent solicitation, request, and entreaty of her husband she returned to him and resumed marital relations with him and lived and cohabited with him for about eight months. The words in which the solicitations, requests, and entreaties were couched do not appear, but that they were put in words is a necessary conclusion. "A contract is either express or implied." Section 1619, Civ. Code. "An express contract is one, the terms of which are stated in words." Section 1620, Civ. Code. That the husband used language that amounted to a request to petitioner to return to him cannot be doubted. That they were sufficient to effect a reconciliation is shown by the conduct of the parties. That petitioner regarded their legal effect as a condonation is apparent from her affidavit, for otherwise she would not have alleged acts of cruelty in paragraph 4 and 6, in a very patent attempt to escape the results of her forgiveness. She further seeks to be relieved from the results of her actions by stating in paragraph 5 of her affidavit that she herself did not express in words her forgiveness and condonation. In other words, appellant's contention is that if her husband had said, "Let us forgive and forget and go back and live together as a married couple should," and she had replied, "I forgive you, and we will forget what is passed and will start our married life over again," the condonation would have been complete; but if she said nothing, and yet returned to him as his wife, then there would have been no condonation. We do not so understand the law. To have an express contract, its terms must be expressed in words. One party may use the words and the other party may accept by words, actions, or conduct. Until accepted, the words form an offer, but when accepted they form an express contract. *Los Angeles Traction Co. v. Wilshire*, 135 Cal. 654, 67 P. 1086.

[5, 6] We believe that the affidavit of petitioner indicated a condonation and a change in the relations of the parties since the rendition of the interlocutory decree of sufficient character to justify the court in using a discretion in granting or refusing a final decree of divorce. In fact, it would seem to be the right of the judge presiding, if not his duty, to conduct such a hearing as would enable him to determine the rights and equities of the three parties in interest, the wife, the husband, and society. The court, and not a party, should decide whether or not there was a condonation. A divorce cannot be granted on the uncorroborated testimony of a party. In the proceeding below the only evidence offered in support of the acts of cruelty under which she sought to escape the effect of a seeming condonation was her unsupported, *ex parte* affidavit.

To grant the relief sought by petitioner, under circumstances which we believe show an express contract to condone, we would have to hold, in effect, that where an innocent husband or wife was granted an interlocutory decree of divorce, such party prevailing in the litigation, could, as a matter of right, secure a final decree at any time after the lapse of one year, without regard to any change in the relations of the parties. We cannot reach such a conclusion. It would strike a serious blow at the sanctity of the marriage relation and disturb the high plane of morals and ethics upon which it is supposed to rest. It would seriously affect the chance of success of a reconciliation, if one were attempted. For one spouse to know that a final and legal dissolution of the marriage relation lay within his or her grasp for the taking, would not tend to promote that feeling of forbearance, charity, and forgiveness necessary to the lasting success of any marriage.

[7] A court of equity has inherent power to do equity in its decision of a cause submitted to it, and in this case the exercise of such power is necessary in order to determine the question pending between the parties litigant in the case of *Lane v. Lane*. The Supreme Court has recognized this power of the court in divorce actions in many decisions. In the case of *Olson v. Superior Court*, *supra*, it was said: "The similar law in the state of New York entitles either spouse to a final judgment after three months 'unless for sufficient cause the court in the meantime shall have otherwise ordered,' and under that statute the court refused a final decree where a reconciliation was effected such as is here shown. *Cary v. Cary*, 144 App. Div. 846, 129 N. Y. S. 444. But, in the absence from our statute of this express language found in that of New York, the power of our courts is no different. The New York

statute but expressed the power which our courts in equity inherently possess. They have under our present statute and without express authorization the power to recognize condonations and reconciliations such as are here shown, and to do justice to the litigants as may be demanded by such events in their lives as have arisen subsequent to the entry of the interlocutory decree and before the expiration of the fixed period of one year."

[8] Appellant complains that if this writ is denied she will be left a married woman with an interlocutory decree, reciting that she is entitled to a divorce without any way of ever obtaining one. We do not so understand her position. We do not understand that any formal order, decree, or judgment has been entered, either granting or refusing a final decree, which would affect her right of appeal if a proper record could be made. Section 936, Code Civ. Proc.; section 963, Code Civ. Proc. If the final judgment went against her, it would not affect her right to bring another action based upon the alleged acts of cruelty, all of which occurred subsequently to the trial and the rendition of the interlocutory decree of divorce as set forth in her affidavit.

The peremptory writ of mandate is denied.

We concur: SLOANE, P. J.; BARNARD, J.

104 Cal. App. 275

PEOPLE v. BALDWIN.

Cr. 1113.

District Court of Appeal, Third District, California.

March 3, 1930.

Criminal law § 1130(4)—Conviction would be affirmed, where no brief was filed for defendant and no appearance made at hearing (Pen. Code, § 1253).

Where defendant was convicted of manslaughter, but no brief on appeal was filed in her behalf and no appearance was made at time case was called for hearing, judgment would be affirmed pursuant to provisions of Pen. Code, § 1253.

Appeal from Superior Court, Butte County; J. O. Moncur, Judge.

Pearl Baldwin was convicted of manslaughter, and she appeals.

Affirmed.

Clinton W. Johnson, of Oroville, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

PER CURIAM.

The defendant was convicted in the superior court of Butte county of a felony, to wit, manslaughter.

The transcript on appeal was filed in this court January 23, 1930. No brief has been filed in behalf of appellant. The cause was regularly placed on the calendar for oral argument on March 3, 1930. No appearance was made for appellant at the time the case was called for hearing.

Pursuant to the provisions of section 1253 of the Penal Code, the judgment is affirmed.

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Suit by J. R. Mitchell and another against the Board of Trustees of the City of Woodland and others to enjoin the making of street improvements and the levying of assessments therefor. Judgment for defendants, and plaintiffs appeal.

Affirmed.

E. B. Mering, of San Francisco, for appellants.

J. H. Laugenour, of Woodland, for respondents.

R. L. THOMPSON, J.

This is a suit in equity to enjoin the city council of Woodland from making street improvements and levying assessments therefor, on the ground that the proceeding would amount to a confiscation of the property without compensation.

The appellants owned several lots in a sparsely settled portion of the outskirts of Woodland. The trustees of the city duly adopted a resolution pursuant to the City Improvement Act of the state of California (St. 1911, p. 730, and amendments thereto), declaring their intention to construct cement sidewalks adjacent to the property of the appellants. At the time set for the hearing of the resolution to construct public improvements, the plaintiffs appeared in open meeting of the council and filed written protests against the proposed improvements, upon the grounds that the cost of such improvements to the adjoining property owners would exceed the value of the benefits and would therefore amount to a confiscation thereof without compensation. Although the opportunity was afforded, the appellants offered no evidence in support of their protests. The council thereupon overruled and denied the protests and proceeded to advertise for bids for the performance of the work. This action was then brought to declare the proceedings for the acquiring of the improvements void and seeking to enjoin the defendants from awarding a contract for the work. A strict compliance with the statutory proceedings on the part of the council is not challenged.

Upon trial the court found that the plaintiffs duly filed their protests and were present at the time fixed for the hearing thereof; that although they were requested to present evidence in support of their protests, they failed and neglected to do so; that the council thereupon overruled and denied the protests; and that this determination was final and conclusive. Judgment was accordingly rendered against the plaintiffs. The evidence supports these findings.

[1] It is true the record, discloses the fact that there was some informal conversation

104 Cal. App. 225

**MITCHELL et al. v. BOARD OF TRUSTEES
OF CITY OF WOODLAND et al.***
Civ. 4018.

District Court of Appeal, Third District, California.

Feb. 26, 1930.

As Modified on Denial of Rehearing March 28, 1930. Hearing Denied by Supreme Court April 24, 1930.

1. Municipal corporations $\S$ 323(3)—Court cannot presume that cost of municipal improvements will exceed value of property or amount to confiscation of property without compensation.

In absence of evidence adduced in support of protests, court may not presume that cost of municipal improvements to owners of property will exceed value of property, nor that proceedings under such circumstances will amount to confiscation of property without compensation.

2. Municipal corporations $\S$ 321(1)—City trustees' decision on protests against municipal improvements was final, in absence of fraud or lack of jurisdiction (City Improvement Act 1911, $\S$ 6, as amended by St. 1915, p. 1465, $\S$ 3).

In hearing of protests filed by property owners against construction of municipal improvements, city trustees acted in quasi judicial capacity, and their decision on protests was final and conclusive, in absence of fraud or lack of jurisdiction under City Improvement Act (St. 1911, p. 734) $\S$ 6, as amended by St. 1915, p. 1465, $\S$ 3.

3. Municipal corporations $\S$ 298—Property owners protesting that cost of improvements would exceed value of property must prove to city trustees value of property, as compared with benefit of proposed improvements.

Where property owners protested against construction of sidewalks, on ground that cost to adjoining property owners would exceed value of benefits and would therefore amount to confiscation without compensation, and strict compliance with statutory provisions was not questioned, it was necessary for property owners to prove to city trustees value of property, as compared with benefit of proposed improvements.

with the trustees at the hearing respecting the grounds of protest, but no witnesses were sworn and no evidence was adduced in support of the protests. The record in this regard is quite similar to the proceedings which occurred in the case of *Wild Goose Country Club v. County of Butte*, 60 Cal. App. 339, 212 P. 711. In the absence of evidence adduced in support of the protests, a court may not presume that the cost of the improvements to the owners of property will exceed the value of the property, nor that the proceedings under such circumstances will amount to a confiscation of the property without compensation. Fraud was neither pleaded nor proved in the present case.

[2] Section 6 of the Improvement Act of 1911, as amended by St. 1915, p. 1465, § 3, provides that "at the time set for hearing protests the city council shall proceed to hear and pass upon all protests so made and its decision shall be final and conclusive."

In the proceeding which is involved in this case the city trustees acted in a quasi judicial capacity and their decision upon the plaintiffs' protests was final and conclusive. In the absence of fraud or a lack of jurisdiction, the action of the city council is conclusive, even though the evidence is conflicting or when the contestants are afforded an opportunity to prove the grounds of their opposition and fail to adduce evidence in support thereof. *Lambert v. Bates*, 137 Cal. 676, 679, 70 P. 777, 778; *Page on California Street Laws*, § 415; *Blake v. City of Eureka*, 201 Cal. 643, 648, 258 P. 945. In the case of *Lambert v. Bates*, supra, the court used this pertinent language: "By declaring that the determination of the council shall be 'final and conclusive,' it intended that that body should be the final tribunal for the determination of all questions that might be appealed to it, so far as such determination was of a question of fact, or depended upon evidence that might be presented in support of the appeal. *Houghton's Appeal*, 42 Cal. 35; *Bixler's Appeal*, 59 Cal. 550. This provision cannot be construed as authorizing a person merely to take an appeal to the council, without presenting to that body sufficient evidence to support his appeal, or any evidence in its support, and afterwards seek to have the grounds of his appeal sustained before another tribunal, and under additional or different evidence."

[3] It is urged that a failure to adduce evidence in support of a protest against street improvements is not a waiver of matters which are jurisdictional in character, and that the council has no jurisdiction to levy a tax for street improvements which amounts to a confiscation of the property without compensation. A number of cases are cited from

other jurisdictions, to the effect that a failure to follow the statutory requirements preliminary to the making of street improvements left the council without jurisdiction, and that such a situation rendered it unnecessary to first raise the jurisdictional question before the council. In those cases the failure to comply with the statute appears from the record, and the council was without jurisdiction to hear or make any order that would be binding against the contestants. In the present case strict compliance with the statutory provisions is not questioned, and the council therefore had jurisdiction. While the complaint does allege facts which were intended to charge a confiscation of property, these facts were denied by the answer. No competent evidence was adduced in support of these charges either before the trial court or the council. Since the issue of confiscation raised the question of the value of the property as compared with the benefits of the proposed improvements, it became necessary to present and prove this question of fact to the city council. This the contestants failed to do. The action of the trustees was therefore final.

The judgment is affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

104 Cal. App. 389
PEOPLE v. CARRILLO.
 Cr. 1112.

District Court of Appeal, Third District.
 California.
 March 7, 1930.

1. Homicide ☞250—Evidence held to support conviction of manslaughter.

In prosecution for homicide, evidence showing defendant shot husband during disagreement as to wine held to support conviction of manslaughter.

2. Criminal law ☞1036(1)—Homicide ☞163 (1)—In prosecution of wife for killing husband, evidence introduced by state showing witness' improper relations with defendant was improper, but error could not be urged, in absence of objection, especially in view of defendant's testimony.

In prosecution for manslaughter, in which defendant was accused of killing husband, evidence introduced by state showing witness had had improper relations with defendant was improper, but error could not be urged, where no objection or motion to strike was made and court was not requested to instruct jury to disregard testimony, especially where defendant, answering questions of her own counsel, stated she had had illicit relations with men since marriage, and that money was paid to deceased husband on account thereof.

3. Homicide ☞285—Instructions given held to cover issues in prosecution for manslaughter (Pen. Code, § 197, subs. 1-4, and § 198).

In prosecution for manslaughter, instructions giving Pen. Code, § 197, subs. 1, 2, and section 198, together with instructions on self-defense and reasonable doubt and burden of proof, held to cover issues, as against contention that court should have given Pen. Code, § 197, subs. 3 and 4.

Appeal from Superior Court, Tehama County; H. S. Gans, Judge.

Alma Carrillo was convicted of manslaughter, and she appeals.

Affirmed.

Curtis Hillyer, of San Francisco, and James T. Matlock, of Red Bluff, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

PLUMMER, J.

By an information filed in the trial court on the 5th day of October, 1929, the appellant was charged with the crime of murder, in that she did, on or about the 2d day of October, 1929, unlawfully, willfully, and with malice aforethought, kill and murder Rosaleo Carrillo. Upon the trial had pursuant to said information, the appellant was convicted of the crime of manslaughter. Her motion for new trial having been denied, an appeal was taken to this court.

[1] The record shows that the appellant and the deceased were husband and wife and belonged to a very low stratum of society. It would serve no useful purpose to set forth the testimony at length, and we content ourselves with the statement that the testimony is amply sufficient to support the verdict.

It appears that the deceased and the appellant were living on a small farm, and, while there, had been engaged in unlawfully making wine, and also using the same to a greater or less degree; that on the day of the homicide they had had some controversy over a cask of wine which the deceased, acting apparently under an agreement to discontinue the making of wine and the using thereof, was proceeding to empty, and the appellant, with a saucepan, or some other kitchen utensil, sought to save a portion thereof. It appears that the emptying of the wine was being done at a short distance from the residence of the appellant and the deceased; that, upon taking a saucepan of the wine, the appellant started toward the residence; that the deceased followed, making some remark to the effect that the appellant would not be allowed to drink the wine, or would not live to drink the wine. The appellant proceeded into the house, followed by the deceased at a short distance. The appellant, after entering the house, seized a loaded gun which was close

by the entrance door, and, as the deceased approached, the appellant commanded him to halt. Instead of so doing, he advanced toward the appellant, whereupon the appellant shot the deceased, from the effects of which he died within a very short time.

The story of the quarrel preceding the killing, and of the details of the homicide, all rest upon the testimony of the appellant. The record also contains considerable testimony of the past lives of the appellant and the deceased, which we do not need to set out in detail, further than to say it shows the debased character of both the appellant and the deceased. They were both given to the excessive use of intoxicating liquors, and numerous fights between them occurred. The testimony also shows that, prior to the marriage of the deceased and the appellant, the appellant had been a woman of "loose" character, and that such practices continued after their marriage.

[2] The chief grounds upon which the appellant seeks reversal are that the district attorney was guilty of improper practices in the asking of questions which necessarily prejudiced the jury against the defendant, and that the court erred in its instructions to the jury. An examination of the record shows that a witness by the name of Norton was asked if he had not had improper relations with the appellant, and answered that he had. No objection was made by the appellant to the introduction of this testimony. While the question appears to be improper as one tending only to degrade the witness, yet, as no objection was urged at the time the question was asked, no motion was made to strike out the testimony, and no request made of the court to instruct the jury to disregard such testimony, we think, in view of what we are about to state, it is too late now to argue that the appellant has suffered any prejudice.

The record shows that, when the appellant herself was on the witness stand, in answer to questions asked by her own counsel, she stated that she had had illicit relations with men since her marriage to the deceased, and that money was paid to the deceased on account thereof. Having voluntarily introduced such testimony, any so-called misconduct on the part of the district attorney in asking improper questions would seem to be entirely waived, or urged upon this appeal as an afterthought.

[3] In its instructions to the jury, the court gave the first and second subdivisions of section 197 of the Penal Code, and also section 198 of the same Code. It is now urged that the court should have given subdivisions 3 and 4 of section 197. However, a reference to the transcript shows that, by the giving of an instruction requested by the defendant,

the jury was instructed as follows: "If at the time of the alleged killing, the deceased was advancing toward the defendant in a threatening manner, and had the power to do great bodily harm to her, and she knew this to be the case, and was in fear of great injury to herself, and that the circumstances were such as to lead a reasonable person to believe that she was in danger of great bodily harm or injury at the hands of her husband, then I instruct you she had the right to protect herself, even to the extent of killing the deceased; and if you believe from the evidence, the state of facts existed which I have just stated, it is your duty to find the defendant not guilty."

The court also instructed the jury that, if they had any reasonable doubt as to the guilt of the defendant, they should find the defendant not guilty, and that the burden of proof was upon the people to establish every fact beyond a reasonable doubt necessary to show the guilt of the appellant.

A reading of the instructions given by the court to the jury shows conclusively that the instructions covered fully and correctly every issue which the jury was called upon to decide.

There being nothing in the record to justify a reversal, the order and judgment of the trial court are affirmed.

We concur: FINCH, P. J.; R. L. THOMPSON, J.

104 Cal. App. 268

KAPLAN v. REID BROS., Inc. ★
Civ. 7143.

District Court of Appeal, First District, Division 2, California.

March 3, 1930.

Rehearing Denied April 2, 1930. Hearing Denied by Supreme Court April 28, 1930.

1. Evidence ⇨80(1)—There is presumption that effect of foreign statute is same as that of similar local statute (General Corporation Law Nev. § 75).

Where no Nevada decision was cited, giving different effect to General Corporation Law Nev. § 75 (St. Nev. 1925, c. 177), court will presume that effect of Nevada law is same as local law under similar statute, Civ. Code, § 309, as construed by Supreme Court.

2. Corporations ⇨408—Contract to repurchase stock held not invalid on ground general manager was unauthorized to execute it.

Corporation cannot escape force of contract to repurchase stock on ground that general manager was unauthorized to execute contract, where he was only person representing corporation in sale of stock, since buyer had right to

assume that salesman was authorized to do those legal acts which nature of his employment seemed to warrant.

3. Limitation of actions ⇨66(2)—Where demand is necessary, statute of limitations does not begin to run until demand is made.

In cases where demand is necessary before cause of action arises, statute of limitations does not begin to run until demand is made.

4. Limitation of actions ⇨66(15)—Where demand is necessary before cause of action arises and delay is expressly contemplated, demand need not be made within statutory period for bringing action.

In cases where demand is necessary before cause of action arises, demand must be made within reasonable time, and time coincident with period of statute of limitations will ordinarily be deemed reasonable, but, where delay is expressly contemplated, even though obligation is payable on demand, there is no rule requiring demand to be made within statutory period for bringing action.

5. Appeal and error ⇨1008(1)—What constituted reasonable time for demanding repurchase of stock by corporation held question for trial court.

In suit for specific performance of agreement to repurchase stock of corporation, question of what was reasonable time for demanding that corporation repurchase held primarily question to be decided by trial court.

6. Corporations ⇨82—Option to require repurchase of stock bought January 24, 1921, held properly exercised February 10, 1927; "at any time."

In suit for specific performance of agreement of corporation to repurchase stock, trial court's determination that option to demand repurchase was exercised within such time as to entitle plaintiff to recover under contract held not erroneous, though stock was purchased January 24, 1921, and demand for repurchase made February 10, 1927, where contract provided stock would be repurchased "at any time," for, while such words will not be given literal construction which would give right to exercise option in perpetuity, their inclusion in contract will be considered in determining what is reasonable time.

[Ed. Note.—For other definitions of "At Any Time," see Words and Phrases.]

Appeal from the Superior Court, City and County of San Francisco; J. T. B. Warner, Judge.

Suit by W. B. Kaplan against Reid Bros., Inc., for specific performance of an agreement to repurchase stock. Judgment for plaintiff, and defendant appeals.

Modified and affirmed.

B. S. Gregory, of San Francisco, for appellant.

Ford & Johnson, of San Francisco, for respondent.

DOOLING, Justice pro tem.

On January 24, 1921, the respondent purchased from the appellant corporation, acting through its president and general manager, M. L. Reid, ten shares of its capital stock for the sum of \$1,000. Contemporaneously and as a part of the same transaction, the following agreement was executed and delivered to respondent:

"This letter will serve to verify our verbal agreement made today as follows:

"Should you, at any time, desire to dispose of the ten shares of the First Preferred Stock in Reid Bros. Inc. which you have this day purchased from the Company, the Company agrees that it will at any time, on thirty days notice, return you the par value of this stock, plus any accrued dividends.

"This letter is to be considered part of the agreement and sale of the ten shares of the First Preferred Stock to you.

"Yours very truly,

"[Signed] Reid Bros. Inc.

"M. L. Reid, General Manager."

On February 10, 1927, respondent demanded of the corporation that it carry out this agreement by repurchasing the stock, and, upon the corporation's failure so to do, this action was brought. Judgment followed for the respondent for the sum of \$1,000, the par value of the stock, together with interest from March 10, 1927, and from that judgment this appeal is taken.

[1] Appellant is a Nevada corporation. The claim is made that under section 75 of the General Corporation Law of Nevada (St. Nev. 1925, c. 177) the contract sued upon is invalid. The section relied upon is practically identical with section 309 of our Civil Code, and appellant's contention is put at rest by *Schulte v. Boulevard Gardens Land Co.*, 164 Cal. 468, 129 P. 582, 44 L. R. A. (N. S.) 156, Ann. Cas. 1914B, 1013. Since no Nevada decision has been cited to us giving a different effect to the Nevada statute, we must presume that the effect of the Nevada law is the same as our own as construed by the Supreme Court in the case above cited.

[2] We are not impressed by the contention that the general manager was without authority to execute the contract sued upon. He was the only person representing the corporation in the sale of the shares of stock in question, and respondent "had the right to assume that the salesman was authorized by the corporation to do those legal acts which the nature of his employment seemed to warrant. The agent, in other words, was ostensibly clothed with unlimited authority, and upon familiar principles appellant should not be heard to disavow and repudiate the contract made by him." *Tidewater Southern Ry. Co. v. Harney*, 32 Cal. App. 253, 257, 258, 162 P. 664, 667; *Tidewater Southern Ry. Co. v. Merz*, 35 Cal. App. 405, 418, 169 P. 1054.

[3-6] Although the contract sued upon in terms purported to give respondent the option "at any time" to have his stock repurchased by the corporation, appellant insists that the option must none the less be exercised within a reasonable time, and that more than a reasonable time had elapsed before the making of respondent's demand, and that the action is barred by the statute of limitations. The use of the words "at any time" in the contract before us indicated an intention of the parties that the option given respondent was not one as to which there was any necessity or occasion for promptness in its exercise, but quite the contrary. Literally construed, it would give respondent the right to exercise the option in perpetuity, and, even though it will not bear this construction as a matter of law, its inclusion in the contract is to be taken into consideration in determining what is a reasonable time for the exercise of the option under all the circumstances. In cases where a demand is necessary before a cause of action arises, the statute of limitations does not begin to run until the demand is made. The demand, however, must be made within a reasonable time, and a time coincident with the period of the statute of limitations will ordinarily be deemed to be reasonable; but, "where delay in making the demand is expressly contemplated, even though the obligation is payable on demand, there is no rule of law that requires that demand shall be made within the statutory period for bringing an action." *Wood on Limitations* (4th Ed.) vol. I, § 118, p. 617; 37 Cor. Jur. pp. 966, 967; *Vickrey v. Maier*, 164 Cal. 384, 390, 391, 129 P. 273, 274. In *Vickrey v. Maier*, the Supreme Court had under consideration a contract for the repurchase of stock "at any time after six months," and held that a delay of more than four years in making a demand after the lapse of the six-month period was not unreasonable. In our case, the delay was somewhat longer, but the question of what was a reasonable time was primarily a question to be decided by the trial court, and we cannot hold that the trial court's determination that the option was exercised within such time as to entitle respondent to recover under the contract was erroneous.

The following language appears among the conclusions of law made and filed by the trial judge: "That upon the payment of said sum of one thousand (\$1,000.00) dollars, together with interest and costs to plaintiff, said plaintiff deliver to defendant said ten shares of the first preferred stock of defendant." Through some inadvertence no such provision was made in the judgment. It is clear that, upon the payment of the judgment, appellant is entitled to have the certificate representing the stock and the stock returned to it. The omission of this provision from the judgment, in view of the conclusion of law above quoted, would appear to have

been an oversight of court and counsel, and one which might have been corrected by the trial court upon timely application. Apparently no such application was made, and for that reason we feel that respondent should recover his costs on appeal. The judgment is accordingly modified by inserting therein just above the date and signature of the trial judge the language above quoted from the conclusions of law, and, as so modified, it is affirmed, respondent to recover his costs on appeal.

We concur: NOURSE, Acting P. J.; STURTEVANT, J.

104 Cal. App. 392

PEOPLE v. THOMAS.
Cr. 13.

District Court of Appeal, Fourth District, California.

March 7, 1930.

Indictment and information  137(4)—**Sufficiency of evidence to warrant commitment for trial can be raised by habeas corpus, but not by motion to set aside information (Pen. Code, § 1487, subd. 7).**

It was proper to deny motion to set aside information made on ground that defendant had not been legally committed by magistrate, as required by Pen. Code, § 995, for alleged reason that evidence before committing magistrate was insufficient, since question of whether evidence is adequate to show probable cause for holding defendant for trial can be raised by habeas corpus, but not by motion to set aside information, in view of section 1487, subd. 7.

Appeal from Superior Court, Orange County; G. K. Scovel, Judge.

A. C. Thomas was convicted of the possession of intoxicating liquor, and he appeals.

Affirmed.

D. G. Wettlin, of Santa Ana, for appellant.

U. S. Webb, Atty. Gen., James S. Howie, Deputy Atty. Gen., and Z. B. West, Jr., Dist. Atty., and S. B. Kaufman, Deputy Dist. Atty., both of Santa Ana, for the People.

MARKS, J.

Appellant was accused, by an information filed in the superior court of Orange county,

of the crime of possession of intoxicating liquors, with two prior convictions. A jury trial was waived and he was found guilty and was sentenced to imprisonment in the county jail of Orange county for the term of six months, and to pay a fine of \$500.

At the time of his arraignment, and before his plea to the information, his counsel moved to set aside the information upon the ground that appellant had not been legally committed by a magistrate, as required by section 995, Penal Code, for the reason, as stated by counsel, that the evidence before the committing magistrate failed to show probable cause of the two prior convictions. The motion was denied. It was renewed at the opening of the trial and again denied. These rulings are now complained of as error. No other question is presented on this appeal.

It is the well-established rule in California that the question of the sufficiency of the evidence taken before a committing magistrate to show probable cause for holding a defendant for trial in the superior court can be raised by habeas corpus, but not by motion to set aside the information. *People v. McCurdy*, 68 Cal. 576, 10 P. 207; *People v. Sehorn*, 116 Cal. 503, 48 P. 495; *People v. Beach*, 122 Cal. 37, 54 P. 369; *People v. Creeks*, 170 Cal. 368, 149 P. 821, 822; *People v. Mitsunaga*, 91 Cal. App. 298, 266 P. 1020. In the case of *People v. Creeks*, supra, the Supreme Court said: "It was further claimed that the evidence adduced on the preliminary examination before the magistrate did not sufficiently show probable cause to warrant a commitment for trial. Such an objection is not available on motion to set aside an information. By reason of an express statutory provision so declaring (Pen. Code, § 1487, subd. 7), such an objection may be raised on habeas corpus, if timely made, and we know of no other way in which it can be raised. It is not included in the grounds specified in the statute for the setting aside of an information. The subdivision relied on, that providing for such a motion on the ground that the defendant has not been 'legally committed by a magistrate,' has no reference to the matter of the sufficiency of the evidence upon which a magistrate has acted. See *People v. Beach*, 122 Cal. 37, 54 P. 369. The trial court did not err in denying the motion to set aside the information."

Judgment affirmed.

We concur: SLOANE, P. J.; BARNARD, J.

104 Cal. App. 273

GIERSTER v. BERGEVIN.

Civ. 7007.

District Court of Appeal, First District, Division 2, California.

March 3, 1930.

1. Guaranty ⇨26—Nonsuit for want of consideration was improper, in action on written guaranty (Code Civ. Proc. § 1963, subd. 39).

In action on written guaranty, it was error to grant motion for nonsuit on ground of want of consideration, since consideration is presumed from writing, under Code Civ. Proc. § 1963, subd. 39, and therefore prima facie case was made.

2. Fraud ⇨64(1)—Order of nonsuit held erroneous under evidence, in action for damages for false representations.

In action for damages for false representations, in which plaintiff showed that representations as to facts were false, known to be such by defendant, and made with intent to deceive plaintiff, and that she relied on them to her injury, order of nonsuit was erroneous.

Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

Action by Paula Gierster against A. M. Bergevin. From a judgment of nonsuit, plaintiff appeals.

Reversed.

John H. Crabbe, of San Francisco, for appellant.

NOURSE, Acting P. J.

Plaintiff sued under three causes of action—for money had and received, upon a written guaranty and for damages for false representations. A nonsuit was granted as to all causes, and the plaintiff has appealed upon typewritten transcripts. The respondent has not defended the judgment by brief or oral argument.

The evidence discloses that the defendant, who was an experienced dealer in the purchase of stocks and securities, persuaded the plaintiff, who was a young German nursemaid, wholly unfamiliar with such transactions and unlearned in the language and customs of this country, to transfer her savings from the Bank of Italy to the offices of a stockbroker in San Francisco, upon the representation that the brokerage office was in effect a banking institution, and that her money would be there deposited with equal safety but with much greater profit. The defendant then persuaded the brokerage office to purchase certain stocks on margin for plaintiff's account, and, when calls for further payment were made, the defendant executed and delivered to plaintiff the written guaranty in suit, wherein he undertook to repay to her

the full sum advanced if she would leave the stock in the hands of the broker until a certain date. Plaintiff performed as stipulated, the stock fell in price on the market and the brokers sold, returning to plaintiff \$742 out of \$2,000 which she had invested with them.

[1] Though no grounds were stated in the motion for nonsuit, it appears that the motion was granted on the cause of action covering the written guaranty on the ground of want of consideration. The ruling was error because the consideration is presumed from the writing. Section 1963, subd. 39, Code Civ. Proc. Hence a prima facie case was made.

[2] The only ground suggested for the order of nonsuit on the issue of fraud is that the representations as to the "value" of the stock were mere expressions of opinion, and hence not actionable. But these were but a small part of the representations made. The plaintiff made a prima facie case, at least showing all the essential elements of such a cause of action—that the representations as to facts were false, known to be such by defendant, made with intent to deceive plaintiff, and that she relied upon them, believing them to be true, to her injury. The order of nonsuit on this cause of action was error.

The judgment is reversed.

We concur: STURTEVANT, J.; DOOLING, Justice pro tem.

104 Cal. App. 276

PEOPLE v. SUPERIOR COURT IN AND FOR SAN BERNARDINO COUNTY et al.

Civ. 158.

District Court of Appeal, Fourth District, California.

March 3, 1930.

1. Infants ⇨20—Justice's court has no jurisdiction to try one accused of contributing to minor's delinquency (Pen. Code, § 1425; Juvenile Court Law, § 21).

Under Pen. Code, § 1425, as amended in 1929, no jurisdiction is conferred on justice's court to try one accused of contributing to delinquency of minor in violation of Juvenile Court Law, § 21 (Gen. Laws 1923, Act 3966).

2. Courts ⇨1—"Jurisdiction" is power to hear and determine case.

Court's "jurisdiction" is the power to hear and determine a case.

[Ed. Note.—For other definitions of "Jurisdiction," see Words and Phrases.]

3. Courts ⇨26—Court acting under special powers has only jurisdiction especially delegated.

Where a court acts under special powers, it has only the jurisdiction especially delegated to it by law.

4. Infants $\S$ 20—Juvenile court cannot try defendant pleading not guilty of contributing to minor's delinquency (Juvenile Court Law, $\S$ 21).

Juvenile Court Law, $\S$ 21 (Gen. Laws 1923, Act 3966), giving juvenile court original jurisdiction to try person accused of contributing to minor's delinquency, prescribing procedure up to time of plea, and then specifically giving additional jurisdiction, if plea of guilty is entered, does not give such court jurisdiction to try a defendant pleading not guilty.

5. Statutes $\S$ 184, 205—All provisions of statute must be considered together and reconciled, if possible, and particular provisions must be so construed as to promote general purposes and policy of law.

In construction of a statute, all its provisions must be considered together and reconciled as far as possible, and particular provisions must be so construed as to promote, rather than defeat, general purposes and policy of law.

6. Infants $\S$ 20—Superior court has jurisdiction to try defendant pleading not guilty of contributing to minor's delinquency in juvenile court (Juvenile Court Law, $\S$ 21; Const. art. 6, $\S$ 5).

Since Juvenile Court Law, $\S$ 21 (Gen. Laws 1923, Act 3966), does not give superior court, sitting as juvenile court, jurisdiction to try defendant pleading not guilty of contributing to delinquency of minor, jurisdiction is in superior court as such under Const. art. 6, $\S$ 5.

7. Infants $\S$ 20—Preliminary hearing before some magistrate is sufficient to authorize filing of information in superior court against defendant pleading not guilty of contributing to minor's delinquency in juvenile court (Juvenile Court Law, $\S$ 21; Pen. Code, $\S$ 888).

While judge of juvenile court may sit as committing magistrate where defendant pleads not guilty of contributing to minor's delinquency in violation of Juvenile Court Law, $\S$ 21 (Gen. Laws 1923, Act 3966), all that is required is a preliminary hearing before some magistrate in order that information may be filed in superior court, under Pen. Code, $\S$ 888.

8. Infants $\S$ 18—Juvenile court is superior court, with inherent power to transfer case to another department thereof after reaching limits of special powers.

The juvenile court is a superior court, acting in a particular class of cases, and has inherent power to transfer case to another department of same court when limits of its special powers are reached.

9. Infants $\S$ 20—It was juvenile court judge's duty to transfer cases to superior court for trial after entry of pleas of not guilty of contributing to minor's delinquency (Juvenile Court Law, $\S$ 21).

After preliminary hearings had been held, defendants held to answer, and informations filed against them for contributing to minor's delinquency, in violation of Juvenile Court Law, $\S$ 21 (Gen. Laws 1923, Act 3966), it became duty of juvenile court judge to arraign them and

to transfer cases to superior court for trial after entry of pleas of not guilty.

10. Infants $\S$ 20—Defendant pleading not guilty of contributing to minor's delinquency in juvenile court, should be tried in superior court, in view of purpose of Juvenile Court Law (Juvenile Court Law, $\S$ 21).

Main purpose of Juvenile Court Law being to provide for care and custody of children, who have shown, or from lack of care are likely to develop, criminal tendencies, in order to train them to good habits and correct principles, actual trial of defendant pleading not guilty of contributing to minor's delinquency in violation of section 21 (Gen. Laws 1923, Act 3966) should be had in superior court.

Application by the People for a writ of mandate to the Superior Court in and for San Bernardino County and Benjamin F. Warmer, Judge thereof.

Writ granted.

George H. Johnson, Dist. Atty. and James L. King, Deputy Dist. Atty., both of San Bernardino, for the People.

Duckworth & Harrison, of San Bernardino, for respondents.

BARNARD, J.

This is an application for a writ of mandate, seeking to compel the respondents to accept jurisdiction in certain cases where the defendants have been arraigned in the superior court, sitting as a juvenile court and have entered a plea of "not guilty" to a charge of violation of section 21 of the Juvenile Court Law.

The petition alleges that a criminal complaint was filed in the justice's court of Ontario township, in the county of San Bernardino, this being a township wherein the population is less than 30,000, by which complaint a certain named defendant was charged with the crime of contributing to the delinquency of a minor, a misdemeanor, as provided by section 21 of the Juvenile Court Law (Gen. Laws of Cal. 1923, at p. 1568), which offense was alleged to have been committed within the boundaries of that township. It is then alleged that, after a preliminary hearing, the defendant was held to answer upon said charge by a commitment issued by said justice's court; that thereafter an information was filed in the superior court of said county, sitting as a juvenile court, charging said defendant with said offense; that thereafter said defendant appeared before said superior court, sitting as a juvenile court, the honorable Benjamin F. Warmer presiding, and, after being arraigned, entered a plea of "not guilty." That thereafter the district attorney requested that the matter be set down for trial and be tried in said superior court, sitting as a juvenile court. This motion was denied upon the ground that this court was

without jurisdiction to proceed further. Thereupon the district attorney moved that the said court transfer or certify the case to the superior court for trial, or for further proceedings. This motion was also denied, upon the ground that said court was without jurisdiction to take any further proceedings in the case. The petition further alleges a similar state of facts with reference to another defendant, also charged with a violation of the same section of the Juvenile Court Act, the only difference being that the justice's court of the township of San Bernardino, which township has a population in excess of 30,000, refused to accept jurisdiction to try the case, and thereafter held a preliminary hearing and issued a commitment which was followed by an information filed in the juvenile court. The petition also sets forth a similar state of facts in still another case, in which the defendant was held to answer by the justice's court of the township of San Bernardino, but in which the information was filed directly in the superior court of said county, and not in the juvenile department thereof. Thereafter the defendant entered a plea of "not guilty" in said superior court, and the court refused to set the case for trial, but transferred said case to the juvenile department of said court. Thereupon the defendant was again arraigned in said juvenile court, and, having again entered a plea of "not guilty," said juvenile court refused to set said case for trial, and also refused to certify or transfer the same back to the superior court. The petition sets forth that the justice's court of San Bernardino township, the superior court of San Bernardino county, and the superior court of said county sitting as a juvenile court, have refused, and do now refuse, to accept and entertain jurisdiction in any of said cases.

The only question presented is what court, if any, has jurisdiction to hear and try a case, after a plea of "not guilty" to a charge of violating the provisions of section 21 of the Juvenile Court Law of the state of California has been entered in the juvenile court.

Section 21 of the Juvenile Court Law reads as follows:

"Any person who shall commit any act or omit the performance of any duty, which act or omission causes or tends to cause or encourage any person under the age of twenty-one years to come within the provisions of any of subdivisions one to thirteen inclusive of section one of this act, or which act or omission contributes thereto, or any person who shall, by any act or omission, or by threats, or commands, or persuasion, induce or endeavor to induce any such person, under the age of twenty-one years, to do or to perform any act or to follow any course of conduct, or to so live as would cause or manifestly tend to cause any such person to become or to remain a person coming within

the provisions of any of subdivisions one to thirteen inclusive of section 1 of this act, shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine not exceeding one thousand dollars, or by imprisonment in the county jail for not more than two years, or by both such fine and imprisonment, or may be released on probation for a period not exceeding five years; and the superior court, sitting as a juvenile court, shall have original jurisdiction over all such misdemeanors. The said court shall in all prosecutions under this section, cause the defendant to be duly arraigned and plead to the charge made against him in the manner provided in the Penal Code of the state of California upon an indictment or information; and the said court shall also have jurisdiction in all cases where the defendant prosecuted under this section shall enter a plea of guilty to impose sentence or in its discretion to grant probation upon such terms as it may deem proper. The court may also, as a condition of such probation, require a bond in such sum as the court may designate to be approved by the judge requiring the same, to secure the performance by such person of the condition imposed by the court on such probation. Such bond shall by its terms be made payable to the State of California and any moneys received for the breach thereof shall be paid into the county treasury."

[1] While the Juvenile Court Law has been before the courts a number of times, the question here involved has not been directly passed upon. The question seems to have now arisen in connection with the uncertainty that has followed recent changes in the jurisdiction of justice's courts in criminal matters. It is apparent, however, that under the provisions of section 1425 of the Penal Code, as amended in 1929, no jurisdiction is conferred upon the justice's court to try such cases as those herein involved. Under this section this class of cases is particularly excluded from the jurisdiction of justice's courts in places having a population of 30,000 or more. And in places having a less population the jurisdiction of such courts is limited to cases in which the term of imprisonment does not exceed six months.

[2-4] Section 21 of the Juvenile Court Law, after providing that the superior court, sitting as a juvenile court, shall have original jurisdiction over all such misdemeanors, goes on to provide that said court shall cause the defendant to be arraigned, and to plead in the manner provided upon indictment or information, and then provides that said court shall *also* have jurisdiction to impose a penalty, where the defendant enters a plea of "guilty." There is, however, no procedure provided, and no jurisdiction given where the defendant, at this stage of the proceedings, enters a plea of "not guilty." Jurisdic-

tion is the power to hear and determine a case. *Bennett v. Wilson*, 133 Cal. 379, 65 P. 880, 85 Am. St. Rep. 207. A court acting under special powers has only the jurisdiction especially delegated. While original jurisdiction is given to the juvenile court, the same section, by providing the procedure up to the time of plea, and then specifically giving additional jurisdiction in the event a plea of "guilty" is entered, has so limited the jurisdiction of the juvenile court that it may not proceed to try a defendant who has thus pleaded "not guilty."

[5-9] Where a plea of "not guilty" has thus been entered in the juvenile court, it does not follow that all proceedings must close and the defendant be freed, for such a construction would nullify the penalty provisions of section 21 of the Juvenile Court Act. In the construction of a statute, "all its provisions must be considered together; they must be reconciled as far as possible, and particular provisions must be so construed as to promote and not to defeat the general purposes and policy of the law." *Welch v. Williams*, 96 Cal. 365, 31 P. 222. It must not be forgotten that the juvenile court is the superior court acting in a particular class of offenses. *Edington v. Superior Court*, 18 Cal. App. 739, 124 P. 450, 128 P. 338; *Nicholl v. Koster*, 157 Cal. 416, 108 P. 302, 303; *People v. Budd*, 24 Cal. App. 176, 140 P. 714. The misdemeanor in question has been created by section 21 of the Juvenile Court Law. Section 5 of article 6 of the Constitution of California provides that the superior court shall have jurisdiction in all cases of misdemeanor, not otherwise provided for. If the jurisdiction of this misdemeanor, after a plea of "not guilty" in the juvenile court, is not given to the superior court in section 21 of the Juvenile Court Law, it is not provided for, and, under the constitutional provision, jurisdiction is in the superior court. It has been frequently held that the superior court has jurisdiction over this class of cases. In *re Sing*, 13 Cal. App. 736, 110 P. 693; *Edington v. Superior Court*, supra; *Nicholl v. Koster*, supra; *People v. Budd*, supra. It has also been held that, such a case being triable in the superior court, section 888 of the Penal Code is applicable, and proceedings in the superior court must be based upon an information or an indictment. In *re Sing*, supra; *Gardner v. Superior Court*, 19 Cal. App. 548, 126 P. 501. While it has been held that the judge of the juvenile court may sit as a committing magistrate (In *re Sing*, supra; *People v. Cohen*, 118 Cal. 74, 50 P. 20; *People v. Smith*, 189 Cal. 31, 207 P. 518), all that is required is a preliminary hearing before some magistrate, in order that an information may be filed in accordance with section 888 of the Penal Code. It has also been held that, where a good information has been filed, the superior court has jurisdiction.

People v. De Leon, 35 Cal. App. 467, 170 P. 173; *People v. Young*, 44 Cal. App. 279, 186 P. 383; *People v. Cohen*, 62 Cal. App. 521, 217 P. 78; *People v. McDougal*, 74 Cal. App. 666, 241 P. 598. The juvenile court is itself a superior court, although acting in a particular class of cases, and has an inherent power to transfer a case to another department of the same court, when the limits of its special powers are reached. In the instant cases, the record shows that preliminary hearings had been held and the defendants held to answer and informations filed. It then became the duty of the judge of the juvenile court to arraign the defendants, and in these particular cases the plea of "not guilty" having been entered, it was the duty of the judge of the juvenile court to transfer the cases to the superior court for trial.

[10] That the actual trial of a person charged with a violation of section 21 of the Juvenile Court Act, after a plea of not guilty, should be had in the superior court rather than in the juvenile court, is in harmony with the whole spirit and purpose of the Juvenile Court Law, and the system and procedure based upon it. As the court said in *Nicholl v. Koster*, supra: "The main purpose of the act is to provide for the care and custody of children who have shown, or who from lack of care are likely to develop, criminal tendencies, in order to have them trained to good habits and correct principles." To this end, and with this purpose in mind, the juvenile court has appropriately been given an original jurisdiction over cases wherein the defendant is charged with an offense, the very essence of which is a violation, not only of the statute, but of the very principles and purposes forming the foundation of the entire act. On the other hand, while jurisdiction may well be given the juvenile court in a case so closely related to its own particular work, to punish, or to release on probation, upon suitable terms, one who admits his wrong and takes the first step toward retribution and reformation by pleading guilty, where a defendant pleads not guilty, and must be tried by a jury, this trial should take place in a more appropriate forum. From its very nature, and because of necessary qualification for doing the work for which it is intended, the juvenile court is not designed as a trial court in the ordinary sense. Not only is its purpose more reformatory than punitive, but its method of operation is very different from that of a criminal court. Technicalities and formalities are largely done away with, and its simple procedure is designed to gain the confidence of those coming within its operations, and to enable the judge thereof to best guide and control its wards, with more consideration for their future development than for their past shortcomings. The circumstances attendant upon contested jury trials are not only out of place

there, but might have an injurious effect, not only upon the methods, but upon the atmosphere and confidence that have been built up around the work of the juvenile court, and which are so largely responsible for its success. We think the general aim and purpose of the Juvenile Court Act should be kept in mind in interpreting the section under consideration, and that these furnish an additional reason for the construction herein placed upon it.

Let a writ of mandate issue out of this court, directed to said superior court, and to said judge thereof, directing said judge to transfer the cases mentioned to the superior court of said county, and directing said superior court to accept jurisdiction thereof, and to hear, determine, and render judgment in the same.

We concur: SLOANE, P. J.; MARKS, J.

104 Cal. App. 394

PEOPLE on Complaint of DANE v. CITY OF SAN BERNARDINO.

Civ. 211.

District Court of Appeal, Fourth District, California.

March 7, 1930.

1. Appeal and error ☞612(2)—Appeal from order dismissing action cannot be heard upon transcript certified only by county clerk.

On plaintiff's appeal from order dismissing action, appeal cannot be heard upon transcript certified only by county clerk and not certified or authenticated by trial judge.

2. Appeal and error ☞616(1)—Transcript failing to certify that all papers were included and to state documents set forth were used on hearing held insufficient warranting dismissal for failure to furnish requisite papers (District Court of Appeals Rule 29; Code Civ. Proc. § 954).

Where clerk's transcript on appeal from order dismissing action in clerk's certificate failed to certify that all papers used on hearing below were included in transcript and failed to state that any of documents therein set forth were used on hearing of motion, as required by District Court of Appeals Rule 29, appellant held to have failed to furnish requisite papers warranting dismissal of appeal under Code Civ. Proc. § 954.

Appeal from Superior Court, San Bernardino County; Charles L. Allison, Judge.

Action by the People, on the complaint of Fred Dane, against the City of San Bernardino, to test the validity of certain annexation proceedings. From an order dismissing the action, plaintiff appeals.

Appeal dismissed.

Raymond E. Hodge, of San Bernardino, for appellant.

Fred A. Wilson and Joseph R. Rensch, both of San Bernardino, for respondent.

BARNARD, J.

The above-entitled action was one to test the validity of certain proceedings, under which a certain area adjacent to the city of San Bernardino had been annexed to said city. In the trial court a motion to dismiss was heard after notice given and a minute order was entered by the trial court granting the motion and dismissing the action. From this order the plaintiff appealed.

The only record before us is a "Clerk's Transcript." This is certified to by the county clerk, as containing full, true, and correct copies of the original records on file in his office in said proceeding, consisting of the petition, affidavits, notice of motion to dismiss, minute order dismissing action, notice of appeal, notice of appeal and request for transcript, notice of entry of judgment. The respondent on this appeal has moved for its dismissal, one ground of said motion being that appellant has failed to furnish the requisite papers.

[1, 2] Where the requisite papers are not furnished by the appellant the appeal may be dismissed. Section 954, Code Civ. Proc. Rule 29 of the rules governing this court provides that, in all cases of appeal from an order of the superior court, the papers and evidence used or taken on the hearing of the motion, must be authenticated by incorporating the same in a bill of exceptions, except where otherwise provided by law. In the instant case there is no bill of exceptions and no certificate or authentication of any kind, signed by the trial judge. There is no provision in law permitting the hearing of an appeal in such a matter as this, upon a transcript certified only by the county clerk. Even if there were such provision, the transcript herein would not be sufficient for the reason that the certificate of the county clerk thereto, fails to certify that all of the papers used on the hearing in the court below are included in the transcript. In addition, the clerk's certificate herein fails to set forth or state that any of the documents therein set forth were used on the hearing of said motion, as required by rule 29, above referred to. Appellant has therefore failed to furnish the requisite papers. *Muzzy v. McEwen Lumber Co.*, 154 Cal. 685, 98 P. 1062. No proper record being before us, it becomes unnecessary to pass upon the other ground of the motion to dismiss.

For the reasons given, the motion to dismiss is granted and the appeal dismissed.

We concur: SLOANE, P. J.; MARKS, J.

PACIFIC EMPLOYERS' INS. CO. v. FRENCH
et al.*
Civ. 6611.

District Court of Appeal, Second District, Division 1. California.

Feb. 26, 1930.

Rehearing Granted March 25, 1930.

1. Master and servant $\Rightarrow$ 405(6)—Finding that insurer had no express agreement limiting fees for medical services to employees, held sustained by evidence.

Where it was contended by insurance company, carrying employers' insurance, that it had express agreement with applicants, who were certain physicians and hospitals, fixing amount to be paid for medical services rendered to injured employees, evidence held to support finding of Industrial Accident Commission that no express agreement was in effect when treatment in question was rendered.

2. Insurance $\Rightarrow$ 513—Insurer was properly substituted for employers' liability for medical services to employees sent by employers, with insurer's knowledge, to certain hospital (Workmen's Compensation, Insurance and Safety Act of 1917, § 30, and section 29, as amended by St. 1925, p. 494).

Where employees, who were injured in course of their regular employment, were sent by employers to certain physician and hospital, employers became liable for reasonable value of medical services, and hence insurance company carrying employers' insurance, having been duly notified, was properly substituted for employers' liability, in view of Workmen's Compensation, Insurance and Safety Act of 1917 (St. 1923, p. 857) § 30, and section 29, as amended by St. 1925, p. 494.

Application for certiorari by the Pacific Employers' Insurance Company to review an order of the Industrial Accident Commission fixing the amount to be paid for medical services to J. Rollin French, M. D., and others.

Award affirmed.

F. Britton McConnell, of Los Angeles, for petitioner.

Edward O. Allen, of San Francisco, J. L. Kearney, of Los Angeles, and G. C. Faulkner, of San Francisco, for respondents.

YORK, J.

Petitioner raises the point that there was an express agreement between the applicants (who were persons and institutions rendering medical aid) and the defendant (which was an insurance carrier), fixing the amount to be paid for the services that were rendered to the injured employees.

It is conceded that if there was an express agreement, in full force and effect on the date or dates that the various medical services were rendered, the Commission was without power to make the award. Workmen's

Compensation, Insurance and Safety Act of 1917 (St. 1917, p. 846), § 17 (b). The Industrial Accident Commission made a finding that the evidence did not establish that at the time the treatment was rendered there existed an express agreement between applicants and defendant fixing the amount to be paid for the services rendered, and this finding was made upon testimony which showed that there had been such a contract, but that at a time prior to the time of the injuries to the two employees, a general notice, purporting to terminate any employment of the persons and institutions that rendered the medical treatment, had been served upon the respondents, French and Golden State Hospital, by the insurance company. Part of the notice read as follows: "You are hereby notified that on all cases of injured employees of employers insured by this company, where X-rays are desired, the case must be referred to Dr. C. E. Early, 1055 Roosevelt Building, Los Angeles." Dr. Early was a former associate of Dr. J. Rollin French, one of the respondents herein, they apparently having been in partnership at the time of the making of the original agreement.

The second paragraph of the letter is as follows: "On all cases coming under your care of employees of employers insured in this company that, in your opinion, require hospitalization, they must be sent to the Angelus Hospital, 1925 Trinity Street, Los Angeles."

On the one hand, the petitioner is claiming that there was an express and unrevoked agreement between the parties fixing the amount to be paid for such services. On the other hand, the respondents are contending that there never was any agreement between the parties, but that if there was such an agreement, it was revoked by the letter of May 15, 1928.

[1] The Industrial Accident Commission made its finding that there was no such express agreement in effect when the treatment was rendered. Although the evidence as to both of these findings is not very definite or positive, under the rules of evidence laid down covering the taking of evidence before the Industrial Accident Commission, there was sufficient evidence for the Commission to make its findings. That being true, we are of the opinion that there is nothing in any of the points made by petitioner herein, as each of the points raised constitutes merely a repetition in different phraseology of the same proposition.

[2] There was testimony at the hearing that the petitioner herein was the insurance carrier of the two employers of the injured men at the time they sustained their injuries; that Dr. French and the Golden State Hospital rendered treatment to the injured men,

Carpenter and Norgaard. Thereupon the employers, who sent these men to obtain this treatment, became liable for the reasonable value of the services so rendered, since the men were injured in the course of their regular employment. The insurance carrier had agreed to assume and carry this liability, and as we are of the opinion that the insurance carrier assumed such liability, it was therefore properly substituted for the liability of the employers. Section 30, Workmen's Compensation etc. Act, chap. 586, Laws of 1917, and section 29, as amended by chap. 300, Laws of 1925.

The evidence in the given case showed that when the employers sent the injured men to the respondents for treatment, the insurance company for the employers was at once notified that these men were receiving treatment. The insurance carrier, however, made no effort to transfer the cases or to designate other doctors to take care of the injured men. The reason that the injured men went to Dr. French and the Golden State Hospital for treatment was that the employers gave to the injured men cards that had theretofore been furnished by the insurance company to the employers, which cards gave directions as to where the injured employees were to go to receive treatment, and how they were to get there. These printed slips contained the address of the Golden State Hospital, and that place was designated, and Dr. French was designated by the petitioner herein in such printed card.

The award is affirmed.

We concur: CONREY, P. J.; HOUSER, J.

104 Cal. App. 313

BUNNELL v. BAKER.*
Civ. 128.

District Court of Appeal, Fourth District,
California.

March 4, 1930.

As Modified on Denial of Rehearing March 31,
1930. Hearing Denied by Supreme
Court April 28, 1930.

1. Sales $\S$ 481—"Value" of motortrucks, in determining damages of buyer for wrongful repossession by conditional seller, held to mean resale price, and not worth of buyer's interest (Code Civ. Proc. $\S$ 16, 1861).

In action on conditional sales contract by assignee of seller to obtain possession of motortrucks sold, value of motortrucks, as fixed by jury in determining damages buyer was entitled to for wrongful repossession by plaintiff, held to mean price at which trucks could have been bought and sold in market, and not worth of special or limited interest of buyer, since under Code Civ. Proc. $\S$ 16, 1861, "value" could not

be given a special or limited meaning, as distinguished from its usual definition, unless intention to so use it appeared, and buyer being only entitled to recover for his limited interest.

[Ed. Note.—For other definitions of "Value," see Words and Phrases.]

2. Sales $\S$ 481—Conditional buyer could recover only value of trucks wrongfully repossessed less unpaid purchase price.

In action on conditional sales contract by assignee of seller to obtain possession of motortrucks in which buyer filed cross-complaint for wrongful repossession of trucks, buyer held not entitled to judgment for full market value of motortrucks, but only to value of his special interest in them, in case delivery of them could not be made; the value of buyer's interest being determined by taking market value of trucks and deducting therefrom amount of purchase price remaining unpaid.

Appeal from Superior Court, Riverside County; G. R. Freeman, Judge.

Action by F. O. Bunnell, an individual doing business under the fictitious name of F. O. Bunnell Company, against Earl Baker, in which the defendant filed cross-complaint. Judgment for defendant, and plaintiff appeals.

Reversed.

Beecher S. Stowe, Ben S. Hunter, and L. E. Dadmun, all of Los Angeles, for appellant.
A. Heber Winder, of Riverside, and John J. Craig, of Los Angeles, for respondent.

MARKS, J.

On June 1, 1927, the Mack International Truck Corporation, as seller, entered into a conditional sales contract with respondent, as purchaser, whereby the seller agreed to sell to the buyer four Mack trucks for the sum of \$14,081.60, upon which a cash payment of \$10,500 was acknowledged. The balance of \$3,581.60 was made payable in seven installments, the first six of which were in the sum of \$500 each and the seventh in the sum of \$581.60. The first installment became due on July 14, 1927, and the balance on the 14th day of each month thereafter. Deferred payments were made to bear interest at the rate of 8 per cent. per annum. The sales contract contained the provisions usually found in such agreements. It reserved title in the seller and gave it the right to retake possession of the trucks in case of a default in the payments by the buyer. The contract was a renewal of former conditional sales contracts for the same trucks which, when new, sold for over \$22,000. The buyer defaulted in some of his payments on this renewed contract, but his defaults were all waived by the seller, except, perhaps, that made by his failure to pay the one falling due on December 14, 1927. It is not necessary to decide here the question of whether

*For opinion denying rehearing, see 286 P. 1090. Hearing denied by Supreme Court.

or not the failure of respondent to make this payment, when due, was waived by the seller.

Appellant was a dealer in trailers and truck equipment. He sold respondent two trailers and some extra wheels for the trucks upon a conditional sales contract and had trouble in making his collections. About December 10, 1927, he entered into negotiations with the Mack International Truck Corporation for its conditional sales contract with respondent, and on December 17, 1927, it was assigned to him. He claims to have paid the Mack International Truck Corporation \$2,968.25 for the contract, but the evidence on this point is not very clear.

On the morning of December 27, 1927, the four trucks were attached by the sheriff of Riverside county, in an action filed in Riverside county, entitled Van Rowen against Baker (respondent here). The next case filed was the one at bar in which appellant sought to gain possession of the trucks. The complaint alleges that they were in the possession of respondent, but whether or not this allegation was true when the complaint was filed is not entirely clear from the record. The same attorney acted for both plaintiffs. The writ was issued in the case before us, and five days thereafter the attachment was released and the trucks delivered into the possession of appellant. Respondent filed an answer and cross-complaint whereby the material allegations of the complaint were denied, and possession of the trucks, or their value, which he placed at \$15,000, was sought, together with damages for withholding the same and also \$10,000 as exemplary damages.

The case was tried before a jury, which returned a verdict against appellant and in favor of respondent and fixed the value of the trucks on the day of the trial at the sum of \$10,000 and awarded him actual damages in the sum of \$15,000 and exemplary damages in the sum of \$1,000. Judgment was entered accordingly.

Respondent had not paid the full purchase price of the trucks on December 17, 1927. It would appear that there was a balance of \$1,581.60 on the principal, being the installments falling due on November 14 and December 14, 1927, and on January 14, 1928, and \$68.89 interest unpaid on that date. It also appears that there were unpaid balances due from respondent which are referred to in the record as "San Francisco account, \$22.60, Oakland account, \$490.95, Los Angeles account, \$69.75." There was also an unpaid account of \$501.47, due from respondent to a garage owner in Fresno which had been assigned to appellant.

The conditional sales contract contained the following provisions: "All bills for repairs done upon, and labor and material furnished by the Seller to or for said personal property before the final payment thereon

is made, shall be added to the purchase price of said personal property, and be payable to the seller on or before the 10th day of the next succeeding month, and shall bear interest and be subject to all the terms of this contract, as though an original part of the purchase price of said personal property."

Of course, this provision would not permit the amount of the Fresno account to be added to the purchase price of the trucks as the labor and materials were not furnished by the seller. It does not appear that all of the items of charges composing the other accounts were for "repairs done upon, and labor and materials furnished by the seller to or for" the trucks. While it would seem that some of the charges might properly be added to the contract price of the trucks, it is intimated that others were for gasoline and oil which could not become part of the purchase price under the contract. From the record before us we cannot determine the amount unpaid under the terms of the conditional sales contract at the time suit was instituted by appellant. This makes it impossible for us to determine whether an attempted tender made by respondent to appellant was good in law.

Appellant urges many grounds for a reversal of the judgment, but we find it necessary to consider but one of them.

The court instructed the jury in part as follows:

"It is the duty of the jury to determine from all the evidence herein as to which of the parties were entitled to possession of said property on the 27th day of December, 1927. If you find the defendant was entitled to possession on that date then you shall find from the evidence the reasonable value of the property and also the amount of the damages defendant has sustained by reason of being deprived from the possession which is the reasonable rental value of said property for the stipulated time of 300 days, and if you find that the taking of this property was with intention to cause defendant oppression, fraud or malice, either express or implied; this is for sake of example and by way of punishment."

"The jury is instructed that if you find in favor of the defendant Baker, your verdict must be that the trucks shall be returned to the defendant and if such return cannot be had, then defendant shall recover of and from plaintiff, the value of the trucks on the day of trial, at such sum as you may fix. Your verdict shall then include that defendant Baker shall recover of and from plaintiff, the reasonable rental value thereof since the 27th day of December, 1927. If you find that plaintiff has been guilty of oppression, fraud or malice, actual or presumed, you may also award defendant such damages as you determine him to be entitled to."

The form of the verdict submitted to the jury was as follows:

"We, the jury in the above entitled action, find judgment for the defendant, Earl Baker, that the four trucks mentioned and described in the complaint be returned to defendant and we further find that the value of said trucks on the day of trial was the sum of \$ ——. We further find judgment for the defendant as reasonable damages sustained by defendant to be the reasonable rental value of said trucks since December 19th, 1927, to date hereof in the sum of \$ ——; and we further find that the defendant is entitled to exemplary damages and fix the same in the amount of \$ ——."

[1] It will be observed that the court instructed the jury to find the value of the trucks on the day of the trial, which it did. There were no other instructions given on the question of value. While the word "value" has various shades of meaning, it was undoubtedly used in the instructions in the sense of the sum for which the trucks might be bought and sold in the open market. This is a well-recognized and commonly understood definition of the word, and one which the jury undoubtedly used in arriving at the figure fixed in the verdict. It corresponds to the value placed upon the trucks by respondent and his witnesses. There is nothing in either the testimony of the witnesses or in the verdict to indicate that the term was used in the sense of the value of the interest of respondent in the trucks, as distinguished from their value in the open market. The term cannot be given a limited or special meaning, as distinguished from its usual definition, unless an intention to so use it appears. Section 16, Code Civ. Proc.; section 1861, Code Civ. Proc. We must therefore hold that when the jury fixed the value of the trucks at \$10,000, it meant the price at which they could be bought and sold in the market, and not the worth of the special or limited interest of respondent in them. This is especially true in view of the fact that we find it impossible to determine the total amount unpaid on the conditional sales contract from the record before us, and therefore cannot determine the value of respondent's interest in the trucks.

[2] The interest of respondent in the trucks was not the entire estate therein, but was special and limited. The value of his interest should have been determined by taking the market value of the trucks and deducting therefrom the amount remaining unpaid under the terms of the conditional sales contract. In case delivery of the trucks could not be made, he was not entitled to a judgment for the full market value of the trucks, but only to the value of his special interest in them. *Lindsey v. Butte* (Cal. App.) 274 P.

428; *Connell v. Hogg*, 181 Cal. 730, 186 P. 134; *Conolley v. Power*, 70 Cal. App. 70, 232 P. 744; *Griffith v. Reddick*, 41 Cal. App. 458, 182 P. 984. As the jury evidently followed the instructions of the court and found the full market value of the trucks at the time of trial, and judgment was entered for this amount in case the trucks were not returned to respondent, we must conclude that the giving of the instructions on the question of value was prejudicial error requiring a reversal of the case.

Appellant in both his brief and in oral argument urged that there was misconduct on the part of the trial judge in remarks made by him in the presence and hearing of the jury. We cannot agree with appellant, and find nothing in the record to sustain this contention. He also urged that there is no evidence in the record sustaining the judgment for exemplary damages. Again we cannot agree with him. We would not disturb this portion of the judgment were the record free from other errors.

Judgment reversed.

We concur: SLOANE, P. J.; BARNARD, J.

KRAUSE et al. v. RARITY et al.★
Civ. 6963.

District Court of Appeal, First District, Division 2, California.
Feb. 19, 1930.

Rehearing Denied March 21, 1930. Hearing Granted by Supreme Court April 17, 1930.

1. Trial ⇨165—Motion for nonsuit admits truth of plaintiff's evidence and every legitimate inference therefrom, and on such motion evidence should be interpreted most strongly against defendants.

Motion for nonsuit admits truth of plaintiff's evidence and every inference which can be legitimately drawn therefrom, and on such motion evidence should be interpreted most strongly against party making motion.

2. Negligence ⇨93(1)—Guest, riding in rear seat of automobile when struck by train, having no power or control over driver or automobile, cannot be contributorily negligent.

Guest, riding in automobile in rear seat when struck by train at crossing, having no power or control over driver or automobile, and never attempting to exercise any, cannot be held contributorily negligent, since under such circumstances negligence of driver cannot be imputed to guest.

3. Automobiles ⚡224(3)—Railroads ⚡327 (12)—Guest, riding in rear seat and having no power or control over driver or automobile, held not required to warn driver of approaching danger of collision at railroad crossing.

Guest, riding in rear seat of automobile, having absolutely no power or control over driver or automobile, and never attempting to exercise any, held not required to warn driver of approaching danger of collision at crossing.

4. Automobiles ⚡242(8)—Railroads ⚡346(5)—Presumption exists that guest in rear seat of automobile used due care and caution for his own protection.

Presumption exists that guest, riding in rear seat of automobile and killed when automobile was struck by train at railroad crossing, used due care and caution for his own protection, and did all that was reasonably required.

5. Automobiles ⚡245(87)—Railroads ⚡350 (21)—Riding in automobile driven by man with only one eye held not contributory negligence as matter of law.

Riding in automobile driven by man with only one eye held not contributory negligence as matter of law.

6. Automobiles ⚡224(3)—Railroads ⚡327 (12)—That driver of automobile was blind in one eye was mere fact to be considered with all other facts and circumstances in determining contributory negligence of guest.

In action for damages for death in railroad crossing collision of guest, against driver of automobile and railroad, fact that driver was blind in one eye held merely a fact to be considered by jury with all other facts and circumstances in determining whether deceased was guilty of contributory negligence.

7. Automobiles ⚡245(87)—Railroads ⚡350 (21)—Contributory negligence of guest, riding in rear seat of automobile when struck by train at crossing, held for jury.

In action for death of guest riding in rear seat of automobile, which was struck by train at crossing, deceased's contributory negligence held question of fact for jury.

8. Automobiles ⚡245(24)—Railroads ⚡350 (22)—Negligence of driver of automobile, struck by train at crossing, held for jury under testimony showing country was strange, that view was obstructed, and he saw nothing.

In action for death of guest riding in rear seat of automobile, which was struck by train at crossing, negligence of driver held question of fact for jury, where he testified he was unacquainted with country and road, and did not see warning signs or railroad tracks or engine, and heard no signal, and that view was obstructed.

9. Negligence ⚡93(1)—Heirs of guest riding in automobile struck by train could recover against railroad, if negligent, notwithstanding driver's negligence.

Though driver of automobile may have been guilty of negligence as matter of law at time of collision with train at crossing, if railroad was guilty of negligence proximately causing death,

heirs of decedent, who was guest in automobile, would not be barred from recovery, since negligence of driver could not, under such circumstances, be imputed to guest.

10. Railroads ⚡350(6)—Negligence of railroad, causing collision with automobile at crossing resulting in death of guest, held for jury.

In action for damages for death of guest, riding in rear seat of automobile which was struck by train at crossing, railroad's negligence held question of fact for jury.

11. Trial ⚡143—Directed verdict is not authorized, where there is any conflict in evidence of a substantial character.

Where there is any conflict in evidence of a substantial character, directed verdict is not authorized.

12. Railroads ⚡350(7)—Whether signals required of train approaching crossing were given held question for jury, where testimony in regard thereto was conflicting.

In action for damages for death of guest riding in rear seat of automobile when struck by train at crossing, conflicting testimony regarding giving of signal by train when approaching crossing held to present question of fact for jury whether signals were given.

13. Damages ⚡96—New trial ⚡74—Amount of damages in personal injury action is within sound discretion of jury, or trial judge on motion for new trial (Code Civ. Proc. § 657, subd. 5).

Amount of damages in personal injury action is committed first to sound discretion of jury, and next to discretion of trial court, who, in ruling on motion for new trial, may consider evidence anew, determine anew facts, and set aside verdict, if excessive, under Code Civ. Proc. § 657, subd. 5.

14. Appeal and error ⚡1004(3)—Decision of trial court and jury on amount of damages cannot be set aside, unless plainly and outrageously excessive, suggesting passion, prejudice, or corruption.

Decision of trial court and jury on amount of damages cannot be set aside, unless verdict is so plainly and outrageously excessive as to suggest at first blush passion, prejudice, or corruption.

15. Death ⚡99(4)—\$35,000 for death of husband and father 42 years old, in good health, with annual income over \$4,000 and life expectancy over 26 years, held not excessive.

\$35,000 to two minor children and wife for death of husband and father 42 years of age, in good health, with proven income of from \$4,000 to \$5,000 per annum, and an expectancy of life of 26.72 years, and contributing from \$250 to \$300 per month to children and wife held not excessive.

16. Death ⚡11—Right of action against automobile driver for death of guest was statutory (Code Civ. Proc. § 377).

Right of action against driver of automobile to recover for death of guest was statutory

right depending on Code Civ. Proc. § 377, since no such right of action existed under common law.

17. Automobiles ⇨242(1)—Plaintiffs, suing for death of guest in automobile, were required under statute to prove only lack of ordinary care on part of defendant; "wrongful act or neglect" (Code Civ. Proc. § 377; Civ. Code, § 2096).

In action against driver of automobile for death of guest brought under Code Civ. Proc. § 377, plaintiffs were only required to prove lack of ordinary care on part of defendant, under Civ. Code, § 2096, since "wrongful act or neglect" mentioned in Code Civ. Proc. § 377 was in such case failure to use ordinary care and diligence.

[Ed. Note.—For other definitions, see Words and Phrases, Third Series, Wrongful Act or Neglect.]

18. Death ⇨9—Statutes respecting actions for wrongful death held amended by vehicle act, in so far as rights of guest in vehicle on public highway are concerned (Code Civ. Proc. §§ 376, 377; Civ. Code, §§ 1714, 2096; California Vehicle Act 1923, as amended, § 141¾, as added by St. 1929, p. 1580).

Code Civ. Proc. §§ 376, 377, and Civ. Code, §§ 1714, 2096, respecting right of action for wrongful death, were amended by California Vehicle Act (St. 1923, p. 517, as amended), § 141¾, as added by St. 1929, p. 1580, in so far as rights of guest riding in vehicle on public highway are concerned, inconsistent portions of former statute being repealed by implication, since under latter statute plaintiff is required to prove death was proximately caused by intoxication, willful misconduct, or gross negligence of person responsible for operation of vehicle.

19. Death ⇨9—Right to sue for death or injury to guest in automobile is not destroyed by statute, but degree of negligence required to be proved is greater (California Vehicle Act 1923, as amended, § 141¾, as added by St. 1929, p. 1580).

Right of guest in automobile to sue, or, in case of his death, right of his heirs or personal representative to sue for injury or death, is not destroyed or impaired by enactment of California Vehicle Act (St. 1923, p. 517, as amended), § 141¾, as added by St. 1929, p. 1580, but degree of negligence required to be proved by guest is greater under new statute.

20. Statutes ⇨267(2)—Statutes are not to be construed as retroactive so as to affect pending litigation, unless such intent is expressly declared or necessarily implied; "retrospective law."

While Legislature has power to pass retroactive laws which do not impair obligations of contracts or affect injuriously vested rights, statutes are not to be construed as intended to have retroactive effect so as to affect pending litigation, unless such intent is expressly declared or necessarily implied; "retrospective law" being one which operates on matters which occurred or rights and obligations which existed before time of enactment.

[Ed. Note.—For other definitions, see Words and Phrases, First, Second, and Third Series, Retrospective Law.]

21. Automobiles ⇨6—Death ⇨9—Statute respecting right of action for injury or death of guest in automobile held not retroactive (California Vehicle Act 1923, as amended, § 141¾, as added by St. 1929, p. 1580; Civ. Code, §§ 3, 14).

California Vehicle Act (St. 1923, p. 517, as amended), § 141¾, as added by St. 1929, p. 1580, respecting right of action for injury or death of guest in automobile on highway, held not retroactive under Civ. Code, §§ 3, 14, since words used are in present tense.

Appeal from Superior Court, Fresno County; S. L. Strother, Judge.

Action by Betty Krause and another, minors, by their guardian ad litem, Lena Krause, and another, against John W. Rarity and another. Judgment for plaintiffs, and defendants appeal.

Affirmed.

Superseding opinion in 283 P. 886.

Leo J. McEnerney, of San Francisco, and Ray W. Hays, of Fresno, for appellant Rarity.

Robert Brennan, M. W. Reed, E. T. Lucey, Leo E. Sievert, and H. K. Lockwood, all of Los Angeles, for appellant Atchison, Topeka & Santa Fé Railway Company.

H. A. Frank, of Oakland, for respondents.

PRESTON, Justice pro tem.

Appellant Rarity, in his petition for a rehearing in this court, makes the contention for the first time that the cause of action upon which plaintiffs recovered judgment was abated by the enactment of section 141¾ of the California Vehicle Act, which became effective on August 14, 1929. To enable us to consider that question a rehearing was granted. On the other issues involved our original opinion filed December 26, 1929 (283 P. 886), is adopted as the decision of this court, which reads as follows:

This is an appeal by the defendants John W. Rarity and the Atchison, Topeka & Santa Fé Railway Company, a corporation, from a judgment entered against them upon a verdict of a jury in the sum of \$35,000. Plaintiffs are the wife and two minor children, who are the sole heirs, of William Krause, deceased, and they brought this action, charging that William Krause's death was due to negligence of the defendants John W. Rarity and the Atchison, Topeka & Santa Fé Railway Company.

On September 12, 1927, at about the hour of 6 o'clock p. m., said William Krause and one O. E. Orr were guests and passengers of the defendant John W. Rarity in his Jewett coach automobile. Rarity was driving said automo-

bile in a westerly direction along a public highway in Fresno county known as "Central Avenue," which is a rural highway, paved and practically level. Across said highway the appellant Atchison, Topeka & Santa Fé Railway Company owned and operated a railroad track and railroad, extending in a northerly and southerly direction, and known as "Mattie Spur." The country surrounding the place where the collision occurred is practically level. The railway track was about one foot lower than the paved highway. At the time of the accident there was a ditch about 3 feet high on the north side of Central avenue and parallel thereto. Upon this bank there was at the time a growth of foliage, which varied in height from 1 to 5 feet. For a quarter of a mile immediately east of the railway there was at the time of the accident a grape vineyard. The rows in this vineyard, which extended in an easterly direction, were about 6 feet high and the vines were in full foliage.

About 12 or 14 feet east of the railway tracks, and about 12 feet north of the highway, there was a standard railroad crossing sign. It consists of an upright post, approximately 10 feet high, painted white, and at the top of which are two crossarms, painted white, with the words "Railroad Crossing" in large black letters thereon. About 300 feet east of the railroad and 20 feet north of the highway there was a smaller sign, a target sign, consisting of an upright post 6 feet high, at the top of which is a metal disc about two feet in diameter, with the letters "R R" in black on a white background. One of the witnesses testified that this sign, at the time of the accident, was hidden by weeds. There was, at the time of the accident, one tree on the north line of the highway, about 70 feet east of the track. This tree stands 20 feet high and is approximately 12 feet across the spread of its branches. On the south line of the highway, east of the tracks, was a row of olive trees that came within about 28 feet of the railroad tracks.

As said automobile was attempting to cross said spur track it was struck by a locomotive of the appellant Atchison, Topeka & Santa Fé Railway Company, and as a result of said collision the said William Krause received injuries from which he died almost instantly.

Plaintiffs allege that the death of William Krause was caused by the negligence and careless operation and handling of the automobile by defendant John W. Rarity, and contributory thereto and concurrent therewith the negligence and carelessness of defendant Atchison, Topeka & Santa Fé Railway Company in so operating and conducting its locomotive as to drive the same toward and upon said highway crossing without giving or sounding any warning whatsoever of the approach thereof, either by sounding a whistle, bell, or otherwise.

The defendants and appellants filed separate answers and have also prosecuted separate appeals.

The appellant railway company in its answer interposed a general denial, and further pleaded as an affirmative defense that the injuries to and death of said William Krause were contributed to and proximately caused by his own negligence in this: That at all times after said William Krause came within 300 feet of said crossing, the locomotive and train of defendant railway company, which was approaching said crossing, were plainly visible, and the noise of the train and engine were plainly audible to said William Krause, and that said William Krause did not look for any train that might be approaching upon defendant railway company's track, and did not warn or caution the driver of said automobile that said automobile was approaching a railway track, and should be operated cautiously and under control, and did not listen for the noise of any train that might be approaching said crossing.

As a further and separate defense to said complaint said railway company alleged that the collision and injuries to and the death of said William Krause were contributed to and proximately caused by his own negligence in this: That he permitted the driver of said automobile to operate the same at a high rate of speed as the same approached the railway crossing and as said William Krause knew that said automobile was so approaching said crossing, and said William Krause so allowed the said automobile to be driven at a high and dangerous rate of speed to and upon the said crossing without cautioning or warning the driver of said machine to approach said crossing with his machine under control, with an opportunity to look for and listen for any train or engine that might be approaching said crossing.

The answer and defense of John W. Rarity was substantially as follows: That at the time of the collision he was operating his automobile with reasonable care and at a lawful and proper rate of speed; that he did not know of the existence of the railway track, or of the fact that a railway track crossed Central avenue; that he did not hear or see the locomotive until it was too late for him to avoid collision with it; that he did not know of the approach of the locomotive, because of the fact that no whistle was blown or bell rung, and because of the fact that the foliage upon the north side of Central avenue obscured the locomotive from his view; that he had only one eye, and that by reason thereof his vision was limited; that, because of the fact that the setting sun was directly in the line of his vision, he watched the highway directly ahead of him, and that because of the position of the sun he could not and did not see the railway sign; and that, as he was at that time driving in a rural district, he was

driving at a lawful and proper rate of speed, to wit, 30 miles an hour. Appellant Rarity contended throughout the trial that, because of the conditions outlined, the burden was cast upon respondents to show that he was negligent in operating his automobile, under the circumstances shown by the evidence.

The appellant railway company first contends that the court erred in denying its motion for a nonsuit. In support of this contention it is argued, first, that deceased, William Krause, was guilty of contributory negligence as a matter of law; second, "the accident was solely and proximately caused by the negligence of defendant Rarity."

[1, 2] In considering whether or not the motion was properly denied, it is important to keep in mind the court's power and limitations with reference to the granting of nonsuits. The motion admits the truth of plaintiffs' evidence and every inference which can be legitimately drawn therefrom, and upon such motion the evidence should be interpreted most strongly against the party making the motion, which in the case at bar would be the appellant railway company. *Stieglitz v. Settle*, 175 Cal. 131, 165 P. 436; *Goldstone v. Merchants Ice & Cold Storage Co.*, 123 Cal. 625, 56 P. 776; *Estate of Arnold*, 147 Cal. 583, 82 P. 252; *Bloom v. Allen*, 61 Cal. App. 28, 214 P. 481; *Bakos v. Shell Oil Co. of California* (Cal. App.) 271 P. 127; *Gregg v. Western Pac. R. R. Co.*, 193 Cal. 212, 223 P. 533. In the light of the foregoing well-established rules, let us examine first the evidence touching the alleged contributory negligence of the deceased. The evidence is undisputed that William Krause, the deceased, was a guest of John W. Rarity, and at the time of the accident was sitting in the rear seat of Rarity's automobile, and had absolutely no power or control over Rarity or the automobile in which he was riding, and never attempted to exercise any. Under such circumstances alone Krause could not be held guilty of contributory negligence, for the law is well settled in this state that the negligence of the driver of the machine cannot be imputed to a passenger therein, in the absence of any evidence showing that the latter exercised some control over the driver, or that he possessed the power to supervise or direct the manner in which the automobile should be operated. *Bryant v. Pacific Electric Ry. Co.*, 174 Cal. 737, 164 P. 385; *Irwin v. Golden State Auto Tour Corp.*, 178 Cal. 10, 171 P. 1059; *Nichols v. Pacific Electric Ry. Co.*, 178 Cal. 630, 174 P. 319; *Marchetti v. Southern Pacific Co.* (Cal. Sup.) 269 P. 529, 530. Therefore, if deceased was guilty of contributory negligence, it must have been some act either of commission or omission on his part, other than being a mere guest of Rarity, which of itself constituted contributory negligence. There is, however, no evidence in the record tending to

show any such act of negligence on the part of the deceased.

[3] It is argued by the defendant railway company that the railroad signs, track, and engine were open and visible to deceased, and that he should have warned Rarity of the approaching danger, etc. Practically the same contention was made in the case of *Marchetti v. Southern Pacific Company*, supra, and there the Supreme Court said:

"This argument, we think, is satisfactorily and completely answered by the following statement of the law on this subject, found in 3 Cal. Jur. pp. 853 and 854: 'A passenger in a motor vehicle approaching a railway crossing is under no legal obligation to warn the driver, either of the presence of the tracks or of an approaching train; the view being unobstructed and the driver reasonably competent and vigilant. And, while it is the passenger's duty to look and listen, it is not his duty to stop for a successful observation, since he has no authority over the driver, but is wholly subject to the latter's action. The passenger has a right to suppose that the driver, on approaching a railway crossing with which he is familiar, will exercise due care for the protection and safety of his passengers, and that, even when so near the crossing as to be in apparent danger of collision with an on-coming train, he will or may take some action which will avert an accident. Nor is the passenger obliged, even when the danger of collision becomes suddenly imminent, to displace the driver, seize the operating levers and endeavor to avoid the impending catastrophe. Nevertheless, it has been said that the passenger must look out for himself, and may not, in a place of danger, as on approaching a railway crossing, rely blindly on the driver. But a passenger in a machine operated by another cannot be said as a matter of law to have been negligent in not calling the chauffeur's attention to the danger of a collision.'

The facts of the *Marchetti Case* are very similar to those in the case at bar, and we deem the foregoing a sufficient answer to the railway company's contention.

[4] Appellant railway company further insists that, if deceased had used ordinary care for his own safety, he would have seen and heard the locomotive and could have warned Rarity of the impending danger in time to have averted the accident, and, having failed to do so, was guilty of contributory negligence as a matter of law. In support of this contention the following cases are cited: *Parmenter v. McDougall*, 172 Cal. 306, 156 P. 460; *Thompson v. L. A.*, etc., *Railway Co.*, 165 Cal. 748, 134 P. 709; *Bressee v. Los Angeles Traction Co.*, 149 Cal. 131, 85 P. 152, 5 L. R. A. (N. S.) 1059. These cases, undoubtedly, contain a correct statement of the law upon the subject of a passenger's duty

in case of *known danger*. They have little or no application to the case at bar, for the reason already stated, and for the additional reason that it does not appear that there was anything that could have been done by the deceased which would have averted the collision, had deceased seen the engine or track in time to have warned Rarity of the impending danger, and there is no assurance that the latter could have brought his machine to a stop before reaching the railroad tracks.

Furthermore, Rarity and Orr both testified that they did not see the crossing signs, or hear the engine, and that no bell was rung and no whistle blown. They were seated in the front seat of the automobile, and there is some evidence in the record that Rarity's view was somewhat obstructed. This testimony is some justification for assuming that deceased, who was in the rear seat of the automobile, did not hear the noise of the engine, or hear the bell or whistle, or see the cross signs, and also some evidence that the bell was not rung nor the whistle blown. Another witness, a lady living near by, also testified that no bell or whistle or other warning was given by the railroad engine. There is a presumption that deceased used due care and caution for his own protection, and did all that was reasonably required of him. There is no evidence in this case to overcome or dispel this presumption. See *Marchetti v. Southern Pacific Co.*, supra; also *Shields v. King* (Cal. Sup.) 277 P. 1043.

In *Carpenter v. Atchison, etc., Ry. Co.*, 51 Cal. App. 60, 195 P. 1073, 1075, the court said: "Conceding that deceased did see the approaching train and said nothing to the driver of the automobile or otherwise interfered with his operation thereof, nevertheless we cannot say as a matter of law that by reason of such omission he was guilty of negligence. * * * The sole ground upon which the negligence of deceased is predicated is the fact that he could, had he looked, have seen the approaching train, and therefore, argues respondent, he should in the exercise of ordinary care for his safety have done something to escape the result of the collision. This question, however, in view of the presumptions arising, is one of fact to be determined by the jury from all the circumstances in the case."

[5-7] Appellant railway company contends that deceased was guilty of negligence as a matter of law for riding in a car driven by a man with only one eye. No authority is cited in support of this contention. The only testimony in the case regarding Rarity's eyesight is that he lost his left eye some 16 years before the accident; that he had been driving an automobile for 8 or 9 years prior to the accident, and that so far as he knew his vision was not affected by the missing eye, and

that the eyesight of the remaining eye was good. The fact that Rarity was blind in one eye was a fact to be considered by the jury with all the other facts and circumstances in the case, in determining whether deceased was guilty of contributory negligence. We cannot say as a matter of law that deceased was guilty of contributory negligence. In view of all the facts and circumstances in the case, the question of contributory negligence on the part of deceased was one of fact to be determined by the jury.

[8] Neither can we say as a matter of law that "the accident was solely and proximately caused by the negligence of the defendant Rarity." Under the authority of such cases as *Koster v. Southern Pacific Co.* (Cal. Sup.) 279 P. 788, *Barnett v. Atchison, Topeka & Santa Fé Railway Co.* (Cal. App.) 278 P. 443, *Hoffman v. Southern Pacific Co.* (Cal. App.) 281 P. 681, and *Young v. P. Elec. R. Co.* (Cal. Sup.) 283 P. 61, and the physical facts as the railway company contends existed at the time of the collision, Rarity was undoubtedly guilty of negligence, as a matter of law. There are, however, several material differences between the facts in the above cited cases and the case at bar, as far as Rarity is concerned. For example: In the instant case, Rarity and Orr both testified they were unacquainted with the country and road, and did not see the warning signs or the railroad track or engine, and heard no signal, and that the view was obstructed in the manner above set forth. We are of the opinion that Rarity's negligence was also a question of fact for the jury.

[9, 10] However, the law is well settled that although Rarity, the driver of the car, may have been guilty of negligence as a matter of law, nevertheless, if the appellant railway company was guilty of negligence proximately causing the death of William Krause, the heirs of Krause, who was a guest of Rarity's in the car, would not be barred from a recovery, as such negligence of Rarity could not be, under the circumstances, imputed to Krause. This was also a question of fact for the jury. *Baldwin v. Pacific Electric Railway Co.* (Cal. Sup.) 281 P. 380. We conclude, therefore, that the trial court did not err in denying the motion for a nonsuit.

[11] The appellant railway company also contends that the court erred in refusing to direct a verdict in favor of said appellant at the close of all the evidence. We are unable to agree with this contention. The law is well settled that a directed verdict is not authorized, where there is any conflict in the evidence of a substantial character. *Kohn v. National Film Corporation*, 60 Cal. App. 112, 212 P. 207; *Estate of Fleming*, 199 Cal. 750, 251 P. 637; *Estate of Baldwin*, 162 Cal. 471, 123 P. 267; *Young v. Pacific Electric Ry. Co.*, supra.

[12] In this case there is a decided conflict between the testimony of the employees of the railway company and the other witnesses as to whether or not a whistle was blown or a bell was rung at the crossing at the time of the accident. Rarity and Orr both testified that they heard none, and the witness Mrs. Koumarin, who lived near the crossing at the time of the accident, testified that there was no whistle blown or bell rung, and the engineer and fireman in the employ of appellant railway company testified that they blew the whistle and rang the bell. Under such circumstances, it was a question of fact for the jury to determine, and the court was not authorized to direct a verdict in favor of said appellant.

Both appellants contend that the court erred in giving certain instructions and refusing certain other instructions. A great many of the instructions given are severely criticized by both appellants. We have examined carefully all instructions, both given and refused, and we are of the opinion that, when the instructions given are taken as a whole they fully and correctly state the law applicable to all phases of the case. Both appellants offered a large number of instructions, and a great many were refused, and it is entirely unnecessary for us to discuss each refused instruction. Suffice it to say we find no prejudicial error was committed by the trial court in refusing or giving any of the instructions complained of.

[13, 14] The appellants also contend that the amount of the verdict is excessive as a matter of law. We are likewise unable to agree with this contention. A motion for a new trial was made upon several grounds, among them being "excessive damages, appearing to have been given under the influence of passion or prejudice." Code Civ. Proc. § 657, subd. 5. The motion for a new trial was denied. The rule is well established that the amount of damages in this kind of an action is committed first to the sound discretion of a jury, and next to the discretion of the judge of the trial court, who in ruling upon the motion for a new trial may consider the evidence anew, determine anew the facts, and set aside the verdict if it is not just. Upon appeal the decision of the trial court and the jury on the subject cannot be set aside, unless the verdict is so plainly and outrageously excessive as to suggest, at first blush, passion or prejudice or corruption on the part of the jury. *Reneau v. Hirsch*, 88 Cal. App. 1, 262 P. 1100, and cases there cited.

[15] We have carefully examined the entire record, including the evidence, and there is nothing in the record to show that the verdict was not the result of a fair and honest judgment of the jury. The uncontradicted evidence shows that the deceased was a man of 42 years of age, in good health, with a

proven income of from \$4,000 to \$5,000 per annum, and an expectancy of life of 26.72 years, and contributed from \$250 to \$300 a month to plaintiffs. When all the facts and circumstances are considered, we think the award is not disproportionate to the compensation reasonably warranted by the facts.

Many other contentions are made by both appellants for a reversal of the judgment, but we have carefully considered them all, and find none of them of sufficient importance to warrant a reversal of the judgment or require special discussion. We have given the entire case careful consideration, and, as above stated, we have come to the conclusion that the question of negligence on the part of Rarity and contributory negligence on the part of deceased were questions of fact for the jury, and, the jury having determined that both Rarity and the Atchison, Topeka & Santa Fé Railway Company were negligent, we find no reason to disturb their findings and judgment.

From the facts stated, it will be seen that the present action is one for damages for the death of William Krause, who was killed on September 12, 1927, while riding as a guest in the automobile of appellant John W. Rarity. As far as Rarity is concerned, the action is based upon his failure to use ordinary care. The accident happened, suit instituted, judgment obtained, and this appeal taken and perfected, all before section 141¾ of the California Vehicle Act became effective.

[16, 17] The right of plaintiffs to maintain this action was a statutory right, depending upon section 377 of the Code of Civil Procedure. No such right of action existed under the common law. *Kramer v. San Francisco Market Street R. R. Co.*, 25 Cal. 434; *Clark v. Goodwin*, 170 Cal. 527, 150 P. 357, L. R. A. 1916A, 1142; *Dickinson v. Southern Pacific Co.*, 172 Cal. 727-730, 158 P. 183; *McLaughlin v. United Railroads*, 169 Cal. 494, 147 P. 149, L. R. A. 1915E, 1205, Ann. Cas. 1916D, 337; 8 Cal. Juris. 948, 949, 950 and 951, and cases there cited.

Section 377 gives a right of action for damages for the death of a person, not a minor, caused by the wrongful act or neglect of another, to his heirs or personal representatives "against the person causing the death, or if such person be employed by another person who is responsible for his conduct, then also against such other person." This is a general section and gives a right of action for damages for the death of any person, not a minor, caused by any actionable wrong or neglect of another person.

In the case at bar, plaintiffs were only required to prove a lack of ordinary care on the part of Rarity to recover against him (section 2096, Civ. Code); or, in other words,

the "wrongful act or neglect" mentioned in section 377 of the Code of Civil Procedure was, in this case, the "failure" of Rarity to "use ordinary care and diligence" for Krause's safe carriage. *Nichols v. Pacific Electric Railway Co.*, 178 Cal. 630, 174 P. 319; *Sheean v. Foster*, 80 Cal. App. 56, 251 P. 235; *Curran v. Earle C. Anthony, Inc.*, 77 Cal. App. 462, 247 P. 236; *Spring v. McCabe*, 53 Cal. App. 330, 200 P. 41; *Brown v. Davis*, 84 Cal. App. 180, 257 P. 877.

[18, 19] Appellant Rarity contends that section 377 of the Code of Civil Procedure, in so far as it formerly authorized an action against the operator of an automobile for damages for the death of a guest caused through a failure to use ordinary care, has been repealed by section 141 $\frac{3}{4}$ of the California Vehicle Act (as added by St. 1929, p. 1580).

The Legislature of 1929 added section 141 $\frac{3}{4}$ to the California Vehicle Act (St. 1929, c. 787). This section provides that the representatives or heirs of a deceased person shall have no right of action for damages for death, where the deceased has been killed while riding in a vehicle as a guest, upon the public highway, unless such death proximately results from intoxication, willful misconduct, or gross negligence of the owner, driver, or person responsible for the operation of the vehicle, and, furthermore, provides that in such action the burden of proof is cast upon the plaintiff to prove that such death was proximately caused by intoxication, willful misconduct, or gross negligence of the person responsible for the operation of the vehicle. This section relates to two subjects: (1) The right of recovery against the operator in an action brought by the guest; (2) the right of action by the personal representatives or heirs of a person killed while riding as a guest. It seems clear, therefore, that the Legislature intended to have section 141 $\frac{3}{4}$ of the California Vehicle Act govern all actions by a guest, or in behalf of the heirs of a guest, against the operator of an automobile or other vehicle upon the public highways of this state.

Said section 141 $\frac{3}{4}$ is, therefore, repugnant to sections 1714 and 2096 of the Civil Code, and also to sections 376 and 377 of the Code of Civil Procedure, in so far as these sections authorize the maintenance of an action for damages for the death or injury of a guest against the operator of an automobile based on ordinary negligence. Such being the situation, the old sections and the new section cannot stand together in their entirety, and, to the extent that sections 376 and 377 of the Code of Civil Procedure and sections 1714 and 2096 of the Civil Code are inconsistent with section 141 $\frac{3}{4}$ of the California Vehicle Act, the latter act will repeal the former sections on the same sub-

ject by implication. *People v. Henshaw*, 76 Cal. 436, 18 P. 413; *City and County of Sacramento v. Bird*, 15 Cal. 295; *Dillon v. Bicknell*, 116 Cal. 111, 47 P. 937; *Treadwell v. Yolo County*, 62 Cal. 564; *Charnock v. Rose*, 70 Cal. 192, 11 P. 625; *Hanley v. Sixteen Horses*, 97 Cal. 183, 32 P. 10; *Ex parte Benjamin*, 65 Cal. 310, 4 P. 23; *Talcott et al. v. Board of State Harbor Commissioners*, 53 Cal. 199; *Mack v. Jastro*, 126 Cal. 130, 58 P. 372; *McGranahan v. Police Court*, 56 Cal. App. 372-374, 205 P. 98; 23 Cal. Juris. 702.

In Sedgwick on Statutory Law, p. 124, it is said: "Even if a subsequent statute be not repugnant in all its provisions to the prior one, yet if the latter statute was clearly intended to prescribe the only rule which should govern in the case provided for, it repeals the original act."

The right of a guest to sue or, in case of his death, the right of his heirs or personal representatives to sue, is not destroyed or impaired by the enactment of section 141 $\frac{3}{4}$ of the California Vehicle Act. The right is the same under the new section as under the old sections, but the degree of negligence required to be proved by a guest is greater under the new statute than under the old. The right given all other class of persons to sue for torts, and the degree of proof required, is in no way affected by the new section.

Therefore, sections 376 and 377 of the Code of Civil Procedure, and sections 1714 and 2096 of the Civil Code, are amended only in so far as the rights of a guest riding in a vehicle on the public highways of this state are concerned, and not in any other respect. Said amendment could have been made to each section of the Code above mentioned and accomplished the same purpose, and we think the new section (141 $\frac{3}{4}$) should be considered as an amendment to said sections of the Code with the same force and effect as if each section had been actually amended to include the language of said section 141 $\frac{3}{4}$ of the California Vehicle Act.

[20, 21] Appellant Rarity next contends that section 141 $\frac{3}{4}$ is retroactive in its operation, and, by reason thereof, the action abates and the judgment falls.

We are unable to agree with this contention. "A retrospective law is one which operates upon matters which occurred, or rights and obligations which existed, before the time of the enactment." 5 Cal. Juris. 747; *Smith v. Mathews*, 155 Cal. 752, 761, 103 P. 199; *People v. Allied Architects' Ass'n*, 201 Cal. 428, 257 P. 511.

It is a well-settled principle of statutory construction that, while the Legislature has power to pass retroactive laws which do not impair the obligations of contracts or affect injuriously vested rights, it is equally true

that statutes are not to be construed as intending to have a retroactive effect so as to affect pending litigation, unless such intent is expressly declared or necessarily implied from the language of the enactment. *Williams v. Johnson*, 30 Md. 500, 96 Am. Dec. 616; *James v. Oakland Traction Co.*, 10 Cal. App. 785, 796, 797, 103 P. 1082; *Greer v. Blanchar*, 40 Cal. 194, 197; *Gates v. Salmon*, 28 Cal. 320, 321; *Pignaz v. Burnett*, 119 Cal. 157, 51 P. 48; *Willcox v. Edwards*, 162 Cal. 455, 123 P. 276, Ann. Cas. 1913C, 1392; *Estate of Richmond*, 9 Cal. App. 402, 99 P. 554; *Montecito County Water Dist. v. Doulton*, 193 Cal. 398, 224 P. 747; *Vanderbilt v. All Persons*, 163 Cal. 507, 126 P. 158; *East Bay Municipal Utility Dist. v. Garrison*, 191 Cal. 680, 218 P. 43; 36 Cyc. 1205; *Bascomb v. Davis*, 56 Cal. 152; *Estate of Frees*, 187 Cal. 150, 156, 201 P. 112; *Estate of Parker*, 200 Cal. 132, 141, 251 P. 907; *State Commission in Lunacy v. Welch*, 20 Cal. App. 624, 630, 129 P. 974, 976; *Endlich on the Interpretation of Statutes*, p. 362.

In *Cooley on Constitutional Limitations* (7th Ed.) p. 529, the rule is thus stated: "It is a sound rule of construction that a statute should have a prospective operation only, unless its terms show clearly a legislative intention that it should operate retrospectively."

In *State Commission in Lunacy v. Welch*, supra, the court said: "It is quite true that the Legislature has power to pass retroactive laws, that do not impair the obligation of contracts or vested rights; but it is equally true that laws are not construed as intended to have a retroactive or retrospective effect, so as to affect pending litigation, unless such intent is expressly declared or necessarily implied in the language of the statute."

Again, in *The Matter of Clyde E. Cate*, etc. (Cal. Sup.) 279 P. 131, 133, Mr. Justice Richards said: "It is a canon of interpretation that statutes are not to be given a retrospective operation unless it is clearly made to appear that such was the legislative intention."

The rule of construction above announced is not alone supported by the foregoing authorities, and many others that could be cited, but the Legislature of this state has expressly prescribed certain rules of interpretation which reflect the general legislative policy of this state upon the question of the effect of legislation repealing or amending statutes upon rights of action which have accrued prior to the enactment of such legislation. Section 3 of the Civil Code contains the express provision: "No part of it [Civil Code] is retroactive, unless expressly so declared." A similar provision is found in the Code of Civil Procedure, § 3; Penal Code, § 3; Political Code, § 3, and this rule applies to the amendments to the codes as well. *Estate of Frees*, supra; *Sharp v. Blankenship*, 59 Cal. 288; *Central Pacific R. R. Co. v. Shackelford*, 63 Cal. 261; *Bank of Ukiah v. Moore*, 106 Cal. 673, 680, 39

P. 1071; *Estate of Richards*, 133 Cal. 524, 527, 65 P. 1034; *McKay v. Lauriston*, 204 Cal. 557, 566, 269 P. 519; In *The Matter of the Application of Cate* (Cal. Sup.) 279 P. 131; *People v. Allied Architects' Ass'n*, 201 Cal. 437, 257 P. 511.

We have carefully read section 141½ and find no language contained therein that would give the slightest intimation that the Legislature intended that said section should have a retroactive operation. The very contrary is indicated by some of the language used. The section, in part, reads: "Any person *who as a guest accepts a ride* in any vehicle moving upon any of the public highways of the State of California, and while so riding as such guest receives or sustains an injury, *shall have no right of recovery*. * * * In the event that such person while so riding as such guest is killed * * * then neither the estate nor the legal representatives * * * shall have any right of recovery. * * * If such person so riding as a guest be a minor and sustain an injury or be killed * * * then neither the parents nor guardian nor * * * representatives * * * of such minor shall have any right of recovery. * * * Nothing in this section contained shall be construed as relieving the owner * * * provided, that in any action for death * * * to person or property by or on behalf of a guest * * * the burden shall be upon plaintiff. * * * For the purpose of this section the term 'guest' is hereby defined as being a person *who accepts a ride* in any vehicle without giving compensation therefor."

"Words used in this code in the present tense include the future as well as the present." Civ. Code, § 14. Under the maxim, "expressio unius est exclusio alterius," it seems to follow that words used in the present tense do not include the past.

Thus it will be seen that said section uses the expression "Who accepts a ride" twice and uses the expression "Shall have no right to recover," or similar language, three times. The word "shall," found in these phrases, while mandatory in meaning, usually refers to the future. Likewise, the expression "who accepts a ride" is directed to rides to be taken in the future. 5 Cal. Juris. 750; *People v. Allied Architects' Ass'n*, supra.

Therefore, from the language of said section alone, a prospective, and not a retrospective, operation of the statute was undoubtedly intended by the Legislature.

In the case at bar, the trial court instructed the jury in accordance with section 2096 of the Civil Code as it stood when the accident happened. If the court had instructed the jury that it was necessary for plaintiffs to prove that Rarity was guilty of willful misconduct or gross negligence in the operation of his car, or was intoxicated at the time of the accident and while operating the car, it

would have been prejudicial error, because the law, as it then stood, only required plaintiffs to show that Rarity failed to use "ordinary care" in the operation of his automobile. The trial judge certainly could not have anticipated a change in the statute as to the degree of negligence required to be proved by plaintiffs.

Rarity places great reliance upon such cases as *People v. Bank of San Luis Obispo*, 159 Cal. 65, 112 P. 866, 37 L. R. A. (N. S.) 934, Ann. Cas. 1912B, 1148; *Moss v. Smith*, 171 Cal. 777, 155 P. 90, and *Freeman v. Glenn County Telephone Co.*, 184 Cal. 508, 194 P. 705, in support of his contention that section 141¾ is retroactive. A careful study of these cases will show that there is a clear distinction between all of them and the case at bar. It must be remembered that this action is not for the enforcement of a *penalty but for the recovery of compensatory relief only*. 8 Cal. Juris., p. 730.

People v. Bank of San Luis Obispo was an action by the Attorney General in the name of the people for a decree declaring the defendant insolvent, etc., prosecuted under the provisions of section 10 of the Banking Act of 1903. St. 1903, p. 368. That section makes it the duty of the Attorney General, under circumstances described therein, to prosecute an action of the kind considered in the decision. It authorizes the entry of judgment in a proper case ordering "such corporation into involuntary liquidation," appoint a receiver, etc. The act of 1903 was repealed pending appeal by the Bank. Act of 1909. St. 1909, p. 87. By section 134 of the latter act the superintendent of banks was authorized to liquidate the affairs of a bank directly, without any action in court. In the *San Luis Obispo Bank Case* it was not a mere change in the degree of proof required, but the provisions of the old law were entirely repealed, leaving no authority therein to support any judgment.

In *Moss v. Smith* the judgment was based on section 309 of the Civil Code. Pending appeal the Public Utilities Act went into effect. St. Ex. Sess. 1911, p. 18. Section 52, subd. b, provided: "The provisions of section 309 * * * of the Civil Code of this state, * * * shall have no application to public utility corporations." There again the whole foundation in law for any judgment against the defendant under section 309 was cut away.

In *Freeman v. Glenn County Telephone Company*, section 309, as amended (St. 1917, p. 657), contained a saving clause as to all actions: "Excepting only the liability of a director of a corporation *heretofore* incurred shall not exist in any case where, all of the debts and liabilities of the corporation to creditors having been paid, the capital stock

divided, withdrawn, or paid out constituted all of the capital stock of the corporation and the same was paid out, withdrawn, or divided with the consent of all of the stockholders to or among themselves." The effect of this language was to make the amendment expressly retroactive in the one instance named therein.

Furthermore, neither section 3 of the Civil Code, nor other similar sections in the Code of Civil Procedure, the Penal Code, or the Political Code is mentioned in any of these cases.

For the foregoing reasons we are satisfied that said section 141¾ of the California Vehicle Act is not retroactive and has no bearing whatsoever upon the case at bar.

Therefore, the judgment will be affirmed, and it is so ordered.

We concur: NOURSE, Acting P. J.; STURTEVANT, J.

104 Cal. App. 326

HUSSONG v. BYERS, Sheriff, et al.
Civ. 290.

District Court of Appeal, Fourth District,
California.

March 4, 1930.

Appeal and error $\S$ 370—Appeal will be dismissed on motion, for appellants' failure to arrange for payment of transcript, to reply, or to appear at hearing (Code Civ. Proc. $\S$ 953(b)).

Where parties appealing from judgment did not file an undertaking as required by Code Civ. Proc. $\S$ 953(b), or otherwise arrange for compensation of reporter in preparing transcript, and did not file any reply on hearing of motion of appellee to dismiss appeal, and judgment was entered on September 11, 1929, motion to dismiss filed on January 9, 1930, will be granted, as time for filing transcript and points and authorities, including any extensions that were within power of court to make on motion for new trial, had expired without excuse therefor being shown.

Appeal from Superior Court, San Diego County.

Action by Percy Hussong against James C. Byers, Sheriff, and another, in which Lillie W. Byers, as executrix, was substituted in the place of J. C. Byers, deceased. Judgment adverse to defendants, and they appeal. On motion of plaintiff to dismiss the appeal.

Appeal dismissed.

Carroll Allen, of Los Angeles, for appellants.

James E. Wadham, San Diego, for respondent.

AGUILAR v. RIVERDALE COOPERATIVE CREAMERY ASS'N.★

Civ. 6801.

District Court of Appeal, First District, Division 1, California.

March 3, 1930.

As Modified on Denial of Rehearing April 2, 1930. Hearing Denied by Supreme Court April 28, 1930.

BARNARD, J.

This is a motion by respondent to dismiss an appeal from the judgment, upon the ground that no transcript of the record, or appellants' points and authorities, have been filed within the time allowed by law, and that the time for preparation thereof has expired. It appears from the certificate of the county clerk that judgment was entered in this action on September 11, 1929; that notice of entry of said judgment was served on the attorney for appellants on September 12, 1929; that on September 20, 1929, appellants' attorney filed a notice of appeal, which notice included a request for the preparation of a transcript of the evidence and proceedings at the trial; that thereafter the county clerk demanded payment in advance of the fees for the preparation of said transcript; that the same were not paid and the transcript was not prepared; that no further demand for such transcript was made by the attorney for the defendants; that on the 14th day of October, 1929, the attorney for defendants filed another notice of appeal, no request for the preparation of a transcript being made; that no other attempt has been made by the defendants, or their attorney, to prepare a record for the purposes of said appeal; and that no proceedings are pending in the superior court for a bill of exceptions, and the time therefor has expired. Notice of motion to dismiss was filed in the Supreme Court on January 9, 1930. The matter was later transferred to this court, and thereafter a supplemental notice of motion to dismiss was served on appellants' attorney.

No reply of any kind has been filed by the appellants and no appearance was made at the time set for hearing the motion. Under section 953(b) of the Code of Civil Procedure, it is incumbent upon an appellant to either file an undertaking or otherwise arrange for the compensation of the reporter in preparing a transcript. No attempt to comply with the statute is disclosed by the record here. The time for filing the transcript and appellants' points and authorities, including any extensions that were within the power of the court to make on any possible motion for new trial having expired, and no excuse therefor, reasonable or otherwise, being shown, the motion of respondent must be granted. *Sutter County v. Tisdale*, 128 Cal. 180, 60 P. 757; *Hughes v. De Mund*, 195 Cal. 242, 233 P. 94.

The appeal from the judgment is dismissed.

We concur: SLOANE, P. J.; MARKS, J.

1. Negligence $\S$ 32(1), 105—Risks attached to condition of premises, or which are incident to operation of business are assumed by licensee, and owner owes licensee only duty to refrain from willful injury.

Licensee assumes all risks attached to condition of premises or which are incident to operation of business conducted thereon, and owner owes licensee no duty except to refrain from doing him willful or wanton injury.

2. Negligence $\S$ 32(2)—To be "invitee," one must have entered premises at invitation of owner or occupant thereof.

Whether person entering premises of another bears legal status of invitee or of bare licensee depends on nature of business which brings him on premises, and before such person can be given legal standing of an invitee it must appear that he entered premises at express or implied invitation of owner or occupant thereof.

3. Negligence $\S$ 32(2)—Invitation is implied when one enters premises for mutual benefit of owner and himself, or in connection with owner's business.

Where purpose of one in entering premises of another is of common interest or mutual benefit to owner or occupant and himself, or when in connection with business of owner or occupant which is being carried on on premises, an invitation is implied.

4. Negligence $\S$ 32(2)—One entering premises merely for purposes of his own or of third party, having no relation to business of owner, is bare "licensee."

Where one entering premises stands in no contractual relationship with owner or occupant and enters premises merely for purpose purely of his own or of a third person which has no relation whatever to business of owner or occupant and in which they have no interest, beneficial or otherwise, he is deemed to be bare "licensee."

[Ed. Note.—For other definitions of "Licensee," see Words and Phrases.]

5. Negligence $\S$ 32(2)—Employee of prune grower using drier with permission of drier owner but without charge held licensee, and could not recover from owner for loss of hand severed by revolving fan in drier.

Where prune grower obtained permission of owner of drier to use drier in connection with drying of prunes on condition grower would use his own men and perform work at his own expense, there being no charge to him for courtesy extended and prune grower's employee's hand was severed on coming in contact with

blades of revolving fan in drier, employee held mere licensee and not an invitee and could not recover from owner.

Appeal from Superior Court, Fresno County; C. E. Beaumont, Judge.

Action by A. Aguilar against the Riverdale Cooperative Creamery Association. Judgment for plaintiff, and defendant appeals.

Reversed.

W. M. Conley, Philip Conley, and Matthew Conley, all of Fresno, for appellant.

Ray W. Hays, of Fresno, for respondent.

PER CURIAM.

[1] Respondent, an employee of one Dr. Goodrich, was performing certain work for his employer in a drier on premises belonging to appellant, and while doing so his hand came in contact with a revolving fan and was severed. Thereafter he brought this action for damages against appellant, claiming that his injuries were proximately caused by the defective and dangerous manner in which the fan was constructed and allowed to be operated. The trial took place before a jury, which rendered a verdict in respondent's favor, and from the judgment entered thereon this appeal was taken. A reversal is sought on a number of grounds, among those urged being that according to respondent's own testimony his injuries were brought about as a result of his own carelessness. But the first question presented for determination is whether respondent was upon appellant's premises as an invitee, as he claims, or as a bare licensee, as contended by appellant; for if his status was that of a bare licensee he is barred from recovery because, in that capacity, he assumed all the risks attached to the condition of the premises or which were incident to the operation of the business conducted thereon, and appellant owed him no duty except to refrain from doing him willful or wanton injury (*Lindholm v. Northwestern Pacific R. Co.*, 79 Cal. App. 3d, 248 P. 1033, and cases cited therein); and no such injury is claimed or established.

Respondent entered the premises under the following circumstances: Appellant was engaged in the business of producing, manufacturing, and selling dairy products. One of its plants was located at Riverdale, and among the different products dealt with was casein, which it prepared for the market by putting the same through a drying process in a drier built for that purpose inside one of the larger creamery buildings on the premises. The drier at this plant had not been operated, however, for about two years. Dr. Goodrich was a grower of prunes, and during the month of December, 1927, had on hand a crop of fresh fruit which he was unable to

sun-dry. He therefore phoned to the foreman of appellant's Riverdale plant, a man named Jorgensen, and requested permission to cure the prunes in the Riverdale casein drier. Jorgensen at first declined to grant the request, but finally consented upon the distinct understanding and agreement with Dr. Goodrich that the latter would operate the drier and do all of the work connected with the drying of the prunes with his own men, and at his own expense, and that there would be no charge to him for the courtesy extended. Thereupon Jorgensen left orders with his men to clean out the drier and connect up the electric motor with propelled the drier fan. On the following Friday, Dr. Goodrich's truck, which was being driven by one of his men, arrived at the plant with the first load of prunes. The driver was accompanied by respondent and a fellow employee named Massias. After the prunes were unloaded they were spread on trays by respondent and Massias, and two of appellant's men who happened to be working in the creamery building at the time, but in no way connected with the operation of the drier, voluntarily and without being authorized or requested so to do by their superiors, explained to respondent and Massias how to stack the trays on small hand trucks and wheel them into the drier. It took respondent and Massias until 10 o'clock that night to place all the prunes in the drier, after which they left the premises and did not return until the following Monday morning. During their absence two of appellant's men, observing that all of the trays had been stacked on one side of the drier, voluntarily moved part of them to the other side. On Monday morning more prunes arrived, and, after removing from the drier some of those already cured, respondent and Massias proceeded to place the fresh fruit therein. Shortly after the noon hour they were wheeling the third truck load of trays into the drier, and while going through a passageway five feet wide in front of the fan, which was six feet in diameter and set just beyond a circular opening of the same dimensions in the southerly wall of the drier, but neither guarded nor screened, respondent, who was in the rear of the truck shoving it, stooped to brace his shoulder and knee against the stack of trays, and in doing so extended his hand out behind him and into the blades of the revolving fan, and his hand was completely severed. Respondent admitted that while working in and about the drier he was fully aware of the location of the fan and that it was constantly in operation; that it made a noise while running and that he had passed in front of it twelve times on Friday and no less than six times on Monday before the accident happened; and besides, the revolving fan caused a constant draft through the drier room. His only explanation of the accident was that when he

extended his hand behind him he did not realize how close he was to the fan.

[2-4] Whether a person entering the premises of another bears the legal status of an invitee or of a bare licensee depends upon the nature of the business which brings him on the premises, and before such person can be given the legal standing of an invitee it must appear that he entered the premises at the express or implied invitation of the owner or occupant thereof. If it be shown that his purpose in so entering was one of common interest or mutual benefit to the owner or occupant and himself, or was in connection with the former's business which was there being carried on, an invitation is implied. But if it be shown that he stood in no contractual relationship with the owner or occupant, and that he was there for purposes purely of his own or of a third party which had no relation whatever to the business of the owner or occupant, and in which the latter had no interest, beneficial or otherwise, he is deemed in law to be a bare licensee. *Means v. Southern California Ry. Co.*, 144 Cal. 473, 77 P. 1001, 1 Ann. Cas. 206; *Lindholm v. Northwestern Pacific R. Co.*, 79 Cal. App. 34, 248 P. 1033; *Bush v. Weed Lumber Co.*, 63 Cal. App. 426, 218 P. 618; *Herzog v. Hemphill*, 7 Cal. App. 116, 93 P. 899; *Grundel v. Union Iron Works*, 141 Cal. 564, 75 P. 184; *Coburn v. Village of Swanton*, 94 Vt. 168, 109 A. 854; *L. E. Meyers' Co. v. Logue's Adm'r*, 212 Ky. 802, 280 S. W. 107; *Walker v. Nona Mills Co.*, 151 La. 738, 92 So. 318; *Forbrick v. General Electric Co.*, 45 Misc. Rep. 452, 92 N. Y. S. 36; 1 *Thompson on Negligence*, 156; 20 R. C. L. 69.

[5] The application of the foregoing legal principles to the situation in the case before us clearly demonstrates that it possesses none of the elements essential to establish respondent's status as an invitee, for admittedly he did not enter appellant's premises on any mission connected with appellant's business, nor in which the latter had any common interest; nor did he go there as a result of any enticement, allurement, or inducement, nor in response to any invitation, on appellant's part. On the contrary, he was there admittedly as the employee of a third party, and for the purpose of performing work in which the latter alone was interested. His status was therefore clearly that of a bare licensee, and as such he assumed all the ordinary risks and perils attached to the condition of the premises, and the manner in which the same or the business conducted thereon were maintained and operated. Under such circumstances there was no legal duty imposed upon appellant to keep its premises in a safe condition, the measure of its liability for injury to him being limited to a wanton or willful injury (*Giannini v. Campodonico*, 176 Cal. 548,

169 P. 80; *Means v. Southern California Ry. Co.*, supra), and as stated no such injury is claimed or established. Nor does the fact that appellant granted respondent permission to come upon the premises affect respondent's status as a bare licensee, for it is well settled that mere permission of an owner to enter and use a portion of his premises does not of itself amount to an invitation (*Herzog v. Hemphill*, supra; 8 *Thompson on Negligence*, p. 144, § 949, notes 30 and 31; *Briscoe v. Henderson Light Co.*, 148 N. C. 396, 62 S. E. 600, 19 L. R. A. (N. S.) 1116; *Coburn v. Village of Swanton*, supra).

We have examined the authorities cited by respondent, but find no rule of law stated therein which is at variance with the views hereinabove expressed. Several of the cases cited deal merely with the rule of liability of an owner where the injured party is admittedly an invitee and not a bare licensee, and such is not this case. The others are cases wherein the question arose as to whether the injured party was an invitee or a licensee, but it will be found that in all of those cases wherein such party was held to be an invitee there was present at least one of the elements above mentioned which is essential to establish such status.

The conclusion we have reached upon the issue as to respondent's legal status at the time he was injured makes it unnecessary to discuss or determine the other points raised by the appeal.

The judgment is reversed.

104 Cal. App. 809

MEDLEY v. HILL.
Civ. 84.

District Court of Appeal, Fourth District, California.

March 4, 1930.

1. Limitation of actions § 57(1), 59(1)—Date of act fixes time for running of limitations against sheriff for negligence in performance of official duty (Code Civ. Proc. § 339, subd. 2, and § 340, subd. 1).

In an action against a sheriff for negligence in performance of his official duty, it is the date of the act and fact which fixes the time for running of limitations under either Code Civ. Proc. § 339, subd. 2, or section 340, subd. 1.

2. Limitation of actions § 57(1), 59(1)—Cause of action against sheriff for failure to give proper notice of sale accrued when notice was posted (Code Civ. Proc. § 339, subd. 2, § 340, subd. 1, and §§ 692, 693).

In action against a sheriff to recover damages under Code Civ. Proc. § 693, for alleged

negligence in failing to give proper notice of sale as required by section 692, in connection with sale of certain lots previously sold under writ of execution, cause of action accrued as respected limitations under Code Civ. Proc. § 339, subd. 2, and section 340, subd. 1, at time notice of sale was posted, and, so far as purchaser was concerned, at time certificate of sale was issued, rather than at time of entry of decree in subsequent action to quiet title.

3. Limitation of actions ⚡95(1)—**Failure to discover alleged negligence of sheriff until decree in quiet title action did not prevent running of limitations (Code Civ. Proc. § 339, subd. 2, § 340, subd. 1, and § 692).**

Running of limitation under Code Civ. Proc. § 339, subd. 2, and section 340, subd. 1, as to cause of action against sheriff for alleged negligence in failing to give proper notice of sale, as required by Code Civ. Proc. § 692, was not prevented because of failure of purchaser to discover alleged negligence until after entry of decree in action to quiet title.

Appeal from Superior Court, Tulare County; J. A. Allen, Judge.

Action by N. C. Medley against R. L. Hill. Judgment of dismissal, and plaintiff appeals. Affirmed.

J. A. Shishmanian, of Exeter, for appellant.

J. A. Chase, of Visalia, for respondent.

BARNARD, J.

This is an appeal from a judgment of dismissal, made and entered after a demurrer to plaintiff's complaint had been sustained, without leave to amend.

The action was one against the sheriff of the county of Tulare, seeking to recover certain damages, together with the statutory penalty provided for in section 693 of the Code of Civil Procedure, for the alleged negligence of the defendant sheriff in failing to give proper notice of sale, as required by section 692 of the Code of Civil Procedure, in connection with the sale of certain lots previously sold under a writ of execution and purchased by this plaintiff. The plaintiff alleges that he brought a quiet title action after purchasing the lots, in which a judgment was rendered declaring the description used by the sheriff, in the aforesaid notice of sale, to be wholly inadequate and insufficient to identify the lots, and adjudging that the plaintiff received no title under the sheriff's deed. It appears that the notice of the execution sale, containing the insufficient description, was posted on October 3, 1923; that the plaintiff bought in the real property and received a certificate of sale from the sheriff on October 29, 1923; that the plaintiff received a sheriff's deed to the property on October 29, 1924, and that a complaint to quiet the title to the property

in question was filed by the plaintiff herein on December 3, 1924, and the judgment therein was rendered on December 2, 1925. The present action against the sheriff was commenced by the plaintiff on February 1, 1926. The demurrer to the complaint was sustained without leave to amend on the ground that the action was barred by the statute of limitations.

[1] An action against a sheriff upon a liability incurred by the doing of an act in his official capacity and in virtue of his office or by the omission of an official duty is barred in two years. Code Civ. Proc. § 339, subd. 2. An action upon a statute for a penalty or forfeiture, when the action is given to an individual, is barred in one year. Code Civ. Proc. § 340, subd. 1. In an action against a sheriff for negligence in the performance of his official duty, it is the date of the act and fact which fixes the time for the running of the statute of limitations. *Lambert v. McKenzie*, 135 Cal. 100, 67 P. 6. Appellant seeks to avoid the application of this rule to the facts in this case, by the argument that the statute of limitations commences to run only when a cause of action accrues, that there can be no cause of action until damage or injury has been incurred, and that the fact of injury to the plaintiff here, and the consequent liability of the sheriff, was first determined by the judgment in the quiet title action rendered on December 2, 1925. He therefore relies upon the general rule of law, as stated in 16 California Jurisprudence, at page 496: "But if a lawful act is committed which does not necessarily result in injury to another, the statute runs only from the time damage is actually sustained by reason of the act."

[2] Appellant is in error in assuming that the injury did not exist, nor the cause of action accrue, until the entry of the decree in the quiet title action. The entry of this decree did not create any injury or damage, or give rise to any cause of action. It did not take from the plaintiff something he previously had, but the decree was itself based upon the fact that the plaintiff had nothing from the beginning, and that he obtained nothing, in the way of title, when he received the sheriff's certificate of sale. The wrong or injury done by the sheriff, if any, occurred, not when the decree was entered in the quiet title action, but when the notice of sale was posted on October 3, 1923, and, so far as the plaintiff herein is concerned, when the certificate of sale was issued, on October 29, 1923.

[3] Nor can the appellant avail himself of the contention that he discovered the alleged negligence of the sheriff for the first time upon the entry of the decree in the quiet title action. In *Lightner Mining Co. v. Lane*,

161 Cal. 689, 120 P. 771, 774, Ann. Cas. 1913C, 1093, the court says: "It was the settled rule in actions at law that the plaintiff's mere ignorance of the existence of the injury complained of, or of the facts constituting such injury, or of the identity of the person liable therefor, until the period of limitation had passed, will not prevent the running of the statute. This rule has been followed in this state in several cases in which the point that there was fraud involved in the cause of action itself, or a fraudulent concealment thereof, was not raised or considered. *Gale v. McDaniel*, 72 Cal. 334, 13 P. 871; *People v. Melone*, 73 Cal. 574, 15 P. 294; *Paige v. Carroll*, 61 Cal. 211; *Lattin v. Gillette*, 95 Cal. 317, 29 Am. St. Rep. 115, 30 P. 545; *Lambert v. McKenzie*, 135 Cal. 100, 67 P. 6. In the last-mentioned case the court said: 'It is not true that, where damages result from negligence, the cause of action arises upon the date of the discovery of the negligence, or of the negligent person. It is the date of the act and fact which fixes the time for the running of the statute. * * * And so throughout the law, *except in cases of fraud*, it is the time of the act, and not the time of the discovery, which sets the statute in motion.'

Having begun an action to quiet his title to the lots involved, on December 3, 1924, the attention of the plaintiff must have been called to the questionable nature of his title at least that early, and he had ample time thereafter, before the running of the statute, to have protected himself in any claim he had against the sheriff. In addition to the general rule of law, as above cited, he had actually been put upon his guard, and the fact that he preferred to rely upon his supposed legal rights, as being tested in the quiet title action, adds nothing to his position after such reliance turns out to have been unjustified.

If the rule contended for by appellant should be applied, the statute of limitations in such a case as this, would mean little, for such an action to quiet title might not be brought for many years. Statutes of limitation are positive rules of law, and they find their justification in reason and experience. The appellant herein had ample time after purchasing the property at the execution sale, and before the running of the statute, to ascertain the true status of the title to the property, and no reason appears why his position is, or should be, any better than that of any other person who has permitted the period of the statute to run.

The order sustaining the demurrer, without leave to amend, was correct, and the judgment is affirmed.

We concur: SLOANE, P. J.; MARKS, J.

WEINRICH v. SACRAMENTO VALLEY SUGAR CO. et al.

104 Cal. App. 385

McLAIN et al. v. SAME.

Civ. 3850, 3851.

District Court of Appeal, Third District, California.

March 7, 1930.

1. Appeal and error $\S$ 1072—Permitting filing of points and authorities after 10 days from filing notice of intention to move for new trial held not prejudicial to defendants' substantial rights (Superior Court Rule 20, subd. 5).

Permitting plaintiffs moving for new trial after judgment for defendants to file points and authorities after expiration of ten days from filing notice of intention to move for new trial, contrary to Superior Court Rule 20, subd. 5, held not prejudicial to defendants' substantial rights, where trial court offered to afford defendants opportunity to file points and authorities in reply to those it permitted plaintiffs to file, and motion for new trial was fully presented and argued.

2. New trial $\S$ 70—Granting new trial in action for damages resulting from automobile accident held not abuse of discretion under evidence.

In action for personal injuries and for death resulting from automobile accident, granting new trial for insufficiency of evidence to sustain verdict for defendants held not abuse of discretion under evidence showing that driver of defendant's automobile was negligent in operation thereof at time of accident, and that such negligence was proximate cause of injuries and death.

3. Appeal and error $\S$ 979(2)—New trial $\S$ 71—Granting new trial for insufficiency of evidence is not abuse of discretion and not reviewable, where verdict is against weight of evidence, though conflicting.

Though there is a substantial conflict in evidence, trial court will not be deemed to have abused its discretion in granting new trial for insufficiency of evidence to sustain verdict when it has determined that verdict is against weight of evidence, and that there should be new trial, and its order in that respect is conclusive on appeal in absence of abuse of discretion.

Appeals from Superior Court, Glenn County; Claude F. Purkitt, Judge.

Separate actions by Bernedette E. Weinrich and by Mercedes E. McLain and another against the Sacramento Valley Sugar Company and another, consolidated and tried together. From an order granting plaintiffs' motions for new trial after judgment for defendants, the latter appeal.

Affirmed.

Len H. Honey, of Stockton, and J. Hampton Hoge, of San Francisco, for appellants.

H. W. McGowan and R. M. Rankin, both of Willows, for respondents.

JAMISON, Justice pro tem.

These two cases were actions for damages for injuries inflicted upon respondent, Bernedette E. Weinrich, in case No. 3850, and for damages for the death of the mother of respondents Mercedes E. McLain and Bernedette E. Weinrich in case No. 3851, both caused by the alleged negligence of appellant A. M. Gelston in the operation of an automobile, the said Gelston, at the time of said accident, being an employee of appellant Sacramento Valley Sugar Company and engaged in the performance of his duties as such employee. The two cases were consolidated and tried together. They were tried by a jury, which returned a verdict in favor of the appellants, and judgment was thereupon rendered in their favor. Respondents thereupon filed a motion for a new trial, which motion was by the court granted, and, from the order granting the same, appellants have appealed.

[1] In their briefs filed in these cases appellants rely for reversal upon the ground alone that the trial court has lost jurisdiction to hear and pass upon the said motion for a new trial. Appellants base their contention upon the failure of respondent to comply with the requirements of rule XX, subdivision 5, of the rules promulgated by the Judicial Council, as said rule stood from August 1, 1928, to February 1, 1929, at which said last-named date the said rule was amended.

This rule, as it stood before said amendment, was as follows: "Within ten days after a notice of intention to move for a new trial shall have been filed, the party seeking the new trial shall serve and file a memorandum of points and authorities relied upon, and within ten days thereafter the adverse party shall serve and file a corresponding memorandum in reply thereto. Said motion for a new trial shall be set for hearing not later than fifty days after service of notice of the entry of said judgment."

The notice of intention to move for a new trial in these cases was filed on November 14, 1928, and the said motion came on for hearing before the court on December 3, 1928. No memorandum of the points and authorities relied upon by respondents had, up to said last-named date, been filed by them as required by said rule. At the said hearing on December 3, 1928, respondents asked permission of the court to file the said points and authorities, and, over the objection of appellants that the court had lost jurisdiction to proceed with the hearing of said motion, it permitted this to be done. Arguments were then had on said motion, defendants reserving their said objection to said hearing, and on December 17, 1928, the court made its order granting said motion.

We are of the opinion that the recent cases of *Bellew v. Bellew* (Cal. Sup.) 276 P. 573, 574, and *Melvin v. Carl, Executrix, etc.* (Cal. Sup.)

276 P. 574, have settled the question involved here adversely to appellants' contention. In the first of these cases, in passing upon the effect of noncompliance with the requirement of subdivision 5 of rule XX, that points and authorities had not been filed within ten days after filing notice of intention to move for a new trial, the court said: "We think the existence of the rule and noncompliance with the requirement thereof, as shown, did not have the effect contended for by respondent. Under the rule in force at the time no penalty was prescribed for its violation and its provisions must be deemed to have been directory only. As amended (rule 19, subd. 4, effective February 1, 1929), the rule provides as a penalty for its violation an abandonment by implication of the right to argue the motion."

In the latter of the two cases hereinbefore cited, the Supreme Court in effect again declared that the requirements of section XX, subd. 5, were not mandatory, but directory only.

The trial court offered to afford appellants time and opportunity to file points and authorities in reply to those it permitted respondents to file, and, while it does not appear that appellants took advantage of this offer, yet it does appear, from the order of the court granting the motion, that on December 3, 1928, the said motion was fully presented and argued. Under these circumstances we fail to see wherein any of the substantial rights of the appellants were affected or prejudiced by the action of the trial court in permitting the points and authorities of respondents to be filed after the expiration of the ten days following the notice of intention to move for new trials.

Respondents' motion for new trials was made upon four of the statutory grounds, including insufficiency of the evidence to justify the verdict, and in its order granting the same the court gives as one of its reasons for so doing insufficiency of the evidence to sustain the verdict of the jury.

[2] An examination of the evidence set forth in the transcript discloses a conflict in the evidence, and will also show that there is substantial evidence to support the allegations of the complaint in each of said cases, to the effect that appellant Gelston was negligent in the operation of the automobile at the time of the accident that inflicted the alleged injuries upon respondent Weinrich and caused the death of respondents' mother; that such negligence was the proximate cause of such injuries and death and that respondents were thereby damaged.

Such being the case, this court cannot say that there was any abuse of discretion by the trial court in granting said motion.

[3] It is the well-settled rule that, even though there is a substantial conflict in the

evidence, the trial court will not be deemed to have abused its discretion when it has determined that the verdict is against the weight of the evidence, and that there should be a new trial; and its order in that respect is conclusive on appeal, in the absence of abuse of discretion. *Gordon v. Roberts*, 162 Cal. 506, 123 P. 288; *Taylor v. Volfi*, 86 Cal. App. 244, 260 P. 927; *Beckley v. Harris*, 84 Cal. App. 557, 258 P. 428.

The order is affirmed.

We concur: FINCH, P. J.; R. L. THOMPSON, J.

104 Cal. App. 299

ACKERMAN v. BEACH et al.
Civ. 5726.

District Court of Appeal, Second District, Division 1, California.
March 4, 1930.

1. Appeal and error $\S$ 935(2)—Appellate court, on plaintiff's appeal from order setting aside default, must assume trial court believed defendants' statement of facts.

On plaintiff's appeal from order setting aside a default and judgment, appellate court must assume that trial court believed statement of facts as made by defendants' attorney.

2. Judgment $\S$ 143(17)—Under circumstances leading defendants' attorney to believe litigation would rest pending settlement conference, delay in filing demurrer after service held excusable, warranting setting aside default.

Where, at time demurrer to complaint was served on January 22, plaintiff's attorney suggested that whole controversy be adjusted out of court, and defendants' attorney agreed to interview his clients following week when he finished jury trial, leading defendants' attorney to believe pending litigation would rest without further proceedings, awaiting outcome of settlement conference, delay in filing demurrer until February 1 held excusable, warranting setting aside of default taken on January 28 and consequent judgment.

Appeal from Superior Court, Los Angeles County; Fletcher Bowron, Judge.

Action by S. E. Ackerman against Annie T. Beach and another. From an order setting aside a default and judgment, plaintiff appeals.

Affirmed.

C. A. Stice, of Los Angeles, for appellant.

E. S. Wakeman, of Los Angeles, for respondents.

ELLIOT CRAIG, Justice pro tem.

This is an appeal by plaintiff from an order of the superior court setting aside a default and judgment.

On January 22, 1927, the attorney for respondents served upon the attorney for appellant a demurrer to the complaint, but did not attempt to file the same until the 2d day of February. Default was taken January 28, 1927, and judgment thereon was obtained on February 1, 1927. The affidavit of the attorney for respondents, in support of the motion to set aside the default and judgment, states, among other things, that at the time the demurrer was served the attorney for appellant suggested that the whole controversy (this case and other matters) between the parties should be adjusted out of court, and requested him to interview his clients to see if the matter could be settled to avoid litigation; that he stated he would do so, but that he had a jury trial set on the following Thursday, which would occupy him all of the following week, but as soon as that was over he would be glad to see if the matter could be settled without further litigation. The counteraffidavit of attorney for appellant denied some of said statements. In the reply affidavit of the attorney for respondents he admitted that it was not agreed in so many words that the demurrer would not be filed, but insisted that they did agree that affiant was to take up the matter with his clients and endeavor to settle the matter in dispute, and that he understood and believed in good faith that pending litigation would rest without further proceedings, awaiting the outcome of such settlement conference.

[1, 2] In view of the order granting the motion to set aside the default, it must be assumed that the court believed the statement of facts as made by the attorney for respondents. This being so, the court was justified in deciding that the delay in the matter of filing the demurrer was excusable. *Waybright v. Anderson*, 200 Cal. 374, 253 P. 148.

The motion to set aside the default and judgment was accompanied by a sufficient affidavit of merits.

The order appealed from is affirmed.

We concur: CONREY, P. J.; HOUSER, J.

104 Cal. App. 788

**S. E. ACKERMAN, Plaintiff and Appellant, v.
Annie T. BEACH and Albert H. Beach,
Defendants and Respondents.**

Civ. 5727.

District Court of Appeal, Second District, Division 1, California.

March 4, 1930.

Appeal from Superior Court, Los Angeles County; Fletcher Bowron, Judge.

C. A. Stice, of Los Angeles, for appellant.

E. S. Wakeman, of Los Angeles, for respondents.

ELLIOT CRAIG, Justice pro tem.

The matters involved on this appeal are identical with those of *Ackerman v. Beach et al.*, 285 P. 895, this day decided by this court, and upon the authority of that case the order herein appealed from should be affirmed.

The order appealed from is affirmed.

We concur: CONREY, P. J.; HOUSER, J.

104 Cal. App. 235

HAMMOND LUMBER CO. v. LOS ANGELES COUNTY.*

Civ. 7235.

District Court of Appeal, First District, Division 1, California.

Feb. 27, 1930.

Rehearing Denied March 29, 1930. Hearing Denied by Supreme Court April 28, 1930.

1. Taxation $\S$ 80—Leasehold interest is assessable as personalty (Pol. Code, $\S$ 3820).

In state of California, a leasehold interest in real estate is assessable as personal property under Pol. Code, $\S$ 3820.

2. Taxation $\S$ 247—Usufructuary interest alone is subject to tax when land leased is owned by state or municipality.

When there is lease of land owned by state or municipality, reversion is exempt from taxation, and the usufructuary interest alone is subject to tax in proportion to its value.

3. Taxation $\S$ 80—Absent agreement to contrary, tax of usufructuary interest falls on lessee when land leased is owned by state or municipality.

When land leased is owned by state or municipality, the tax of the usufructuary interest falls on lessee, in absence of agreement to contrary; the reversion being exempt from taxation.

4. Taxation $\S$ 535—That assessment is in excess of property's value is not evidence of fraud, hence overvaluations honestly made are not grounds for refund.

Mere fact that assessment not discriminatory or inequitable on its face is in excess of

fair value of property assessed is not in itself evidence of fraud, hence mistakes or overvaluations honestly made are not grounds for refund of protested charge.

5. Taxation $\S$ 347—To invalidate tax assessment, there must be conscious failure to exercise impartial judgment or resort to arbitrary assessments.

There must be conscious failure to exercise fair and impartial judgment, or resort to arbitrary methods varying from those employed in assessing other property of like character and situation and resulting in imposition designedly of an unequal burden on property, to invalidate tax assessment.

6. Taxation $\S$ 490—Decision of equalization board, made after due hearing and within limits of reasonable discretion, is final and conclusive on question of reasonableness of assessment.

In case taxpayer feels aggrieved by reason of assessor's valuation, taxpayer must first apply to county board of equalization for relief, and decision of board made after due hearing and within limits of reasonable discretion is final and conclusive.

7. Taxation $\S$ 453—When assessment is not wholly void taxpayer must first apply for relief to equalization board.

In case taxpayer feels aggrieved by reason of assessor's valuation, if assessment is not wholly void taxpayer must first apply for relief to board of equalization.

8. Taxation $\S$ 490—Decision of equalization board will not be rejected on review by court, unless there is proof of actual fraud or such arbitrary action as to amount to constructive fraud.

Decision of board of equalization is an independent and conclusive judgment which abrogates and takes place of judgment of the assessor, and even though there be mistake or error, decision of board will not be rejected on review by court unless there is proof of actual fraud or such arbitrary, unreasonable, or grossly oppressive action in willful disregard of law as amounts to constructive fraud.

9. Taxation $\S$ 543(1)—Function of trial court in reviewing decision of equalization board was to determine whether correct method of valuing property was pursued or whether evidence before board justified assessment made.

In action to recover tax paid in effect proceeding to review decision of county board of equalization as to excessiveness of assessment, function of trial court was to determine whether correct method of valuing lessee's usufructuary interest was pursued and whether there was substantial evidence before board in justification of assessment made.

10. Taxation $\S$ 347—Assessor must exercise prudent discretion in reaching conclusions as to valuation of property.

There is no rigid rule for valuation of property by an assessor, but it is his duty to exercise prudent judgment in reaching conclusions after considering all circumstances and various factors influencing value.

11. Taxation Ⓒ350—In determining value of lease, assessor should consider nature of estate granted, its duration, and profits arising therefrom.

Assessor, in determining value of lease for taxation, should give due consideration to nature of estate granted, its duration, and profits arising from use of leased property.

12. Taxation Ⓒ490—Weight and value of evidence in proceedings for reduction of tax assessment held for equalization board.

In proceedings before county board of equalization for reduction of tax assessment, it was for board to judge weight and value of evidence.

13. Taxation Ⓒ543(7)—Evidence held to support finding that leasehold interest was not assessed improperly or in excess of its cash value.

In action to recover tax paid in effect proceedings to review decision of board of equalization as to equality of tax assessment, evidence supported finding that taxpayer's leasehold interest was not assessed improperly or in excess of its cash value.

14. Taxation Ⓒ543(7)—Burden was on taxpayer to prove that his leasehold interest was assessed improperly or in excess of its cash value.

In action to recover tax paid in effect proceedings before county board of equalization for reduction of assessment, burden was on taxpayer seeking reduction to show that his leasehold interest was improperly assessed and assessed in excess of its cash value.

15. Taxation Ⓒ490—Decision of board of equalization could not be collaterally attacked by new evidence in different tribunal.

In action to recover tax paid in effect proceedings to review decision of county board of equalization as to whether taxpayer's leasehold interest was improperly assessed or assessed in excess of its cash value, decision of board of equalization on evidence adduced before it could not be collaterally assailed by new evidence in different tribunal.

16. Taxation Ⓒ40(8)—Assessment of leasehold estate in exempt property is not discriminatory because similar estates in unexempt property are not separately assessed.

Fact that leasehold estates in property not exempt from taxation are not separately assessed does not make assessment on leasehold estate in property exempt from taxation discriminatory.

17. Taxation Ⓒ543(7)—Charge of willful disregard of law by equalization board, or intentional imposition of unequal taxation, held without basis, where there was no showing of discrimination at hearing before board.

Where there had been no showing of discrimination at hearing before county board of equalization for reduction of assessment, there was no basis for charge of willful disregard of law by board or of intentional or conscious imposition of unfair or unequal burden of taxation.

18. Taxation Ⓒ247—Taxpayer would not be exempt from paying taxes on proper assessment of his leasehold in exempt property, even if other property of like character escaped taxation.

That other property of like character escaped taxation would not release the taxpayer from paying a tax on his leasehold interest in land owned by municipality which was free from taxation, where tax on leasehold was based on proper assessment.

19. Evidence Ⓒ571(7)—Expert witness' testimony in proceedings to review decision of equalization board held entitled to credit, though gained from inadmissible sources, because of added sanction of expert's general experience.

In action to recover tax paid in effect proceedings to review decision of county board of equalization as to excessive assessment of property, where it appeared that witness had wide experience in real estate transactions, he being an expert his testimony, though based on knowledge gained from inadmissible sources, held entitled to credit because of added sanction of his general experience.

20. Constitutional law Ⓒ284(1)—Where taxpayer's property was assessed by approved method and assessment was approved by equalization board and reviewed by court, taxpayer held not deprived of property without due process.

When taxpayer's leasehold interest in land owned by municipality was assessable under laws of state and assessor followed approved method of valuation in making assessment which after ample hearing was confirmed by the board of equalization, and taxpayer further invoked revisory powers of courts of justice, taxpayer held not to have been deprived of his property in contravention of United States Constitution without due process of law.

Appeal from Superior Court, Los Angeles County; Frank C. Collier, Judge.

Action by the Hammond Lumber Company against the County of Los Angeles. Judgment for defendant, and plaintiff appeals.

Affirmed.

R. L. Horton, of Los Angeles, for appellant.

Everett W. Mattoon, Co. Counsel, and W. Sumner Holbrook, Jr., Deputy Co. Counsel, both of Los Angeles, for respondent.

JOHNSON, Justice pro tem.

Plaintiff has appealed from a judgment in favor of defendant in this action brought to recover the amount of a tax levied on plaintiff's possessory interest as a tenant of real property and paid under protest.

Since May, 1923, the plaintiff has been in possession of certain harbor lands comprising about 25 acres, with a water frontage of about 2,500 feet, owned by the city of Los Angeles and rented by the city to plaintiff

for use in plaintiff's lumber business under a permit in the nature of a lease running to June 3, 1951, the annual rental until June 3, 1931, being \$8,060.88, payable in quarterly installments, and for succeeding decennial periods to be fixed either by the parties themselves or by arbitration.

In the year 1924 the county assessor assessed plaintiff's possessory interest in the land, apart from plaintiff's improvements, at \$234,150, and plaintiff was required to pay as the tax on its possessory interest the sum of \$8,780.62, based on the rate for the year 1923. Of this amount \$374.64 was returned to plaintiff after a lower tax rate had been fixed for the year 1924.

Plaintiff paid the tax under protest, and thereafter in the month of July, 1924, applied to the board of supervisors, sitting as the county board of equalization, for a reduction of the assessment, on the ground that the possessory interest had been grossly overvalued and that the assessment and tax were discriminatory and inequitable. After hearing all the evidence which was offered, the board denied the application.

Thereafter, on January 7, 1925, plaintiff instituted this action, alleging that the rent designated in the permit was the full rental value of the premises and that the assessment on plaintiff's possessory interest was made, with clear knowledge and intent, grossly in excess of its full cash value and really equalled the value of the fee. The plaintiff averred further that it had presented the facts to the board of equalization, but that board, in disregard of the evidence adduced, had arbitrarily and willfully denied the application, and had intentionally imposed on plaintiff such an unfair and unequal burden of taxation as to amount to constructive fraud.

Upon the trial of the case the court, after hearing the evidence, made its written decision and its judgment in favor of defendant, finding among other things that the rent reserved was not the full reasonable rental value of the lands; that the assessment was not fixed at an amount representing the value of the fee, and was not in excess of the cash value of plaintiff's interest; that the valuation was not made in furtherance of any scheme to impose an excessive tax, or to place an unequal burden on plaintiff, nor was the assessment or tax discriminatory; and that the action of the board of equalization in refusing to reduce the assessment was not arbitrary, oppressive, or capricious, and did not constitute constructive fraud.

The plaintiff contends on this appeal that the evidence does make out a case of constructive fraud under the rules declared in *Los Angeles Gas & Electric Co. v. County of Los Angeles*, 162 Cal. 164, 121 P. 384, 9 A. L. R. 1277; *Southern Pacific Land Co. v. County of San Diego*, 183 Cal. 543, 191 P. 931; and

Mahoney v. City of San Diego, 198 Cal. 388, 245 P. 189.

[1-3] A leasehold interest is in this state assessable as personal property under section 3820 of the Political Code. *San Pedro, etc., R. R. Co. v. City of Los Angeles*, 180 Cal. 18, 179 P. 393. When land held in private ownership is leased, both the leasehold and the reversionary interest are ordinarily assessed together to the owner; the value of the lessee's estate being treated as a constituent of the valuation of the larger interest belonging to the owner of the freehold. Instead of splitting the interests, it operates fairly as a rule to make a single assessment against the lessor as the beneficial owner not only of the freehold, but also of all lesser estates, and the incidence of the tax then becomes a matter of agreement between the lessor and the lessee. Usually in the case of short leases the lessor pays the entire tax, and with such charge in view he fixes his rent accordingly. *Graciosa Oil Co. v. County of Santa Barbara*, 155 Cal. 140, 143, 144, 99 P. 483, 20 L. R. A. (N. S.) 211. When, however, there is a lease of land owned by the state or a municipality, the reversion being exempt from taxation, the usufructuary interest alone is subject to tax in proportion to its value; and in the absence of agreement to the contrary, the tax necessarily falls upon the lessee. While the instrument executed between the plaintiff and the city of Los Angeles is denominated a "permit," it is not, as plaintiff asserts, a mere license. It grants to plaintiff for a fixed period the right to the exclusive use of the premises on prescribed terms. It embodies an agreement having all of the characteristics and qualities of a lease, and entitles plaintiff to the exclusive control and enjoyment of the premises for the full term specified, subject only to fulfillment of the terms and conditions expressed. On the termination of the tenancy, improvements constructed by the occupant are to become the property of the city, but so long as plaintiff complies with its covenants, plaintiff remains secure in its possession throughout the agreed term.

[4, 5] The plaintiff took this grant of the exclusive possessory right in the lands, charged with knowledge that the interest so acquired would be subject to taxation under the laws of the state. The mere fact that an assessment, not discriminatory or inequitable on its face, is in excess of the fair value of the property assessed, is not in itself evidence of fraud. Hence mistakes or overvaluations honestly made are not grounds for refund of a protested charge. To invalidate the assessment there must be a conscious failure to exercise a fair and impartial judgment, or a resort to arbitrary methods varying from those employed in assessing other property of like character and sit-

uation, and resulting in the imposition designedly of an unequal burden on the property of the complainant. *Los Angeles G. & E. Corp. v. County of Los Angeles*, 162 Cal. 164, 166, 121 P. 384, 9 A. L. R. 1277; *Miller & Lux v. Richardson*, 182 Cal. 115, 128, 187 P. 411; *Pacific Coast S. S. Co. v. Richardson*, 186 Cal. 70, 72, 198 P. 1034; *Pierce v. County of Santa Barbara*, 40 Cal. App. 302, 305, 180 P. 641; *Birch v. County of Orange*, 50 Cal. App. 134, 136, 210 P. 57; *Wild Goose Country Club v. County of Butte*, 60 Cal. App. 339, 342, 212 P. 711; *Ambassador Hotel Corporation v. Los Angeles County* (Cal. App.) 270 P. 726.

[6, 7] In case a taxpayer feels aggrieved by reason of the assessor's valuation, the law provides for a determination of the facts by a tribunal sitting as a county board of equalization. When the assessment is not wholly void, it is to this tribunal that the taxpayer must first apply for relief, and the decision of the board, made after due hearing and within the limits of reasonable discretion, is final and conclusive. *La Grange Co. v. Carter*, 142 Cal. 560, 565, 76 P. 241; *California Domestic Water Co. v. County of Los Angeles*, 10 Cal. App. 185, 191, 101 P. 547; *Pierce v. County of Santa Barbara*, 40 Cal. App. 302, 304, 180 P. 641; *Globe G. & M. Co. v. County of Los Angeles*, 62 Cal. App. 297, 299, 216 P. 631.

[8] The decision of the board constitutes an independent and conclusive judgment which abrogates and takes the place of the judgment of the assessor, and even though there be mistake or error, the decision of the board will not be rejected upon review by the court, unless there is proof of actual fraud, or such arbitrary, unreasonable, or grossly oppressive action, in willful disregard of the law, as amounts to constructive fraud. *Los Angeles G. & E. Co. v. County of Los Angeles*, 162 Cal. 164, 170-172, 121 P. 384, 9 A. L. R. 1277; *Southern Pacific Land Co. v. County of San Diego*, 183 Cal. 543, 546, 191 P. 931; *Wores v. Imperial Irr. Dist.*, 193 Cal. 609, 627-629, 227 P. 181; *Birch v. County of Orange*, 186 Cal. 736, 741, 742, 200 P. 647; *Mahoney v. City of San Diego*, 198 Cal. 388, 397, 245 P. 189.

[9] Plaintiff followed the requisite procedure in applying to the board of equalization for reduction of the assessor's valuation, but met with no success. No charge is made of any actual fraud or malicious abuse of power on the part of either the assessor or the board of equalization, but it is earnestly contended that the assessment is so grossly excessive and discriminatory as constructively to constitute fraud. The assessment not being wholly void, this action, though cast in the form of an action to recover a tax paid under protest, is properly a proceeding to review the decision of the board of equalization. The function of the trial court, therefore, was

to determine whether a correct method of valuing the usufructuary interest was pursued, and whether there was substantial evidence before the board in justification of the assessment made. The plaintiff was represented at the hearing before the board by its attorney and by its general manager, Mr. McLeod, together with its real estate appraiser, C. S. Anderson. The interest of the county was represented by the assessor, E. W. Hopkins, and his deputy, S. R. McClay. Mr. Anderson and Mr. McLeod insisted that the possessory interest had no value in excess of the rent reserved, and that the assessor's valuation was equivalent to the full value of the land to the city. After these witnesses had been heard, Mr. McClay gave his testimony as to the method used by the assessor in making his assessment. The method was that known as the capitalization method. The deputy assessor stated that in arriving at the value of the leasehold interest, the land itself was first taken at a valuation of \$13,000 per acre, which corresponded with the value of surrounding property; then the annual average rent per acre, representing the income from the investment, was capitalized on the basis of an annual interest return of 6 per cent., and the difference between the value of the land and the capitalized rent charge or income represented the average value of the possessory interest per acre. This value was then multiplied by the number of acres, and in accordance with the usual practice in assessing property in general, one-half of the amount so arrived at was adopted as the assessed valuation of the leasehold interest.

It appeared also from McClay's testimony that, under a new schedule of rents adopted by the city, leases of similar lands had been made subsequent to plaintiff's lease at much higher rentals.

The assessor admitted that it was not his practice to assess leasehold interests separately when the land itself was subject to taxation, but with regard to other harbor leases made by the city it appeared that they were dealt with in the same manner as plaintiff's lease.

After hearing all the evidence presented, the board refused to make any change in plaintiff's assessment.

The proceedings before the board were rather informal in character, and the plaintiff had, and exercised, full freedom in questioning the witnesses and commenting on their testimony as it was given. No complaint can justly be made of any arbitrary or malicious abuse of power. If the capitalization method is a reasonably fair and accurate method of appraising the value of a leasehold interest, it is apparent that the determination of the board of equalization, as the sole judge of the facts, must be accepted as controlling. *Miller & Lux v. Richardson*, 182

Cal. 115, 128, 187 P. 411; *Pacific Coast S. S. Co. v. Richardson*, 186 Cal. 70, 72, 198 P. 1034. Hence the question before the trial court was not whether, through some miscalculation, mistake, or oversight, there had been an erroneous valuation, but whether the method pursued had resulted in an overcharge so disproportionate and exorbitant as to produce an illegal assessment and tax.

At the trial the evidence was not limited strictly to this question, and, over the objection of defendant, much opinion evidence was received on behalf of plaintiff as to the fair market value of the lease. The plaintiff called as witnesses a number of real estate brokers, some of whom specialized in leases of industrial sites, but without having had actual experience with water-front properties. These witnesses in general expressed the opinion, voiced by plaintiff's witnesses before the board of equalization, that the rent payable was the full market value of the use and in consequence the lease had no saleable or "bonus" value. One of plaintiff's witnesses, however, W. H. Daum, when asked by the trial judge how he figured the value of a lease, indicated that the capitalization method should be followed. "The value of a lease to my opinion," he said, "can be arrived at only in one way. All of the costs of occupancy to a tenant must be carefully set down on one side of the ledger, the value of that occupancy on the other side of the ledger, and inasmuch as the value of occupancy exceeds the cost of occupancy can we capitalize it; a reasonable sum of all the various conditions of occupancy being taken into consideration, that sum capitalized being the difference between the two.

"Q. What do you mean by 'capitalize'?"
A. Capitalizing at a reasonable percentage in return that is justified by the uses which may be made in the particular business occupancy under consideration."

The witness then went on to say that he attached no "bonus value" to this particular lease, because it limited the use of the land to the purposes of a lumber business instead of extending a privilege for any sort of commercial use.

In support and explanation of the rule applied in the valuation of leasehold interests, the county relied upon the testimony of Milton W. Moore, who became a deputy county assessor in 1925, and began to give his attention to the harbor district in 1926. Between 1903 and 1915 he had acted as right of way and tax agent for railroad companies, some of which had water-front properties in Tacoma, Seattle, and Vancouver. And in 1915 he had entered the service of the interstate commerce commission as senior land appraiser, with duties which had required appraisal of water-front properties in Oakland and elsewhere. He had had prac-

tical experience also as a real estate broker, both in Southern and Northern California. His testimony showed that for several months he had given close study to the valuation of the harbor properties of the city of Los Angeles and the leases thereof, as well as other leasehold interests throughout the county. This witness fixed the value of the leasehold interest of plaintiff for purpose of assessment on the first Monday of March, 1924, at \$204,650, taking into consideration the limitation of use to plaintiff's lumber business. He described his method of procedure in detail, stating that he first determined what he called a base value representing the present worth of a right in perpetuity to the lands, subject to the privileges and limitations of the lease. He then calculated the annual return that an owner might reasonably expect from property so valued at the rate of 7 per cent., and the difference between such amount and the annual rent represented the annual benefit or saving to the lessee. To ascertain, however, the savings or bonus value on the first Monday of March, 1924, the savings of future years had to be reduced to present worth. So by a process which need not be followed here with particularity, the witness figured the full market value of the leasehold interest at \$409,313, one-half of which amount, or roughly \$204,650, was taken as the "full cash value" for taxation purposes. The witness in his testimony thus demonstrated the application of the capitalization method, which in *Birch v. County of Orange*, 59 Cal. App. 133, 138, 139, 210 P. 57, was pronounced to be a fair and reasonable method of valuing a beneficial interest. See, also, *Graciosa Oil Co. v. County of Santa Barbara*, 155 Cal. 140, 143, 144, 99 P. 483, 20 L. R. A. (N. S.) 211.

In *McMichael's "Long and Short Term Leaseholds"* it is said (2d Ed., pp. 90, 91): "A property, whether held in fee simple or as a leasehold, is usually worth what it will earn, the net amount of earnings being capitalized at the rate of interest prevailing at the time and place the lease is appraised. That percentage is usually six, but fluctuates up and down, according to the price of money, and other market conditions, such as the demand for that particular type of investment. * * * The value of the lease is the difference between burdens and benefits. The burden of rental is known and the burden as to taxes may be approximated. * * * Strictly speaking, to get at the value of a lease involves striking a balance of theoretical receipts and expenses for each present and prospective year of the lease and taking the present worth of future profits."

Again, Zangerle, inheritance tax appraiser of Ohio for the opulent county of Cuyahoga, in his "Principles of Real Estate Appraising," says (p. 31): "Short term leases

such as 20, 30, 40 or 50 years must be appraised on the present worth of an annuity." This is supplemented by the following statement, at page 150: "In other words, the present worth at 6 per cent of an accumulating dollar for a given number of years multiplied by the annual rental gives the full present worth value of the usual lease for a short and definite time." And in chapter 23 on Appraisal of Leasehold Estates, he says further (p. 148): "In a number of cities, as in Cleveland, on the main thoroughfares, few outright sales have taken place during the last ten years. An assessor determining the general property tax, as well as the appraiser for investment purposes, is compelled to obtain his evidence of capital value through a capitalization of land rentals under long-time leases. More and more the inheritance tax appraiser is called upon to appraise the interest of lessor, lessee, sublessee, fees subject to leases, and the like." The books from which we have quoted are standard reference books approved and indorsed by the National Association of Real Estate Boards, and they contain examples of the manner in which various kinds of leaseholds are valued by use of the capitalization method. Since that method is employed in appraising the values of leases in the business world and in determining inheritance taxes, no good reason suggests itself against the adoption of the same rule of procedure, with due regard to other appropriate factors, as a lawful means of arriving at the assessable value of a lessee's possessory interest under the general tax laws of the state.

[10, 11] There is no rigid rule for the valuation of property by an assessor. Different minds may be expected to differ honestly in their judgments. But after considering all the circumstances and the various factors influencing value, it is the assessor's duty to exercise a prudent discretion in reaching conclusions. *New Orleans Cotton Exchange v. Board of Assessors*, 37 La. Ann. 423, 426. And in determining the value of a lease, due consideration should be given to the nature of the estate granted, its duration, and the profits arising from the use of the demised property. *People v. Feitner*, 61 App. Div. 129, 70 N. Y. S. 500, 502, affirmed in *Memo. 171 N. Y. 641*, 63 N. E. 786.

[12, 13] While the opinions of plaintiff's witnesses expressed in their statements to the board of equalization were competent evidence, such evidence was in no sense conclusive, and it was for the board to judge of the weight and value of the evidence on both sides. The board determined that the method pursued by the assessor was a correct method, and that his assessment was a fair and just valuation for purposes of taxation. The evidence before the trial court tends to confirm the judgment of the board, and sup-

ports the court's finding that plaintiff's interest was not assessed improperly, or in excess of its cash value, but only in proportion to the value of the possessory right.

[14, 15] The valuation placed on the plaintiff's interest at the trial by the witness Moore was somewhat lower than the amount of the assessment complained of, due mainly to the fact that the witness took into consideration certain additional charges of \$1,500 per year that would fall upon the plaintiff partly in 1926 and partly in 1930 for certain wharf franchises. No mention of these future charges was made before the board of equalization; and hence the omission to give consideration to that factor at that time casts no imputation upon the decision of the board. In the proceeding before the board the burden of proof was on the plaintiff, and the decision of the board upon the evidence adduced cannot be collaterally assailed by new evidence on the point in a different tribunal. *Wild Goose Country Club v. County of Butte*, 60 Cal. App. 339, 341, 212 P. 711.

[16-18] What has just been said applies with equal force to the contention that there was such gross inequality and arbitrary discrimination as to invalidate the assessment. At the hearing before the board it was admitted by the assessor that leasehold interests in land held in private ownership were not separately assessed, a single assessment in such case being made of the freehold with all lesser interests. There was, however, no evidence of any omission to assess separately possessory interests in other property exempt from taxation, and an assessment upon a leasehold estate in exempt property is not discriminatory because similar estates in unexempt property are not separately assessed. *Chicago v. University of Chicago*, 302 Ill. 455, 461, 134 N. E. 723, 23 A. L. R. 244; *Trimble v. City of Seattle*, 231 U. S. 683, 34 S. Ct. 218, 58 L. Ed. 435. At the trial the assessor was asked whether in the year 1924 he had assessed the possessory interests of tenants in lands of the municipality other than harbor lands, and he stated that he had assessed all such possessory interests of which he had any knowledge. There was no countervailing evidence, though some unsubstantiated assertions were made by plaintiff's attorney. And there having been no showing of discrimination at the hearing before the board of equalization, there is of course no basis for any charge of willful disregard of the law by the board or of the intentional or conscious imposition of any unfair or unequal burden of taxation. Even if other property of like character escaped taxation, such circumstance would not relieve plaintiff from paying a tax based on a proper assessment of its property. *City of Los Angeles v. Western Union Tel. Co.*, 161 Cal. 204, 207, 118 P. 720.

[19] Regarding the evidence given at the trial by the witness Moore, over the objection of plaintiff, it is insisted by plaintiff that Moore lacked competence to testify as an expert concerning the value of harbor lands, upon the ground that his connection with the assessor's office did not begin until October, 1925, and that the data which he had gathered consisted of information derived from hearsay sources. The witness, who was shown to have had a wide experience in real estate transactions, described in much detail the investigations he had made in gathering his statistics relative to the Los Angeles harbor lands, and it is well settled that testimony as to market values is not incompetent because derived from published reports or from information acquired through others. The expert's testimony, though based on knowledge gained from inadmissible sources, is entitled to credit because of the added sanction of his general experience. *Betts v. Southern California Fruit Exchange*, 144 Cal. 402, 409, 77 P. 993; *People v. Marblehead Land Co.*, 82 Cal. App. 289, 303, 255 P. 553; *Fishel v. Ball & Co.*, 83 Cal. App. 128, 134, 256 P. 493; *Glantz v. Freedman* (Cal. App.) 280 P. 704.

[20] In the complaint plaintiff averred that the assessment and tax were in contravention of the federal Constitution, and that plaintiff was deprived of its property without due process of law. The leasehold interest being assessable under the laws of the state, and the assessor having followed an approved method of valuation which, after ample hearing, was confirmed by a tribunal duly constituted by law, and the plaintiff having further invoked the revisory powers of the courts of justice, plaintiff has had its full day in court and has in no way suffered in any of its constitutional rights. In *Davidson v. New Orleans*, 96 U. S. 97, 104, 24 L. Ed. 616, it is said: "That whenever by the laws of a State, or by State authority, a tax, assessment, servitude, or other burden is imposed upon property for the public use, whether it be for the whole State or of some more limited portion of the community, and those laws provide for a mode of confirming or contesting the charge thus imposed, in the ordinary courts of justice, with such notice to the person, or such proceeding in regard to the property as is appropriate to the nature of the case, the judgment in such proceedings cannot be said to deprive the owner of his property without due process of law, however obnoxious it may be to other objections."

This is not a suit in equity to enjoin collection of an excessive or illegal tax. And in the federal courts the rule is firmly established that when an action at law is brought to recover a tax, not wholly void, which was

paid under protest, the determination of a quasi-judicial body, such as a board of equalization acting within its jurisdiction, operates as a conclusive judgment. Even if such judgment is erroneous, the taxpayer, having had his hearing, can no more recover the amount paid thereunder than if it were money collected under an erroneous judgment of a court of competent jurisdiction. *Balfour v. City of Portland* (C. C.) 28 F. 738, 739; *Stanley v. Albany County*, 121 U. S. 535, 550, 7 S. Ct. 1234, 30 L. Ed. 1000; *Western Union Tel. Co. v. Missouri*, 190 U. S. 412, 426, 23 S. Ct. 730, 47 L. Ed. 1116.

There is nothing in the evidence presented to the trial court indicating an arbitrary, discriminatory, or fraudulent assessment on the part of the board of equalization, and the findings in favor of the fairness, correctness, and validity of the assessment have ample support.

The judgment is affirmed.

We concur: TYLER, P. J.; CASHIN, J.

JOHNSON v. JOHNSON. ★
Civ. 272.

District Court of Appeal, Fourth District,
California.

March 3, 1930.

Rehearing Denied March 31, 1930. Hearing Denied by Supreme Court April 28, 1930.

1. Divorce ⇨282—Objection that husband was in contempt of court at time of hearing, on motion to modify decree regarding alimony, could not be urged for first time on appeal.

Where wife did not make objection in trial court at hearing on motion to modify divorce decree, in so far as it provided for payment of alimony, that husband was in contempt of court at time of hearing on motion, such objection could not be urged for first time on appeal.

2. Divorce ⇨245(3)—Husband's motion thirty-three days after discharge from his position, for modification of decree as respects alimony, held not premature.

Where interlocutory decree of divorce decreed that husband pay wife for alimony \$100 per month, and up to June 12, 1928, husband was earning salary of \$550 a month, and on this date was discharged without any fault on his part, motion filed July 13, 1928, thirty-three days thereafter, while his total income was less than \$9 per month and before he had secured another position, for modification of decree, as respects payment of alimony, was not made prematurely, but fact that husband was very prompt in seeking relief from his obligation to support wife merely constituted one of facts to be weighed and considered in deciding controversy.

3. Divorce ⚭286—Appellate court must presume decree, allowing wife support money, was regular and supported by evidence.

In support of decree in superior court in divorce suit allowing support money, there was presumption that judgment was regular and was supported by proper evidence.

4. Divorce ⚭245(1)—Award of alimony to erring wife, if based upon contract as part of settlement of property rights, could not be modified but, if not based on contract, it was unauthorized (Civ. Code, §§ 136, 139, 158).

Where decree of divorce was given to innocent husband, and he was directed to pay \$100 per month to wife, if award of \$100 per month was based upon contract authorized by Civ. Code, § 158, as part of settlement of property rights of parties, court had no authority to modify it, but if it was not supported by contract, it was not authorized under sections 136, 139, and it did not have sanction of law.

5. Divorce ⚭245(3)—Burden of proof rested on husband moving for modification of divorce decree, as respects alimony.

Where husband moved for modification of decree of divorce, in so far as it provided for payment of alimony, burden of proof rested on husband as moving party.

Appeal from Superior Court, Fresno County; Denver S. Church, Judge.

Divorce action by W. P. Johnson against Clara C. Johnson. Plaintiff was granted an interlocutory decree of divorce, and on plaintiff's motion the decree was modified in so far as it provided for payment of alimony, and defendant appeals.

Reversed.

Strother P. Walton, of Fresno, for appellant.

Everts, Ewing, Wild & Everts, Dan F. Conway, and C. L. Clark, all of Fresno, for respondent.

MARKS, J.

On March 14, 1928, respondent was granted an interlocutory decree of divorce from appellant, which provided in part as follows:

"And it further appearing to the court that the parties hereto have mutually effected a settlement of their property rights wherein and whereby the defendant herein was given the sum of five thousand (\$5,000.00) dollars in cash as and for a complete settlement and adjustment of her community interest and interests held in joint tenancy between the parties and the defendant having made, executed and delivered to plaintiff deeds to all real property held in joint tenancy between parties hereto or held as community property and having delivered to plaintiff a bill of sale of all furniture and personal property belonging to the parties hereto, save and except a certain bedroom

set, a vacuum cleaner and two certain pictures, and the court having determined that said settlement of the property rights was just and equitable as between the parties hereto. Now, therefore, it is ordered, adjudged and decreed that the plaintiff above named is entitled to a divorce upon the grounds stated in his complaint, to-wit, extreme cruelty, and that the bonds of matrimony heretofore existing between the plaintiff and defendant should be dissolved, and it is determined that an interlocutory judgment of divorce should be entered in said action and said interlocutory judgment is hereby entered accordingly, and it further appearing to the court that the defendant is physically incapable of earning a livelihood by her own labors. It is further ordered, adjudged and decreed that plaintiff pay to the defendant as and for alimony the sum of one hundred (\$100.00) dollars per month, payable on the 15th day of each and every month, commencing on the 15th day of March, 1928. It is further ordered, adjudged and decreed that the provisions hereinbefore recited as to the division and settlement of the property rights between the parties hereto be and the same are hereby confirmed and approved."

On July 13, 1928, respondent served and filed a notice of motion for a modification of the decree in so far as it provided for the payment of alimony to appellant. The motion was heard on July 20, 1928, and on August 15, 1928, the court made its order reducing the monthly payments from one hundred dollars per month to forty dollars per month. The appeal is taken from this order.

The record before us consists of the interlocutory decree of divorce, the notice of motion and two affidavits used at the hearing, the order modifying the decree and a very brief bill of exceptions.

Appellant relies upon three grounds for a reversal of the order, namely: First, that respondent was in contempt of court at the time of the hearing and that, therefore, the trial court should not have considered his application for a reduction of the alimony; second, that the application was prematurely made; and third, that the portion of the decree awarding appellant alimony in the sum of one hundred dollars per month was entered by consent and was based upon contract and, therefore, could not be modified.

[1] Under appellant's first specification of error, it is admitted that respondent had not paid the one hundred dollars falling due on July 15, 1928. It does not appear that this objection was made in the trial court at the hearing of the motion. It cannot be urged for the first time here.

[2] Appellant next contends that respondent's motion was made prematurely. Up to

June 12, 1928, he was earning a salary of five hundred fifty dollars a month and on this date was discharged without any fault on his part. His motion was filed thirty-three days thereafter while his total income was less than nine dollars per month and before he had secured another position. It may be admitted that respondent was very prompt in seeking relief from his obligation to support his wife, but still this fact would not deprive the trial court of the right to entertain and decide the motion. It merely constituted one of the facts to be weighed and considered in deciding the controversy.

Appellant's last ground upon which she relies for a reversal of the order, namely, that the award of alimony by the court was by consent of the parties and based upon contract, presents the real question to be decided in this case.

When the court awards alimony to an innocent wife it is not bound by the terms of a contract between the parties, either as to its amount or its duration. The power to make the award is drawn from the terms of the statute and not from the agreement of the husband and wife. It follows that the power to modify the award of alimony, either as to amount, duration, or time and manner of payment, is inherent in the court, unhampered by the terms of any contract which the parties might have entered into providing for the payment of any such alimony, when it is given in the order or decree as maintenance only. *Smith v. Superior Court*, 89 Cal. App. 177, 264 P. 573; *Soule v. Soule*, 4 Cal. App. 97, 87 P. 205; *Gates v. Gates*, 54 Cal. App. 407, 202 P. 151; notes 58 A. L. R. 639.

In the case before us we have an entirely different state of facts to which the general rule we have just stated does not apply. In this case the decree of divorce was given to the innocent husband, and he was directed to pay one hundred dollars per month to his erring wife. There is no authority of law for such an order (sections 136, 139, Civ. Code), and if supported at all, it must find its strength in a contract between the husband and the wife settling their property rights. There is nothing in the policy of our law prohibiting such a contract. In fact, it is authorized by our statutes (section 158, Civ. Code), and if the contract is fair and just it may be approved by the court.

[3] In the instant case, if the award of a monthly allowance to the wife is to be supported at all, it must be based upon a contract. The interlocutory decree of divorce recites that the husband and wife had agreed upon a division of the community property and approved this division in its details. It also makes the award of one hundred dollars per month to the wife for her support and maintenance. It does not in explicit terms

declare that this allowance was based upon the contract, but if it were not, the award lacked the authority of law, the transcript of the proceedings at the hearing of the divorce action is not before us, but, in support of the decree allowing the support money, we have the presumption that the judgment of a superior court is regular and is supported by proper evidence. In addition to this, we have excerpts from the testimony of respondent to the effect that at the trial of the divorce case he was asked if he knew that the proposed interlocutory decree contained a provision that he pay one hundred dollars per month to appellant, and he answered that he did, and that it was inserted with his consent.

An affidavit of the attorney for appellant, used at the hearing of the motion to modify the decree, contains the following: "That after the case was set for trial further negotiations resulted in an agreement and property settlement being arrived at between the parties hereto; that said settlement provided that the defendant be given the sum of \$5,000.00 in cash; that she deed to plaintiff certain real property in the City of Fresno and that she transfer to plaintiff certain personal property, and that plaintiff pay to defendant for her support and maintenance and by way of alimony the sum of \$100.00 per month, and that all of these matters be embraced in the interlocutory decree of divorce; that pursuant to said agreement at the time of the trial of this action the matters involved in the agreement were acted upon and approved by the court, and that the sum of \$100.00 per month provided in said decree was an amount agreed upon and stipulated in open court by the attorneys of the parties hereto." This portion of the affidavit is not directly controverted by respondent.

It has been held that, where the innocent husband is awarded a divorce, and there is an agreement between the parties settling their property rights, under the terms of which the erring wife is to receive a monthly allowance from her husband as a part of the settlement, which agreement being approved by the court and its terms incorporated in the decree, the court has no power to relieve the husband of part of the burdens of the decree by its modification as it rested not on the authority of law but on the terms of a contract. *Parker v. Parker*, 55 Cal. App. 458, 203 P. 420, 421. In deciding this case, the court used the following language:

"If in this case the court had authority to impose a lien in favor of the defendant upon a portion of the community property awarded to the plaintiff, as security for payments thereafter to be made by the plaintiff to the defendant, that authority was derived from the stipulation made, and not

from any right of the court to impose upon the plaintiff any duty to provide for the future support of the defendant. Having accepted the benefit of the decree so made in accordance with his own consent, we think that the plaintiff should be held to be estopped to deny the validity and efficacy of the lien thus established. The parties agreed that the provision thus made was in lieu of any other division of the property. If the plaintiff at the time of the award had objected that such payments to be made and such liens securing the same were outside the scope of the stipulation as made, it may well be that the court would have decided that the defendant was entitled to a larger portion of the community property in the division then about to be made. Having accepted the benefits of the stipulation and decree as thus made, the plaintiff should not now be permitted to be relieved from the burdens imposed upon his property by the decree. In the decree of divorce and in the interlocutory decree, the court attempted to reserve to itself the right to modify the decree and the allowance to be paid to the defendant, and the liens declared to secure the payment thereof. If this had been the allowance provided for by the statute to be paid to the wife in a divorce action where she is not the party in fault, it may be conceded that such allowance might thereafter be modified. But since the payments provided for in this decree were a part of and only incidental to the division of the community property, no reason appears why the judgment, when it became final, did not also become unchangeable to the same extent as a final judgment in any other action."

[4, 5] We conclude that if the award of one hundred dollars per month was based upon contract as part of the settlement of the property rights of the parties, the court had no authority to modify it. If it were not supported by contract, it did not have the sanction of law. Under the state of the very limited record before us, we are not prepared to hold that this portion of the decree is supported by contract although the record strongly indicates this fact. The respondent, the moving party in the court below, should have met this question with satisfactory evidence to sustain the burden of proof resting upon him. His notice of motion did not specify the grounds upon which he would base his motion, but the affidavit of respondent filed with the notice set forth financial reverses and the inability of respondent to respond to the terms of that order. It was not attacked in the court below on the grounds of its illegality. The motion to be relieved of the payments because of an inability to make them, assumed a valid existing order.

Under the condition of the record before us, we believe that the order modifying the interlocutory decree of divorce should be reversed, with directions to the trial court to take such future action as may be appropriate under such facts as may be developed at a further hearing.

Order reversed.

I concur: SLOANE, P. J.

Justice CHARLES R. BARNARD, deeming himself disqualified, did not participate in this decision.

104 Cal. App. 223

LEINER v. ENG-SKELL CO. et al.
Civ. 7186.

District Court of Appeal, First District, Division 2, California.
Feb. 26, 1930.

1. Automobiles $\S$ 246(49)—Giving instruction that driving automobile in violation of ordinance "upon or along" public sidewalk constitutes negligence held not error under evidence.

In action for personal injuries sustained when plaintiff was struck by truck while standing upon sidewalk, giving instruction to effect that driving automobile in violation of ordinance, making it unlawful for any person to drive "upon or along" any public sidewalk, itself establishes negligence, held not error, notwithstanding trial court's failure to explain that words "upon or along," used in ordinance, meant "upon and along," where evidence showed automobile at time of accident was being driven both upon and along sidewalk in violation of ordinance, and there was no contention that automobile was being driven across sidewalk.

[Ed. Note.—For other definitions of "Upon and Along," see Words and Phrases.]

2. Trial $\S$ 260(8)—Error, if any, in failure to give instruction regarding when violation of ordinance constitutes negligence, held not available, where defendant's instruction on that point was given.

On defendant's appeal from judgment in action for personal injuries sustained in automobile accident, defendant cannot complain of error, if any, because of trial court's failure to instruct jury that violation of ordinance was negligence only in event that it was not satisfactorily explained or excused, where defendant's instruction on that phase of case was given in full as requested.

3. Damages $\S$ 158(2)—Evidence showing loss of earning power is admissible under general allegations of damage in action for personal injuries.

In action for damages for personal injuries sustained in automobile accident, evidence show-

ing loss of earning power is admissible under general allegations of damage, and special averments of such loss are not necessary.

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Action by Frank F. Leiner against the Eng-Skell Company and another. Judgment for plaintiff, and defendants appeal.

Affirmed.

Charles B. Morris and McEnerney & Morris, all of San Francisco, for appellants.

Edmund J. Holl, of San Francisco, for respondent.

NOURSE, Acting P. J.

Plaintiff sued for damages resulting from being struck by an automobile, which was driven by the defendants, while plaintiff was standing upon the sidewalk adjoining a public street in the city and county of San Francisco. The cause was tried before a jury, and resulted in a verdict in favor of plaintiff in the sum of \$5,000. From the judgment upon the verdict, the defendant appeals upon typewritten transcripts.

The case made by plaintiff was that, while he was standing upon the sidewalk, the truck suddenly swerved from its course in the street so that the front and rear right wheels thereof came over the curbing and proceeded for a distance along the sidewalk so that the truck struck plaintiff, throwing him against an iron pole and causing the injuries complained of. In defense, evidence was offered that, because of the condition of the surface of the highway, the truck suddenly skidded to the right, so that the front and rear right wheels came flush with the curb, and that the overhang of the truck struck the plaintiff, who, under defendants' theory, was standing too close to the edge of the sidewalk. Plaintiff put in evidence provisions of an ordinance of the city and county of San Francisco which made it unlawful for any person, among other things "to drive an automobile upon or along any public sidewalk." The trial court read this ordinance to the jury, and gave an instruction to the effect that, if it were found that the operator of the automobile was driving it in violation of this ordinance, "that in itself establishes negligence on the part of the defendant," provided that it should be found that such negligence was the proximate cause of the injury, etc.

[1] On this appeal the point is raised that the trial court should have construed the ordinance in question and should have advised the jury that the expression "upon or along" meant "upon and along," so that the inhibition of the ordinance should not go to a driving upon a sidewalk alone such as to prevent a crossing of a sidewalk into

a garage or vacant lot. Manifestly the word "or" in the ordinance is incorrectly used for "and," and the clear purpose of the ordinance is the prohibition of driving "upon and along" a sidewalk rather than a driving across a sidewalk for purposes of ingress or egress to or from private property. But, aside from the fact that the defendant did not request an instruction upon these lines, we are unable to perceive how the failure to so instruct has any bearing upon the case. It was the plaintiff's case that the two right wheels proceeded both upon and along this particular portion of the sidewalk. There was no contention by either party that the automobile was being driven across a sidewalk, and there is no contention that the ordinance relates only to a case where all four wheels are upon and along the sidewalk. If the evidence offered by the plaintiff is to be believed, then manifestly the automobile at the time of the accident was being driven both upon and along the sidewalk in violation of the terms of the ordinance.

[2] This brings us to the further contention of the appellants that the court erred in instructing the jury that a violation of the ordinance in the manner just referred to established negligence on the part of the defendants, and that the court should have gone further and instructed the jury that such violation of an ordinance was negligence only in the event that it was not satisfactorily explained or excused. There is no quarrel with the rule as stated in the case of *Berkovitz v. American River Gravel Company*, 191 Cal. 195, 199, 215 P. 675, 677, that, "if some good excuse appears which would be a sufficient defense to an action for the penalty imposed by the law * * * then the law is not really violated." But whatever application the rule may have to the case at hand, we are confronted by the fact that the only explanation or excuse made by the defendants was that the automobile skidded or sloughed over to the sidewalk, and that this defense was the only explanation or excuse which the defendants requested the court to submit to the jury. Their request for an instruction on this phase of the case was given in full as requested, and the defendant cannot now point to any error on the part of the trial court.

[3] It is argued, with apparent lack of confidence in the point, that the trial court erred in permitting the plaintiff to offer evidence of loss of wages or earning power, in the absence of an express allegation in the complaint specifying such loss as an item of the damage suffered. The rule is settled that evidence of loss of earning power is admissible under general allegations of damage and that special averments of such loss are not necessary. *Worden v. Central Fireproof Bldg. Co.*, 172 Cal. 94, 97, 155 P. 839; *Shaw v.*

Southern Pacific R. R. Co., 157 Cal. 240, 242, 107 P. 108.

We find no error in the record.
Judgment affirmed.

We concur: STURTEVANT, J.; DOOLING, Justice pro tem.

104 Cal. App. 328

KIBELE v. BOMKE et al.
Civ. 223.

District Court of Appeal, Fourth District,
California.
March 4, 1930.

1. Master and servant $\Rightarrow$ 80(9)—Evidence sustained findings as to indebtedness for wages, by reason of labor performed in connection with drilling certain oil wells.

In action for wages, based on labor performed in connection with drilling certain oil wells, evidence held sufficient to support findings to effect that defendant became indebted to plaintiff in accordance with agreement to pay for work, and that certain amount was due by reason thereof.

2. Appeal and error $\Rightarrow$ 1011(1)—Judgment cannot be reversed because evidence is conflicting.

Fact that evidence is conflicting does not warrant the reversal of a judgment thereon.

Appeal from Superior Court, Kern County;
Robert B. Lambert, Judge.

Action by John Kibele against August J. Bomke, Madison Roumain, and another. Judgment for plaintiff against defendants named, and defendant last named appeals.

Affirmed.

Fred E. Stivers and O. M. Peabody, both of Los Angeles, for appellant.

Dorris & Henderson, of Bakersfield, for respondents.

BARNARD, J.

This is an action for wages, claimed to be due the plaintiff. While the complaint sets up four causes of action, this appeal is taken with reference to the first cause alone, and the judgment rendered thereon.

The complaint in the first cause of action alleges that within two years last passed, the defendants became indebted to the plaintiff for labor performed in connection with drilling certain oil wells in the county of Kern, in the sum of \$1,312. It further alleges that the plaintiff was employed by the defendants at \$12 per day, and that the defendants agreed to pay for this work the sum of \$1,312. The answer denied each of the al-

legations of the complaint. The court dismissed the action as to one defendant, and gave judgment against the defendants Bomke and Roumain. Defendant Roumain alone has appealed, basing his appeal entirely on the contention that the evidence is not sufficient to support the findings of the trial court, to the effect that said defendant became indebted to the plaintiff; that said defendant had agreed to pay for this work; and that said amount was due to the plaintiff from said defendant.

Appellant admits that he and the other defendants employed the plaintiff to assist in drilling what is known herein as well No. 1. He contends, however, that work on this well was completed in February, 1925; that plaintiff was paid in full up to that time and that thereafter other parties went ahead, attempting to drill what is known as well No. 2. Appellant contends that before well No. 2 was started, he notified defendant Bomke that he was through with the proposition, and would go no further. It is contended that Bomke informed the plaintiff of this fact on February 23, 1925. Appellant therefore contends that since he never specially hired the plaintiff, he became responsible to him only through a partnership with the other defendants, in the drilling of well No. 1; and that he is not further liable since that partnership was cancelled, and the plaintiff notified of its termination. Appellant relies upon the following evidence: Roumain testified that he never said anything to plaintiff about employment; that he did not promise to pay him; that he dropped out of the partnership in February; that some time in April plaintiff came to him for the purpose of borrowing money to finish well No. 2, and that he then told him that he had quit and had nothing to do with it. Defendant Roumain's daughter testified that, about the first of April, at her father's house, she heard her father tell the plaintiff that he had nothing to do with it, and had no interest in it. Defendant Bomke testified that he informed plaintiff, on February 23, 1925, that Roumain had refused to put in any more money or have anything to do with further work on the wells. Reliance is further placed upon the fact that defendant Bomke gave the plaintiff a letter reading as follows:

"April 24, 1925.

"I, August J. Bomke, this day appoint J. A. Kibele, as my lawful agent to act for me in all matters pertaining to my oil land."

Appellant further insists that the plaintiff admitted that said defendant had informed plaintiff that he had no further interest, by making the following answer: "A. He said that he had no further interest, he wrote an order, a written order in the contract that you gave me this morning here, should be at-

tached to the contract, he gave me a written order to show the Group Ten people that he owned the property that was on the ground, and the written order * * *—and that plaintiff said this conversation occurred in June, but later admitted it might have been in April. The record, however, shows clearly that the plaintiff testified that he had a conversation with Roumain, at his home, in June, later admitting it might have been as early as April or March, but flatly denied that he had asked Roumain to put money into this proposition, and denied that Roumain had then informed him that he had quit, and had no further interest in the well. On further questioning, the plaintiff then stated that he had had more than one conversation with Roumain, at his home, and told of two others in July and August. While testifying as to the last conversation he had with Roumain, he made the answer above quoted.

The plaintiff testified: "I was employed by Mr. Roumain to drill the property in the Temblor, that was known as the Kerr Permit." Further, that during the same conversation defendant Bomke entered the room and he was employed to work for them, as driller, at \$12 per day; that after work stopped on well No. 1, appellant came out to the property and helped step off the location for well No. 2; that he then told plaintiff he had sufficient money on hand to go ahead and complete the work in accordance with his agreement with Mr. Bomke, and that he was to pay for the drilling of so many wells; and that he had the money on hand for at least five wells, and by the time they were in, he would probably drill the other wells. Plaintiff testified that he worked on well No. 2, seven days in March, thirty days in April, thirty-one in May, thirty in June, thirty-one in July, and seventeen in August, making a total of 146 days, amounting to \$1,752; and that he had received a total of \$340, leaving a balance of \$1,312. Plaintiff's son also testified that he heard defendant Roumain tell his father that he was going to drill more wells, on the occasion when he visited the property when work stopped on well No. 1.

[1, 2] Nothing is here presented but a conflict in the evidence. The testimony of the plaintiff that he was employed by the appellant; that he performed the work; that after the work on well No. 1 ceased, the appellant visited the property and assisted in arranging for further work, stating he was to pay for the same; and that plaintiff had three further conversations with him, between that time and August, and that nothing was said about his having withdrawn from the enterprise, until the last conversation some time in August, is sufficient to support the findings complained of, and this evidence was apparently believed by the court. It is true,

as argued by appellant, that the final location for well No. 2 was not the one stepped off by the appellant in February, but it was upon the same quarter section, was a part of the same lease, and nothing appears in the record to show why the change was made, or why appellant should thereby be relieved from responsibility. It is elementary that a judgment cannot be reversed because the evidence is conflicting. 2 Cal. Jur. 921, and cases cited.

The judgment is affirmed.

We concur: SLOANE, P. J.; MARKS, J.

104 Cal. App. 255

**BEARDSLEY LAND & INVESTMENT CO. v.
SUPERIOR COURT IN AND FOR LOS
ANGELES COUNTY et al.**
Civ. 7020.

District Court of Appeal, Second District, Division 1, California.
March 1, 1930.

1. Mandamus ☞28—Trial court's exercise of judicial discretion will not be controlled by mandate, in absence of palpable abuse.

Where a trial court is vested with discretion in the exercise of its judicial power, its exercise thereof will not be controlled by mandate, except in case of palpable abuse.

2. Attachment ☞132—Attachment bond held not invalidated by recitals referring to contract sued on as for direct payment of money (Code Civ. Proc. § 538, and § 537, subd. 2).

That recitals of bond for attachment in action on contract against nonresident of state under Code Civ. Proc. § 537, subd. 2, referred to contract as one "for the direct payment of money," whereas affidavit in conformity with section 538 omitted such words, and amended complaint was for payment to third parties, did not render undertaking void, though such recital was unnecessary.

3. Mandamus ☞36—Discharge of attachment in action for breach of contract to pay debts of plaintiff's assignor held not specially enjoined by law within mandamus statute (Code Civ. Proc. § 537, subd. 2, and § 1085).

Court's duty to discharge attachment, sought in action against nonresident under Code Civ. Proc. § 537, subd. 2, for breach of contract which covered many transactions, including agreement to pay debts of plaintiff's assignor, held not related to performance of act which law specially enjoins within section 1085, authorizing writ of mandate; court being called on to determine judicially disputable questions whether cause of action was proper basis for attachment, whether amount claimed was excessive and supported by contract, whether contract or rights arising thereunder were assign-

able, and whether it was sufficient to support attachment.

4. **Mandamus** ⇨26—Mandamus lies to compel particular act by court in relation to action only in exceptional cases usually involving jurisdictional questions or refusal to perform specific, clearly indicated duty.

Court will be compelled by mandamus to perform a particular act in relation to an action only in exceptional cases, which usually involve questions as to extent or limitations of jurisdiction or court's refusal to perform some specific and clearly indicated duty.

Application by the Beardsley Land & Investment Company, a corporation, for a writ of mandate to the Superior Court of the State of California in and for the County of Los Angeles, and L. E. Lampton, County Clerk of such county and ex officio clerk of said court.

Alternative writ discharged, and application denied.

Patterson, Bailey & Montgomery, of Los Angeles, for petitioner.

Louis Lombardi and John M. Hall, both of Los Angeles, for respondents.

CONREY, P. J.

There is now pending in respondent court an action entitled Ralph Pleasant, Plaintiff, v. Beardsley Land & Investment Company, Defendant. The company is an Arizona corporation. From the complaint in that action it appears that plaintiff's assignor, one Carl Pleasant, had entered into sundry contracts and business relations with the corporation, and also that he was indebted to various creditors in sums which in the aggregate amounted to a sum in excess of \$75,000; that on the 17th day of May, 1928, by an agreement in writing between the corporation and Carl Pleasant, the corporation assumed and agreed to pay this outstanding indebtedness of Carl Pleasant; that the corporation failed and refused to pay any part of said indebtedness save and except the sum of \$5,000 and the sum of \$500, which it did pay upon account of two of said claims of creditors; that after breach of the contract by the corporation, Carl Pleasant sold and assigned to the plaintiff his claim against the corporation arising out of said breach of contract. The complaint asks for judgment against the corporation in a sum in excess of \$69,000.

Upon instituting said action, the plaintiff therein obtained a writ of attachment, directed to the sheriff of Los Angeles county, and under said writ the sheriff by garnishment process attached certain moneys in the hands of the United States National Bank at Los Angeles, as property of defendant corporation. Thereupon the corporation, ap-

pearing specially for the purposes of the motion (Willett & Burr v. Alpert, 181 Cal. 652, 663, 185 P. 976), made its motion to discharge the writ of attachment, which motion was denied. Thereupon this proceeding was commenced wherein the corporation applied for the writ of mandate. The answer filed by respondent does not raise any issues of fact which require particular attention. Substantially the facts are those set forth in the petition and in the exhibits which are made part thereof.

[1] "Where a trial court is vested with discretion in the exercise of its judicial power, the exercise of such discretion will not be controlled by mandate except in case of palpable abuse. Realty, etc., Co. v. Superior Court, 165 Cal. 543, 182 P. 1048." Los Angeles A. T. Co. v. Superior Court, 94 Cal. App. 433, 441, 271 P. 363, 366. A pertinent case illustrating the use of the writ of mandate to compel the discharge of an attachment is seen in Alexander v. Superior Court, 91 Cal. App. 312, 266 P. 993, 994, where it was made to appear that the so-called undertaking used to obtain the writ of attachment was a void instrument. The pretended sureties on the undertaking were themselves plaintiffs in the action and therefore were not qualified to be sureties on the undertaking. It was held that the void character of the writ was so clearly apparent that the exercise of judicial discretion was not involved in the matter and it was the duty of the court to discharge the attachment. The rule was affirmed that, "where the discretion ceases and the duty becomes absolute, the writ will lie." Or, as said in Pacific Palisades Association v. City of Huntington Beach, 196 Cal. 211, 222, 237 P. 538, 542, 40 A. L. R. 782, "where the discretion ceases, and the act to be done is purely ministerial, the duty becomes absolute, and can be compelled through the application of the writ."

In the argument of counsel for petitioner herein they rely upon five separately stated propositions. These are: That the cause of action alleged is not a basis for an attachment; that the amount claimed is excessive and not supported by the contract upon which the action is based; that the bond for attachment is fatally defective; that the plaintiff, an assignee under a personal contract not assignable, cannot sue; that the contract, not made or payable in California, does not support the attachment.

[2] We will first discuss the point that the bond for attachment is fatally defective. It is pointed out that the bond recites the commencement of an action "against the above-named defendant upon a contract for the direct payment of money," whereas, the affidavit for attachment omits the words "for the direct payment of money." It is

further claimed that the amended complaint is specifically not for the direct payment of money, but is for payment to third parties who are not parties to the action. From an inspection of the record it is evident that the attachment was sought under the provisions of section 537, subdivision 2, of the Code of Civil Procedure, which authorizes an attachment, "In an action upon a contract, express or implied, against a defendant not residing in this state." In such a case it is necessary (section 538, Code Civ. Proc.) that the affidavit for attachment show, among other things, the facts specified in section 537 which entitle the plaintiff to the writ. It appears in this case that the affidavit was in conformity with the statute, and that the recitals of the undertaking were in conformity with the statute. The fact that the undertaking in its recitals referred to the contract as one for the direct payment of money did not, in our opinion, render the undertaking void, although such recital was not necessary in the instant case.

[3, 4] Concerning the other points above stated, and which are argued at length in the briefs, we think that it is not necessary for this court in this proceeding to determine whether or not the court below, in passing upon the motion to discharge the attachment, erred in deciding those points against the contentions of petitioner. The duty of the court to discharge the attachment, if such duty existed at all, was not related to "the performance of an act which the law specially enjoins," according to the meaning of those words as contained in section 1085 of the Code of Civil Procedure. *People v. Pratt*, 28 Cal. 166, 87 Am. Dec. 110; *People v. Superior Court*, 114 Cal. 466, 46 P. 383; *First National Bank v. Superior Court*, 71 Cal. App. 64, 71, 234 P. 420. The decision in *Andersen v. Superior Court*, 187 Cal. 95, 200 P. 963, does not destroy the effect of the earlier decisions in their application to a proceeding like that now before us. The cases in which mandamus lies, to compel a particular act by a court in relation to an action, are exceptional. Usually they involve some question relating to the extent or the limitations of jurisdiction, or the refusal of the court to perform some specific and clearly indicated duty.

The alleged cause of action shown in the present case arose out of a contract which covered the subject-matter of many transactions and which included the alleged agreement of the company to pay various items of outstanding indebtedness of Carl Pleasant. In its interpretation of the contract and of the complaint of the plaintiff, the court was called upon to determine

whether or not the cause of action alleged (admittedly a claim based upon a contract) was a proper basis for attachment, and whether or not the amount claimed was excessive and not supported by the contract, and whether or not the contract or the rights arising thereunder were assignable, and whether or not the contract was sufficient to support the attachment. In arriving at its decision on those questions for the purposes of the then pending motion, the court was dealing with disputable propositions affecting the merits of the case and was acting judicially with respect to those matters and questions. If in so acting the court committed error, such error is not one to be corrected by mandamus proceedings.

The alternative writ is discharged, and the application for peremptory writ is denied.

We concur: HOUSER, J.; YORK, J.

104 Cal. App. 232

PASHLEY v. WUKEJEVICH.

Civ. 5827.

District Court of Appeal, Second District, Division 2, California.

Feb. 26, 1930.

1. Trial $\S$ 43—To accept or reject testimony held within province of trial court in seller's action for purchase price.

In seller's action for purchase price of automobile, to accept or reject testimony held within exclusive province of trial court, where defense was that buyer could not read contract and that seller represented automobile to be in first-class condition and would repair it free of charge for 30 days.

2. Appeal and error $\S$ 994(3)—Credibility of witnesses held for trial court in seller's action for purchase price.

In seller's action for purchase price of automobile where defense was that buyer could not read contract and that seller falsely represented that automobile was in first-class condition, credibility of witnesses held within exclusive province of trial court.

3. Appeal and error $\S$ 1011(1)—Weight of conflicting evidence in seller's action for purchase price held for trial court.

In seller's action for purchase price of automobile where defense was that seller falsely represented that automobile was in first-class condition, and that he would repair it free of charge for 30 days, and that buyer was unable to read contract, weight of conflicting evidence held within exclusive province of trial court.

4. Appeal and error 1010(1)—Judgment for buyer would not be disturbed on appeal, where there was evidence tending to show that he acted in good faith on seller's representation that automobile was in first-class condition.

In seller's action for purchase price of automobile where there was substantial evidence tending to show that seller represented that automobile was in first-class condition and that representations were acted upon in good faith to detriment of buyer, judgment for buyer would not be disturbed, on appeal.

5. Evidence 589—Court was not bound by every declaration of seller, regardless of its improbability, in action for purchase price of automobile.

In seller's action for purchase price of automobile where defense was that seller falsely represented that automobile was in first-class condition, court was not bound by every declaration of seller, regardless of its improbability.

Appeal from Superior Court, Los Angeles County; Walter Hanby, Judge.

Action by Robert R. Pashley, doing business as the Pashley Motor Company, against Joe Wukejevich. Judgment for defendant, and plaintiff appeals.

Affirmed.

C. Ibeson Sweet, of Los Angeles, for appellant.

D. A. Knapp, of Los Angeles, for respondent.

CRAIG, Acting P. J.

The appellant instituted this action for the recovery of the purchase price of an automobile which he had sold to the respondent, basing the suit upon a written contract. This respondent contended was obtained by fraud, coercion, and misrepresentation.

The contract specified one used Chevrolet touring car, for which the purchaser was to pay a stated amount in monthly installments. It recited that the personal property had been examined, and was "in good order and repair, and said purchaser further agrees that he will, at his own expense, during the life of this contract, repair any injuries sustained by said personal property; * * * all bills for repairs done upon, and labor and materials furnished by the seller * * * before the final payment * * * shall be added to the purchase price," and that the car was "sold as is." It was respondent's contention that he was unable to read or write, that the contract was not read to him, and that the machine was guaranteed for a period of thirty days. It appears that he was accompanied to appellant's place of business by one Bradovich, who witnessed his signature, made by "his [X] mark"; that the machine was of no practical value, and when returned was held by appellant upon charges for repairs until a second installment became due, when

the whole purchase price was demanded. The trial court found that the document in suit was void, in that it did not represent the agreement upon which the purchase was made; that appellant had agreed to furnish a first-class automobile, and to keep it in repair during the first month.

There is a sharp conflict in the evidence. But it is argued that, conceding the truth of respondent's evidence, all oral statements and representations, if made, were merged in the writing. It is insisted by respondent that the defense, rather than attempting to vary the terms of a written contract, proved the true one which was entirely different from that upon which the suit was founded. Resolving all intendments in favor of the judgment, we are confronted with certain positive evidence, which must be accepted by this court as it was viewed below. The testimony tends to show that Pashley expressly stated the machine to be "first class," "in perfect mechanical condition," and agreed that "if anything was wrong with the machine to return it"; that it was "all right; guaranteed for thirty days"; and that he "would repair it for thirty days." Respondent knew nothing about an automobile, nor could he operate one. It was not demonstrated before the purchaser made the first payment, and his companion drove it to his home. The plaintiff testified that a form of contract was prepared, and further: "I said, 'You can't write at all?' He said 'No.' I said, 'Can you read?' I asked the other man, 'Can you read?' He says, 'Yes.' I handed him one of the copies. I took the original up and started to read to Joe, and Joe says, 'Oh, I have signed a lot of those already, forget all about it. You'll get your money.' I said, 'Listen here before you go any further, if you don't make your payments there will be a collector sent out to you and that costs money, and if you don't come through with the deal it is going to cost you \$100 attorney's fees.' And he said, 'All right,' and put his mark and the other man witnessed his mark." There is evidence that the car was not in serviceable condition at any time, though repeated attempts were made to operate it. It made "all kinds of noises and knocks," was returned for adjustment three days after the sale; it "did not work the first day, * * * right from the start," it "was going sideways," and "became worse and worse all the time." When driven it would run but ten miles an hour, "something was wrong with it," it stopped at times, and they had difficulty in getting home. Within ten days it was again returned for repairs and adjustment, and the defendant swore that when he called for the car he was told there were charges for the work, to which he remarked: "'Why charge \$37 to fix the machine when they say no charge for thirty days?' Pashley said got to pay or get out of the place. I went home."

[1-5] From this and other evidence which we do not recite, the trial court concluded that the defendant was in ignorance of the terms of the contract; that he acted entirely upon the plaintiff's statements, representations, and asserted guaranty, and placed his mark upon the instrument only when threatened with expensive litigation if he did not "come through with the deal"—in brief, that there was no meeting of the minds. The only point urged by appellant is that the evidence offered by respondent was contradicted, and that had there in fact been understandings and oral agreements the written contract expressly excluded them. However, it lay exclusively within the province of the trial court to accept or reject testimony, to determine the credibility of witnesses, and to pass upon the weight of conflicting evidence. *Stransky v. Callan*, 81 Cal. App. 476, 253 P. 960; *People v. Marblehead Land Co.*, 82 Cal. App. 289, 255 P. 553. Where there is substantial evidence tending to show that untrue statements were made, and that they were acted upon in good faith to the detriment of a person so deceived, the judgment will not be disturbed. *Bates v. United Construction Co.*, 81 Cal. App. 295, 253 P. 328. There is some evidence to the effect that appellant offered to guarantee the car for thirty days if sold at a higher price than that mentioned in the contract, and that a reduction was made in order to consummate the sale of the machine "as is." The court, however, was not bound by every declaration of the plaintiff, regardless of its improbability (*Zibbell v. Southern Pacific Co.*, 160 Cal. 237, 116 P. 513), and it may well have construed this as an admission of defective mechanism. With the witnesses before the court, it was equipped with facilities for determining as to whether or not the defendant had bargained at any price for an article which could not be operated until even the second monthly installment became due. Reversible error does not appear.

The judgment is affirmed.

We concur: IRA F. THOMPSON, J.; BURNELL, Justice pro tem.

104 Cal. App. 290

ROYAL INDEMNITY CO. v. INDUSTRIAL ACCIDENT COMMISSION et al.
Civ. 287.

District Court of Appeal, Fourth District,
California.

March 3, 1930.

1. Master and servant §367—"Independent contractor" is one rendering service in course of independent employment or occupation, following employer's desires only in results.

One who renders service in course of an independent employment or occupation, follow-

ing his employer's desires only in results of work and not means whereby it is to be accomplished, is an "independent contractor."

[Ed. Note.—For other definitions of "Independent Contractor," see Words and Phrases.]

2. Master and servant §367—That compensation of real estate salesman consisted of commissions on sales made was not determinative on whether he was employee.

That injured real estate salesman's compensation consisted of commissions on sales made or a division of such commissions was not determinative on whether he was an employee of real estate broker.

3. Master and servant §367—Real estate broker's right to discharge salesman without recourse was not determinative of whether salesman sustaining injury was employee.

Right of real estate broker to discharge salesman at any time without recourse was not significant on question whether relationship of employer and employee existed between broker and salesman sustaining injury, where it fit in equally with theory of an independent association.

4. Master and servant §405(2)—Evidence showed an association between salesman sustaining injury and real estate broker rather than relation of employer and employee.

Evidence showing that salesman sustaining injury and real estate broker arranged their work by common consent and agreement, that salesman did not change his broker's license because he did not think it necessary, that both made suggestions and raised points and showing that broker did not have any control over means, manner, or mode of work of salesman, held to conclusively show an association, rather than relation, of employer and employee.

Proceeding under the Workmen's Compensation Act by D. R. Murray, claimant, for injuries, opposed by M. Brauer, employer, and the Royal Indemnity Company, insurance carrier. The Industrial Accident Commission made an award in favor of claimant, and the insurance carrier brings certiorari.

Award annulled.

Harry P. Sweet, of San Diego, for petitioner.

Edward O. Allen, of San Francisco, for respondents.

BARNARD, J.

This is a petition for certiorari, seeking to annul an award of the Industrial Accident Commission in favor of D. R. Murray and against Royal Indemnity Company, a corporation, as the insurance carrier for one M. Brauer.

After a hearing and a rehearing, the Industrial Accident Commission found that the said Murray was an employee of the said Brauer and had sustained the injury complained of in the course of his employment. Briefly stated, the facts are as follows: Brauer was oper-

ating a real estate office in the city of San Diego and advertised for salesmen. Murray answered the advertisement and entered Brauer's office under some arrangement, the exact nature of which is here in controversy. A short time later Murray inserted an advertisement in a newspaper to the effect that he had a client who desired to purchase a small piece of land. In response to this advertisement a man named Bean phoned the office and asked for Murray. Brauer took his name and address and later Murray called him on the phone, and arranged to go with him to inspect a parcel of land which Bean desired to sell. Just before they arrived at the land Murray observed some avocado trees on an adjoining property. He left the road and entered that property for the purpose of seeing whether or not there was fruit on these trees. While on this mission he slipped, fell down an incline, and received the injuries for which compensation was later awarded. The Industrial Accident Commission found that his injuries arose out of and in the course of his employment, and that he was at that time an employee of Brauer.

[1] The principal question to be here considered is whether or not the respondent Murray was, at the time of the injury, an employee of the said Brauer. The law is well settled as to the tests that are to be applied in distinguishing an employee from an independent contractor. The general rules are summarized in *Moody v. Industrial Accident Commission*, 204 Cal. 668, 269 P. 542, 543, 60 A. L. R. 299, as follows: "Section 8 (b) of the Compensation Act, above referred to, provides that: 'Any person rendering service for another, other than as an independent contractor, or as expressly excluded herein, is presumed to be an employee within the meaning of this act.' Many definitions of an 'independent contractor' have been made, but they are not essentially different. *Franklin Coal & Coke Co. v. Industrial Comm.*, 296 Ill. 329, 334, 129 N. E. 811. The following definition may be regarded as a correct statement of what constitutes an independent contractor: One who renders service in the course of an independent employment or occupation, following his employer's desires only in the results of the work, and not the means whereby it is to be accomplished. *Brown v. Ind. Acc. Comm.*, 174 Cal. 457, 460, 163 P. 664; *Green v. Soule*, 145 Cal. 96, 99, 78 P. 337; *Barton v. Studebaker Corp.*, 46 Cal. App. 707, 189 P. 1025; *North Bend Lumber Co. v. Chicago, etc., R. Co.*, 76 Wash. 232, 242, 135 P. 1017. 'It is well settled that, where one person is performing work in which another is beneficially interested, the latter may exercise over the former a certain measure of control for a definite and restricted purpose, without incurring the responsibilities, or acquiring the immunities, of a master, with respect to the person controlled.' *Western Indemnity Co. v.*

Pillsbury, 172 Cal. 807, 811, 159 P. 721, 723. The decisive test of the relationship is: Who has the right to direct what shall be done, and when and how it shall be done? Who has the right to general control? *Lassen v. Stamford Transit Co.*, 102 Conn. 76, 128 A. 117, 118; see, also, *Fidelity & Casualty Co. v. Ind. Acc. Comm.*, 191 Cal. 404, 407, 216 P. 578, 43 A. L. R. 1304. In other words, the test of what constitutes independent service lies in the control exercised. The test of control means complete control, and we must carefully distinguish between authoritative control and mere suggestion as to detail. *Western Indemnity Co. v. Pillsbury*, supra."

[2] The occupation of real estate salesman is one that might come under the classification of employee, or independent contractor, depending upon the facts of the particular case. The fact that the compensation may consist of commissions on sales made, or a division of such commissions, is not determinative of the relationship. In *Hartford Acc. & Indem. Co. v. Industrial Acc. Comm.*, 93 Cal. App. 313, 269 P. 733, it was held that a real estate salesman was an employee, the decision being based upon the fact that the employer exercised certain control over the mode or method of work of the salesman, and not merely over the results. Respondents justify the award in the instant case on the application of the above rules of law to certain facts in this case, which may be summarized as follows: Respondent Murray testified that he was working on the usual basis of 60 per cent. of the commissions for the agent, and 40 per cent. for the employer; that he was acting in the capacity of a salesman, selling real estate. When asked what type of business he was to handle, he replied: "Well, I think we discussed that I would handle exchanges, and that it was later understood we might work together. We were alone in the office for a while; that is, before there was anyone else came in; as things would come up, Mr. Brauer would say, 'You go and see this party if you want to;' or he would suggest that whether it was a trade or not a trade, and by common consent and agreement that way, if anything different was made, we always discussed it and agreed upon it; if it were to be different from an exchange deal, why, he said, 'Go ahead.'"

He testified that Brauer maintained the office, and paid for the advertisements; that he used Brauer's cards, and the listings were taken in Brauer's name. And further:

"Q. What I mean is this: Mr. Brauer didn't care what you did with your time during the day; all he was interested in was having you close a deal, and when a deal was closed, you would then prorate the commission between you? A. He wasn't supposed to want a man around his office or in this connection unless he was a busy man; that is

what he wanted and that is what I was trying to give in the way that it is commonly done, whatever a man can do."

In reference to the particular call that resulted in the trip upon which he was injured, he testified: "I just stated Mr. Brauer turned over the call to me which he received over the telephone, which is customary. I would have done the same thing if he had been out; if I had received a call for him, I would have turned it over to him; likewise he had done the same with the call that he had to try to take care of the business that he was advertising."

In reference to his first going to work, he testified as follows:

"Q. When you first spoke to Mr. Brauer about associating yourself with him, isn't it true Mr. Brauer suggested you come in as a salesman and that you said, no, you preferred to remain an independent broker but that you would like to work out of his office as such? A. There was a conversation regarding my making application for a salesman's license and I just remarked that I did not think that that was necessary and the matter was left open at that point."

In reference to his right to quit without recourse against him, he testified as follows:

"A. There wouldn't be any recourse in the event there was nothing unsettled; providing there was nothing unsettled."

"Q. Assuming you had been paid for everything you had earned up to that time and he just said, 'Murray, you are through.' A. Why yes, I wouldn't have any recourse because I had no contract. In the same way, I could say the same thing to him. I would say, 'I believe I will not remain longer.' Provided everything was in shipshape on both sides. I don't know of anything that would stop either one from taking issues."

Mr. Brauer testified as follows:

"Q. Just how did Mr. Murray operate out of your office? Did you have any special time at which he was to report for work? A. No; he was to use his own judgment as to coming to work, or working his clients. I gave him the right to advertise, to make all calls come to him direct; all his advertisements called for Mr. Murray. * * * A. If I wanted to discontinue his services? There was no discussion as to that, but it is always understood that if a man does not want a man to work for him any more in a real estate office, he can tell him to discontinue the service and settle with him right there."

"Q. Did you feel that if Mr. Murray should have any reason desiring not to work out of the office, he could do that? A. Yes, sir."

"Q. In other words, you had the power, either of you could terminate without liability? A. At any time, yes, sir."

In reference to their talk about a license, Brauer testified as follows: "A. When I first advertised for salesmen, Mr. Murray came around. The first day he discussed the matter, he did not let me know definitely whether he could come or not; he came back a day or so afterwards when he decided that he was coming and work with me. I gave him a salesman's application blank to fill out and he told me he did not want to fill that out; he did not want to relinquish his broker's license; that he would have his broker's license transferred to this office. I asked him to do that and I found later that he didn't do that."

In *Bennett v. Truebody*, 66 Cal. 509, 6 P. 329, 331, 56 Am. Rep. 117, the court said: "The plumber was left to produce the desired result in his own way. If that did not constitute him an independent contractor we do not know what would." We feel there is absolutely no evidence in this record to show that respondent Murray was not free to produce the desired result of his work in his own way. It is true that Brauer testified: "It is always understood that if a man does not want a man to work for him any more in a real estate office, he can tell him to discontinue the service and settle with him right there." But he also testified that after the first conversation Murray "came back a day or so afterwards, when he decided that he was coming and *work with me*." All of the facts taken together indicate a purpose on Murray's part to associate himself with Brauer rather than to become his employee. Brauer says Murray refused to give up his broker's license. When Murray was asked if he had not told Brauer that he preferred to remain an independent broker, and would like to work out of his office as such, he did not deny this, but answered: "There was a conversation regarding my application for a salesman's license, and I just remarked that I did not think that that was necessary, and the matter was left open at that point." In any event, it is undisputed that Murray did not take out a salesman's license, but continued to work under his broker's license. While section 18 of the California Real Estate Act permits a licensed broker to pay compensation to any other licensed broker, or to salesmen licensed under the broker who pays the compensation, it specifically provides: "No real estate salesman shall be employed by or accept compensation from any person other than the broker under whom he is at the time licensed." It was therefore unlawful for Murray to accept compensation as a real estate salesman from Brauer, although he had the right, as a broker himself, to divide commissions with him. If he did not specifically refuse to change his status in this respect, he at least had his attention called to it, and the circumstance is of great significance in determining the relationship existing between these parties.

The other circumstances show no control over the movements, or methods, or mode of operation of the respondent Murray, but only an interest in the results of his work. Murray testified: "We discussed that I would handle exchanges, and it was later understood we might work together." And again, "as things would come up Mr. Brauer would say 'you go and see this party if you want to,'" and again, "he would suggest that whether it was a trade or not a trade, and by common consent and agreement that way, if anything different was made, we always discussed it and agreed upon it." He also testified that the call that came in the day he was injured was the result of his own advertisement; that Brauer received the call and turned it to him, which was customary; and that he would have done the same thing if he had received a call for Brauer when he was out. He testified he had made no sales up to the time he was hurt; that he was working on an indeterminate arrangement; that he did not receive any sales instructions, nor did Mr. Brauer have a sales school; that there were no requirements as to his reporting to the office any time of day, and no specific time of reporting to the office or keeping in touch therewith. Respondent also testified: "We understood we were trying to sell real estate and that we were working to each other's hand, and Mr. Brauer, if he had any suggestions to make to me, he did it, and if I had any questions to ask him or points to raise with him, I did it." He also states he remained in the office, or went out, as he pleased. While he advertised on Brauer's contract, he used his own name and when people called for him, these calls were turned to him by Brauer. When asked whether it was not true that Brauer did not care what he did with his time during the day, but was only interested in having him close a deal and then prorating the commission, instead of denying this, he answered as follows: "He wasn't supposed to want a man around his office or in this connection unless he was a busy man." The record shows no contradiction to Brauer's testimony that "he was to use his own judgment as to coming to work, or working his clients. I gave him the right to advertise, to make all the calls come to him direct; all his advertisements called for Mr. Murray." Murray testified: "I operate on a straight commission basis, no salary, no drawing account, no expenses."

[3] While the right to discharge a person at any time, without recourse, has been held

to be a strong circumstance tending to show the subserviency of the employee (Press Pub. Co. v. Ind. Acc. Comm., 190 Cal. 114, 210 P. 820), it is of less significance in a case of this sort, where it fits in equally with the theory of an independent association. In this regard, both parties testified that the right to terminate their arrangement was a mutual one.

[4] We think these circumstances show an association, rather than the relation, of employer and employee. An employer does not suggest that an employee do the things for which he is hired, "if he wants to"; their work is not arranged by "common consent and agreement"; and an employer is usually interested in what an employee does with his time. Murray stated, in reference to the telephone call, that he would have done the same thing for Brauer; that if anything different was made they always discussed it and agreed upon it; that he had the same right to terminate the arrangement that Brauer had; that he did not change his license because he himself did not think it necessary; that he and Brauer were working to each other's hand; and that both made suggestions and raised points. These statements do not indicate an employment, and the entire circumstances fail to support the assumption that Murray was working illegally, and contrary to the provisions of the Real Estate Act. We find no evidence in the record showing any control over the means, manner, or mode of the work, to have been exercised by Brauer, or reserved to him. We think the relationship between Murray and Brauer, as conclusively shown by the record, was the not unusual one of associated real estate brokers, rather than that of employer and employee.

A second point raised is that the injury suffered by Murray did not arise in the course of his employment, but arose when he was on a purely personal errand, having no relation to the sale of real estate. Were Murray an employee of Brauer, this contention would be without merit, as the evidence sufficiently shows his motive in examining the avocado trees was to gain information that would assist him in selling the land, the sale of which was the object of the trip.

For the reason that the record discloses that the relationship of employer and employee did not exist in this case, the award is annulled.

We concur: SLOANE, P. J.; MARKS, J.

104 Cal. App. 379

PEOPLE v. THORP.*

Cr. 21.

District Court of Appeal, Fourth District, California.

March 6, 1930.

Rehearing Denied March 20, 1930. Hearing Denied by Supreme Court March 31, 1930.

Criminal law §1186(4)—Admitting hearsay and incompetent testimony, in forgery prosecution, identifying defendant as man who committed crime, held prejudicial error warranting reversal (Const. art. 6, § 4½).

In prosecution for forgery, admitting hearsay and incompetent testimony identifying defendant as man who committed crime held prejudicial error, warranting reversal, notwithstanding Const. art. 6, § 4½, authorizing reversal for erroneous admission of evidence only where error complained of has resulted in miscarriage of justice.

Appeal from Superior Court, San Diego County; V. N. Thompson, Judge.

Willis Thorp was convicted of forgery, and he appeals.

Reversed, with directions to grant new trial.

E. L. Johnson, of San Diego, for appellant.

U. S. Webb, Atty. Gen., and John L. Flynn, Deputy Atty. Gen., for the People.

MARKS, J.

Under an information filed by the district attorney of San Diego county on November 4, 1929, appellant was convicted of the crime of forgery alleged to have been committed by him on March 3, 1928. He was sentenced to confinement in the state penitentiary for the term prescribed by law.

Appellant complains of errors of the trial court in the admission and rejection of evidence, of instructions to the jury, and of misconduct of the district attorney during the trial, and relies upon them for a reversal of the judgment.

The alleged errors in rulings on the evidence occurred in connection with the identification and admission in evidence of a photograph which respondent urges was used for the purpose of assisting witnesses to identify the appellant. The picture was evidently taken in a criminal investigation bureau. The forged check was drawn on the First National Trust & Savings Bank of San Diego, in favor of the First National Bank Trust & Savings, in the sum of \$151.13, and was used to purchase travelers' checks of the American Express Company. A certain signature card, and another forged check were also involved. None of the bank employees could identify the appellant as the man connected with ei-

ther transaction. Other than the testimony concerning the photograph, the only evidence connecting him with the forgery was that of a handwriting expert who testified for the people that admitted writings of the appellant and the writings on the checks and signature cards were written by one and the same person, and the testimony of a witness who was a lobby man at one of the banks who said that the appellant looked like the same man who had signed the signature card and deposited one of the forged checks in the bank.

The principal testimony in connection with the identification of the photograph occurred in the evidence of P. J. Slattery, a police officer of the city of San Diego. The transcript shows that the following occurred:

"Q. Now, did you make any investigation of the crime with which this defendant is charged? A. I did.

"Q. And what did that investigation consist of? A. Well, I interviewed the complaining witness, and he gave me a description of this man, of this special—

"Mr. Johnson: Just a moment, we object upon the ground that is incompetent, irrelevant and immaterial, calling for hearsay testimony.

"Mr. Clark: He is not testifying to any hearsay. He is simply testifying that he was given a description. We are not going into what he said.

"The Court: Objection overruled.

"A. I was given a description of this defendant—I mean given a description of the man who is presumed to have passed this check at the First National Bank, and took this matter up with the American Railway Express Company in a letter.

"Mr. Johnson: Just a moment, now, we object to this upon the ground it is wholly incompetent, irrelevant and immaterial, and hearsay.

"The Court: Overruled—objection overruled.

"A. (continuing): And after writing them and explaining what our investigations were here with reference to this check, we received a photograph from the American Railway Express Company's office at 609 West Seventh street, Los Angeles, and that photograph was taken to the complaining witness, Mr. Hadley, and Mr. Hadley identified the photograph as the man that passed the check.

"Mr. Johnson: Just a moment now, we move to strike out the entire answer, upon the ground that it is incompetent, irrelevant and immaterial, and is the conclusion and opinion of the witness, and hearsay.

"The Court: Were you present when he identified the photograph? A. Yes, sir.

"The Court: Objection overruled.

"By Mr. Clark: Q. Now, did you show this photograph to anyone else?

"Mr. Johnson: I make the objection that it is wholly incompetent, irrelevant and immaterial.

"The Court: Objection overruled.

"A. On the same date the photograph was shown to Mr. Cosgrove, who at that time was in charge of the new accounts department of the Southern Trust & Commerce Branch of the Bank of Italy, and he identified the photo.

"Mr. Johnson: We move to strike out that he identified the photo, on the ground it is incompetent, irrelevant and immaterial, and hearsay.

"By Mr. Clark: Q. That was in your presence? A. Yes, that was in my presence.

"Mr. Johnson: That doesn't alter the situation, may it please the Court. That is hearsay and we move to strike it out on the ground it is incompetent, irrelevant and immaterial, and hearsay.

"The Court: The motion is denied.

"A. (continuing): And also on the same day, in my presence, Mr. Leach, who at that time was floor man at the Southern Trust & Commerce Bank—Southern Trust Branch of the Bank of Italy, identified the photograph.

"Mr. Johnson: I move to strike that out as being incompetent, irrelevant and immaterial, and hearsay.

"The Court: The motion is denied.

"By Mr. Clark: A. Now, I call your attention to People's Exhibits Nos. 5 and 6, and I will ask you if you have seen these before? A. I have.

"Q. When and where did you first see them? A. Well, I seen them at the Southern Trust Branch of the Bank of Italy.

"Q. Who showed them to you there? A. Mr. Cosgrove.

"Q. Was that at the time you showed this photograph to Mr. Cosgrove? A. That was afterwards—I had received these—these were turned over to me and then I showed him the photograph afterwards.

"Q. Have you that photograph? A. Yes, sir.

"Q. That you showed these parties?

"Mr. Clark: At this time we will offer this photograph in evidence as People's Exhibit next in number.

"Mr. Johnson: I make the objection it is wholly incompetent, irrelevant and immaterial, based upon hearsay testimony.

"The Court: I don't know whether a proper foundation has been laid for it or not.

"Mr. Johnson: And we make the further objection, no proper foundation has been laid.

"The Court: The objection is good on that ground.

"Mr. Clark: If the Court please, it is not introduced as being necessarily the photograph of this defendant, but it is introduced for what it is worth, for the jury to see. The jury are entitled to see this testimony that certain individuals identified as the photograph of this defendant.

"The Court: There is nothing in evidence to show where the witness got the photograph.

"Mr. Clark: He testified where he received it.

"The Court: Objection overruled. It may be taken out of the file—it may be taken out of this file, Mr. Slattery? A. Yes, sir.

"Mr. Clark: What number is it, Mr. Clerk?

"The Clerk: Seven.

"Mr. Johnson: I do not know whether we have fully covered our objections, your honor, but we object to the introduction of the photograph on the ground that there is no proper foundation for its introduction laid, and upon the further ground that it is incompetent, irrelevant and immaterial, not germane to any issue in the case, and it is entirely based upon hearsay statements and hearsay testimony.

"The Court: The objection is overruled."

The Mr. Hadley and Mr. Cosgrove and Mr. Leach referred to were all in court and testified for the people. Appellant's counsel moved to strike out all the foregoing testimony concerning the identification of the photograph and the photograph itself, which motion was denied. Counsel for the people recalled Leach, who testified as follows:

"Q. Now, Mr. Leach, I show you the photograph, People's Exhibit No. 7, and I will ask if you have seen that photograph before. A. Yes, sir.

"Q. Approximately when was that, if you remember? A. I could not give the date—some time ago.

"Q. Who was it that showed you that photograph? A. Sergeant Slattery, city detective.

"Q. Now, at that time, did you have any conversation with him in regard to this photograph? A. I cannot recall—I may have.

"Q. I will ask you whether or not you identified this photograph as being a photograph of the man you saw there in the lobby of the bank. A. I think I did.

"Mr. Johnson: Just a moment, I object to that on the ground it is wholly incompetent, irrelevant and immaterial, calling for the opinion and conclusion of the witness, based upon hearsay testimony.

"The Court: Objection overruled.

"A. I think I did."

Hadley was also recalled, and the following occurred:

"Q. Now I show you the photograph, People's Exhibit No. 7, and I will ask you if you have seen that photograph before. A. Yes, sir.

"Q. By whom was that photograph shown you? A. Why, it was by the detectives' department of the San Diego police.

"Q. Was it Sergeant Slattery? A. I do not recall whether it was Sergeant Slattery or not.

"Q. You do not recall the individual? A. No.

"Q. At any time that picture was shown you, did you identify that as being the picture of the man who had purchased these traveler's checks at your window and passed the \$151 check—just answer 'Yes' or 'No.'

"Mr. Johnson: Just a minute, we object to that on the ground it is incompetent, irrelevant and immaterial, calling for the opinion and conclusion of the witness, based on hearsay testimony.

"The Court: Objection overruled.

"A. Yes, sir."

Cosgrove was recalled and testified that Slattery had shown him the photograph. Neither Leach nor Hadley were asked if they could identify the defendant as the man presenting the checks. Cosgrove testified that he could not identify the defendant.

The foregoing excerpts from the transcript furnish an extreme illustration of a prosecutor, by indirection, and by the use of hearsay and incompetent testimony, attempting to bolster up a weak case against a defendant where there was no satisfactory evidence identifying him as the man who committed the crime. Section 4½ of article 6 of the Constitution was not intended to apply in a case of this kind. The error was prejudicial to the defendant, and his conviction cannot be sustained. *People v. Turner*, 93 Cal. App. 133, 269 P. 204; *People v. Vasquez*, 93 Cal. App. 448, 269 P. 549; *People v. Adams*, 92 Cal. App. 6, 267 P. 906.

The defendant testified that he was never in San Diego prior to his arrest, over a year after the forgery. He presented some evidence in support of this alibi. The trial court instructed the jury on the question of the defense of an alibi along the lines of the instruction given in the case of *People v. Lee Gam*, 69 Cal. 552, 11 P. 183. This instruction has been criticized in many cases and should not be given. *People v. Girotti*, 67 Cal. App. 399, 227 P. 936; *People v. Roberts*, 122 Cal. 377, 55 P. 137; *People v. Smith*, 189 Cal. 31, 207 P. 518; *People v. Arnold*, 199 Cal. 471, 250 P. 168.

The other errors complained of will, in all probability, not occur at another trial of the case.

The judgment is reversed, with directions to the trial court to grant appellant's motion for a new trial.

We concur: SLOANE, P. J.; BARNARD, J.

104 Cal. App. 138

SWITZLER v. ATCHISON, T. & S. F. RY.
CO. et al.★
Civ. 4012.

District Court of Appeal, Third District,
California.

Feb. 19, 1930.

Rehearing Denied March 21, 1930. Hearing Denied by Supreme Court April 17, 1930.

1. Railroads ⇨328(2)—Automobile driver is negligent in not stopping at obstructed crossing to look and listen for train.

Where it was not shown that automobile was stopped in order that parties therein might look and listen for approaching train, although it was clear that view was more or less obstructed, it would seem that driver of automobile was negligent.

2. Railroads ⇨327(12)—Guest riding in automobile must use "ordinary care and prudence" to insure his personal safety at railroad crossing.

Guest riding in automobile must use "ordinary care and prudence" to insure his own personal safety, that is, he must use such reasonable care and prudence as ordinarily prudent person would exercise under like circumstances, but guest, when not having any control, supervision or management over automobile, is not placed in same legal situation as driver, as regards liability for collision at railroad crossing.

[Ed. Note.—For other definitions of "Ordinary Care," see Words and Phrases, First, Second, and Third Series.]

3. Railroads ⇨350(21)—Negligence of guest in automobile at railroad crossing, held for jury.

In action against railroad for injury to guest in automobile in accident at crossing, evidence held sufficient to take to jury question whether plaintiff was negligent.

4. Railroads ⇨327(12)—Guest in automobile may assume driver will drive in proper manner and take necessary precautions at railroad crossing.

Guest in automobile has right, in using ordinary and usual care which prudent person is required to exercise, to assume that automobile driver will drive in proper manner and will take necessary precautions to safeguard lives of his guests in driving upon railroad crossing.

5. Negligence $\S$ 136(30)—Automobile driver's negligence is not imputable as matter of law to guest.

Negligence of automobile driver, even in approaching railway crossings, is not imputable, as matter of law, to guest or passenger having no control or direction over operation of machine.

6. Railroads $\S$ 350(7)—Whether bell and whistle sounded held for jury in action involving crossing collision.

In action against railroad for injury to guest in automobile in collision at crossing, evidence held sufficient to take to jury question whether bell was rung and whistle sounded.

7. Appeal and error $\S$ 1003—Reviewing court is bound by finding though triers of facts gave credence to negative testimony, notwithstanding that positive testimony is of greater weight.

Positive testimony is doubtless of greater weight than negative testimony, and hence testimony that witnesses heard signals of railroad train is of greater probative force than statement of other witnesses that they did not hear any signals, but where triers of facts have given credence to negative testimony, reviewing court is bound by finding.

8. Jury $\S$ 135—Right of peremptory challenge in civil cases is statutory (Code Civ. Proc. $\S$ 601).

Exercise of peremptory challenge in civil cases is purely right or privilege granted by statute such as Code Civ. Proc. $\S$ 601, since at common law there was no right of peremptory challenge in civil actions.

9. Jury $\S$ 136(6)—In action against railroad and automobile driver for injury to guest in crossing collision, defendants must join in four peremptory challenges (Code Civ. Proc. $\S$ 601).

In action for injury to guest in automobile received in collision with train at railroad crossing, brought against railroad and against driver of automobile, Code Civ. Proc. $\S$ 601, under which each party is entitled to four peremptory challenges, must be construed to require all of defendants to join in four peremptory challenges, as against contention that defendant railroad was entitled to four and that driver of automobile was also entitled to four.

10. Appeal and error $\S$ 1045(1)—Unless injury is shown, any error in permitting plaintiff to exercise peremptory challenge after once having passed jury is without prejudice.

Any error in permitting plaintiff to exercise peremptory challenge after once having passed jury is not prejudicial in absence of showing that defendants were injured by ruling, since party is not entitled to have any particular juror sit on his case and any error in allowing challenge is without prejudice, if it appears that fair and impartial jury was obtained.

11. Railroads $\S$ 236—Railroad speed ordinance is competent evidence in personal injury case.

Ordinance regulating speed of trains passed in proper exercise of police power, in interest

of safety and for protection of public, is competent evidence in personal injury case.

12. Railroads $\S$ 236—Power to pass ordinances regulating speed of trains within city limits may be implied from general powers of city.

Ordinances regulating speed of trains within city limits are police regulations and power to pass them need not be given in express terms, but may be implied from general powers of city, as to abate nuisances and provide for public welfare.

13. Municipal corporations $\S$ 592(2)—Ordinance regulating speed of trains held not in contravention of statute or of rules or regulations of railroad commission (St. 1915, p. 137, $\S$ 42; Const. art. 11, $\S\S$ 6, 8, and art. 12, $\S$ 23).

Ordinance of city of Stockton regulating speed of trains held not in contravention of any act of Legislature or of any rules or regulations promulgated by railroad commission, notwithstanding St. 1915, p. 137, $\S$ 42, relative to powers of railroad commission and Const. art. 11, $\S\S$ 6, 8, and article 12, $\S$ 23, relative to authority of incorporated city.

14. Railroads $\S$ 347(10)—Speed ordinance held properly admitted where testimony showed railroad was exceeding limit set therein.

Where there was testimony in action against railroad for injury to guest in automobile in crossing collision that speed limit in ordinance was being exceeded by defendant, ordinance was properly admitted.

15. Appeal and error $\S$ 1003—Where there was sufficient testimony to support verdict, reviewing court cannot disturb judgment because testimony apparently favored appellant.

Where there was sufficient testimony in record to support verdict which was against railroad but exonerated automobile driver in action for injury to guest in automobile in crossing accident, reviewing court is not at liberty to disturb judgment entered thereon, because testimony apparently favored railroad as to sounding of bell and whistle and indicated automobile driver should also have been found liable.

16. Trial $\S$ 260(1)—When subject is covered, it is not helpful to repeat instructions in slightly different language.

When subject is once covered by instructions in personal injury action, it does not appear helpful to repeat instruction in slightly different language.

17. Trial $\S$ 260(1)—Verdict will not be disturbed for any error in refusing instruction on subjects which were sufficiently covered.

Where subjects on which refused instructions were requested were sufficiently covered in action for injury in collision between train and automobile at railroad crossing, verdict will not be disturbed for any alleged errors in relation thereto.

Appeal from Superior Court, San Joaquin County; D. M. Young, Judge.

Action by Violet Scott Switzler against Atchison, Topeka & Santa Fé Railway Company and others. Judgment for plaintiff, and named defendant and others appeal.

Affirmed.

Robert Brennan, M. W. Reed, E. T. Lucey, Leo E. Sievert, and H. K. Lockwood, all of Los Angeles, and Nutter, Hancock & Rutherford, of Stockton, for appellants.

Charles H. Vance and Levinsky & Jones, all of Stockton, for respondent.

PLUMMER, J.

For convenience, the plaintiff in this action will be referred to as the plaintiff, and the three appellants, simply as appellants.

The plaintiff had judgment against the appellants in an action prosecuted by her against the appellants and the defendant Leo F. Sweem, to recover damages suffered by reason of a collision between an automobile driven by the defendant Leo F. Sweem, and an engine drawing a train of cars belonging to the Atchison, Topeka & Santa Fé Railway Company, and operated by J. J. Scott, as engineer, and C. A. Parks, as fireman.

The complaint alleges that the automobile was driven carelessly and negligently by the defendant Leo F. Sweem, and that the train belonging to the railroad company was operated carelessly and negligently, at an excessive rate of speed, and without warning, through and over the public streets of the city of Stockton; and further, that no sufficient and adequate warning signals were placed, maintained, or in operation at the crossing where the collision involved in this action, occurred.

The record shows that a collision occurred between an automobile driven by the defendant Leo F. Sweem, in which the plaintiff was riding as a guest, and an engine operated by the appellant at a point where the Santa Fé Railway Company, passing through the city of Stockton intersects a certain highway therein known as El Dorado street. The collision occurred at about 11:30 p. m. of April 30, 1927. The automobile in which the plaintiff was riding was of the type commonly known as a "Paige" coupé, with a rumble seat. However, the plaintiff and three others were all riding in the front seat, the plaintiff occupying a position in the front seat partly upon the seat and partly upon the lap of one of the other passengers therein. The party in the coupé were traveling southward on El Dorado street; the train operated by the appellants was traveling eastward. El Dorado street and the tracks of the Atchison, Topeka & Santa Fé Railway, intersect at practically right angles. The main track of the railway company is maintained along what is known as "Taylor" street; the first street to the north of Taylor street is "Scotts Avenue"; the first street to the west of El

Dorado street is "Center Street"; and the street immediately east of El Dorado street is known as "Hunter Street." Between Scotts avenue and Taylor street are some ten or twelve different railroad tracks. Immediately to the north of the main line of the Atchison, Topeka & Santa Fé Railway is a switching track known as and called the "House Track." This track runs along by the side of a freight shed belonging to and used by the company, situate between El Dorado and Center streets. The area west of El Dorado street and east of Center street, lying between Taylor street and Scotts avenue, contains a number of buildings. The freight shed just referred to is a one-story structure having a loading platform which extends approximately 150 feet east from the east wall of the freight shed. The record also shows that there is a structure on this platform used for housing freight, being protected by a roof and on the sides by upright slats. This structure is situate at the northeast corner of the platform to which we have just referred. This slatted structure, as appears by the photographic exhibits, is of the form and outlines of ordinary box cars. Upon the night of the 30th of April, 1927, the plaintiff, in company with the others, was traveling southward on El Dorado street, as hereinbefore stated, and as the automobile reached a point where the main line of the Atchison, Topeka & Santa Fé Railway Company intersects El Dorado street, the automobile came in collision with the pilot of the engine. There is much contention as to whether the automobile struck the engine or whether the engine collided with the automobile. It would appear from the record that an instant before the collision the automobile was swerved slightly to the left, as the impact of the pilot of the engine appears to have been upon the portion of the automobile just in the rear of the front right wheel, the record showing, however, that the left-hand side of the pilot was more or less shattered by the impact. Although there is testimony in the record that just prior to the collision the automobile had been slowed down to a speed of five miles an hour, the record shows that its speed was sufficient so that the occupants, as well as the wrecked automobile, were carried completely across the railroad track and landed on the pavement of El Dorado street to the south. This physical fact would indicate that the speed of the automobile was much in excess of five miles per hour, as the sudden stop of an automobile not traveling over five miles an hour would not catapult anyone the distance shown to have taken place in this case. The testimony of one Rieger, who was driving an automobile, is to the effect that when about 150 feet from the point of collision, and driving at about ten miles per hour, the machine in which the plaintiff was riding passed him at at least double his speed. The fact that all of the party and the wreck were propelled entirely

across the railroad track and some distance to the south thereof, instead of being thrown eastward by the force of the collision with the engine, would indicate that the speed of the automobile had not been materially slackened. However, the jury in this case found in favor of the defendant, Leo F. Sweem, and we are not concerned with his contributory negligence, save and except as to whether it was of such a character that contributory negligence would likewise be imputed to the plaintiff herein.

[1] There is no testimony that the automobile was stopped in order that the parties therein might look and listen for an approaching train, although it is clear from the records that the view to the westward was more or less obstructed. Under the conditions presented it would seem clear that the driver of the automobile in question was negligent under the rule laid down in the case of *Koster et al. v. Southern Pacific Co.* (Cal. Sup.) 279 P. 788, and likewise, in the case of *Barnett v. A., T. & S. F. Ry. Co.* (Cal. App.) 278 P. 443, and the cases there cited. The testimony of all of the occupants of the car was to the effect that they heard no warning bell, that they heard no whistle; nor did they perceive the noise of the approaching train, which consisted of an engine, thirty-six cars and a caboose. The testimony of the occupants of the automobile was also to the effect that they were listening to determine whether there was any indication of an approaching train, and heard no warning. The record shows that an electric arc light is maintained at the intersection of El Dorado and Taylor streets in such a position that it casts a bright light over the immediate point of contact involved in this action, and would to some extent mingle with the headlight of an approaching train and the headlights of an approaching automobile in such a manner as not to give warning of the approaching train. The record contains testimony on behalf of the appellants to the effect that the bell on the engine, operated by an automatic contrivance, had been set in operation some distance to the westward of El Dorado street, and that the station whistle had been sounded. A few seconds before the collision actually occurred, the fireman on the engine saw the approaching automobile, gave three short whistle blasts, and called to the engineer to stop, who immediately did everything that could be done to bring the train to a standstill. From the hour of 6 a. m. to 10 p. m., the company at the time maintained a flagman. After 10 p. m. and until 6 a. m. an electric signal was in continuous operation, giving warning that no flagman was maintained. The foregoing constitute the salient features of the testimony set out in the transcript.

[2-5] Departing somewhat from the order of attack made by the appellants in this case, we will first consider the question of con-

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tributory negligence, waiving the question as to whether such negligence was or is properly pleaded. This question has been before the appeal courts of this state a number of times, and it seems to be pretty well settled that a guest riding in an automobile must use ordinary care and prudence to insure his own personal safety, that is, he must use such reasonable care and prudence as an ordinarily prudent person would exercise under like circumstances. However, a guest when not having any control, supervision or management over the automobile, is not placed in the same legal situation as the driver. As stated in *Carpenter v. Atchison, Topeka Ry. Co.*, 51 Cal. App. 60, 195 P. 1073, 1075: "Interference by the passenger or guest where the vehicle is about to be placed in a position of danger might prove to be gross imprudence and so disconcert the driver as to cause the disastrous result which such interference was designed to avoid." And further, the opinion in that case states, referring to the driver: "For aught that appears to the contrary, he might have reasonably believed that Gibson intended to and would have either stopped or increased the speed of the car and thus have easily escaped the threatened peril." The opinion in that case quotes from a number of other cases, and then the rule approved is as follows: "Assuming that deceased, when the automobile which he occupied as a passenger or guest, reached the point 30 feet distant from the crossing, and traveling at a speed of only 4 miles per hour, saw the train 300 feet away therefrom and approaching at a high rate of speed, we cannot say as a matter of law that his failure to interfere with the driver's operation of the car rather than to rely upon the latter's judgment in escaping the threatened danger, nor that his failure to leave the car, constituted contributory negligence. The question as presented was one of fact which should have been left to the verdict of the jury." In *Curran v. Earle C. Anthony, Inc.*, 77 Cal. App. 462, 247 P. 236, 239, we find the following: "While one who knows, or should know, that the driver is carelessly operating the car must use ordinary care for his own safety, and it is incumbent upon him to take proper steps for his own protection, still whether by failing to protest against the course being pursued by the driver, or to leave the vehicle, constituted a want of ordinary care which proximately contributed to his injuries was a question of fact to be submitted to the jury, unless from the evidence but one conclusion might reasonably be drawn." The following cases all show that whether the guest is chargeable with contributory negligence in not protesting with the driver, or doing anything to interfere with his management and control of the car, is a question to be submitted to the jury under proper instructions: *Crabbe v. Mammoth Channel Gold Mining Co.*, 168 Cal. 500, 143

P. 714; *Hardi v. Central Cal. Traction Co.*, 36 Cal. App. 488, 172 P. 763; *Dover v. Archambeault*, 57 Cal. App. 659, 208 P. 178; *Carpenter v. Atchison, Topeka & S. F. Ry. Co.*, 51 Cal. App. 60, 195 P. 1073; *Curran v. Earle C. Anthony Co.*, 77 Cal. App. 462, 247 P. 236; *Drouillard v. Southern Pac. Co.*, 36 Cal. App. 447, 172 P. 405. These authorities are sufficient to show that in the instant case the negligence of the plaintiff was properly left to the determination of the jury. We may properly call attention, however, to the case of *Campion v. Ira L. Eakle*, 79 Colo. 320, 246 P. 280, 47 A. L. R. 289, and the extended notes appended thereto beginning on page 293. It may be further stated that the facts and circumstances attending the driving of the automobile involved in the collision under consideration are entirely different from instances where the facts show the guest or passenger to have been aware of the careless and negligent habits of an automobile driver, or of his intoxicated condition, where the courts would be called upon to declare a plaintiff riding as a guest, guilty of contributory negligence as a matter of law. Here, there is nothing indicating that the plaintiff had any knowledge of any reckless, careless or inattentive manner of driving an automobile by the defendant Leo Sweem, until it was too late to interpose any objections or protest against his manner of driving, as a guest has a right, in using the ordinary and usual care which a prudent person is required to exercise, to assume that an automobile driver will drive in a proper manner and will take the necessary precautions to safeguard the lives of his guests or passengers, and in the absence of any want of knowledge to the contrary, under the authorities the question of contributory negligence must go to the jury. That the negligence of an automobile driver, even in approaching railway crossings, is not imputable, as a matter of law, to a guest or passenger having no control or direction over the operation of the machine, clearly appears by the text found in 3 California Jurisprudence, pp. 853, 854, and 855, and the authorities in the footnotes supporting the text.

[6, 7] Upon the question of whether any warning was given by the appellants of the approach of the train, testimony pro and con has been urged upon our attention—on the part of the appellants, that the testimony is positive that the bell was rung when the whistle sounded; on the part of the respondent, that no such signals were heard. This again presents only a subject proper for the consideration of the jury. In 22 California Jurisprudence, p. 311, the rule is thus stated: "Positive testimony is doubtless of greater weight than negative testimony. Hence, the testimony of witnesses to the effect that they heard signals is of greater probative force than the statement of other witnesses that

they did not hear any signals. But where the triers of facts has given credence to the negative testimony, the reviewing court is bound by the finding that the signals were not sounded." The footnotes cite a number of cases. See, also, *Jones v. Southern Pacific Co.*, 74 Cal. App. 10, 239 P. 429, where additional cases on this subject are cited.

[8, 9] This brings us to the principal grounds urged for reversal upon this appeal, to wit, the rule of the court in the selection of the jury, the admission of an ordinance of the city of Stockton regulating the speed of trains, and alleged errors in the instructions given by the court to the jury. Upon the selection of the jury the defendants in the action were restricted to the exercise of four peremptory challenges. Upon this appeal it is contended by the appellants that they were entitled to four peremptory challenges and that the defendant Sweem was likewise entitled to four peremptory challenges. This, upon the theory that the appellants and Leo F. Sweem constituted antagonistic parties, the appellants claiming that the defendant Leo F. Sweem was wholly chargeable for the collision and the resultant injuries to the plaintiff. Section 601 of the Code of Civil Procedure reads: "Either party may challenge the jurors, but where there are several parties on either side, they must join in the challenge before it can be made. The challenges are to individual jurors, and are either peremptory or for cause. Each party is entitled to four peremptory challenges," etc. Under the construction contended for by the appellants, the plaintiff would have four challenges, the appellants four and the defendant Leo F. Sweem, four. Following the rule adopted in some of the eastern states, where the subject is unregulated by statute, the appellants' contention would appear to be correct. The exercise of a peremptory challenge in civil cases is purely a right or privilege granted by statute. As said in 35 C. J. p. 406, § 460: "At common law there is no right of peremptory challenge in civil actions. The right is, therefore, purely statutory, and does not exist except where expressly so conferred, but such provision has now been very generally made." And further, in the same volume, section 468, it is said: "In civil actions where there are several plaintiffs or several defendants, the general rule is that all on one side constitute but one party, and are entitled only to the number of peremptory challenges allowed a single plaintiff or defendant, and statutes giving to each party a certain number of peremptory challenges are uniformly so construed"—citing a number of cases in the footnotes.

In some of the states where the statutes do not so provide, it appears that a different rule prevails. Thus, as said in 35 C. J. p. 410: "The rule, however, is to be applied

according to the reasons upon which it is based and limited to cases in which the positions of the several parties upon the same side are similar, so while the fact that several defendants who set up a common defense plead separately does not entitle them to any additional peremptory challenges, the rule is otherwise where they set up separate and distinct defenses presenting different issues, or where the parties on one side, although having a common cause against the other, have conflicting rights among themselves which the verdict of the jury will affect." However, on the same page, and as a part of the same section of *Corpus Juris*, we find the following: "The statutes sometimes expressly provide that if there are several parties on either side of a controversy they must all join in their challenges, and in such case the rule allowing parties appearing separately to interpose separate challenges cannot obtain"—citing a number of authorities. The earliest case touching on this subject which we have discovered is that of *People v. McCalla et al.*, 8 Cal. 301, which, however, is a criminal case. There it was held that under the statute then prevailing, even in capital cases where there were several defendants tried together, they were required to join in their peremptory challenges as well as their challenges for cause. The later amendments regulating challenges do not affect the rule stated. In 15 California Jurisprudence, page 407, § 79, the rule in relation to joinder of challenges is thus stated: "In civil actions, where there are several parties on either side, they must join in the challenge before it can be made. In construing these provisions it has been held in criminal cases defendants must join in peremptory challenges as well as in those for cause. The provision of the Code of Civil Procedure does not deny persons the equal protection of the laws and thus violate the fourteenth amendment, for the same rule applies to all the parties to an action where they are united with others either as plaintiffs or defendants." In *County of San Luis Obispo v. Simas*, 1 Cal. App. 175, 81 P. 972, section 601 of the Code of Civil Procedure was construed to require all of the defendants to join in the challenges irrespective of interest. In *Muller v. Hale*, 138 Cal. 163, 71 P. 81, it is said: "Either party may challenge the jurors; but where there are several parties on either side they must join in a challenge before it can be made."

* * * A similar provision was contained in the old practice act. The appellant concedes that the ruling of the court was justified by the statute in this state, but contends that it violates the Fourteenth Amendment of the Constitution of the United States, in that it denies persons equal protection of the laws. We see nothing in this contention, inasmuch as the same rule applies to all the parties to an action where they are united with oth-

ers either as plaintiffs or defendants." As we read the case of *Muller v. Hale*, we find that the defendants had antagonistic interests, each trying to shift the onus of the alleged negligence leading to the plaintiff's injury upon the shoulders of the other defendant, precisely similar to the circumstances presented in the instant case. In *Crandall v. Puget Sound Traction, etc., Co.*, 77 Wash. 37, 137 P. 319, a similar question was presented to the supreme court of Washington. Among other things, it was there said: "The right of peremptory challenge of jurors is wholly statutory, and the Legislature may withhold the right entirely, or it may grant it with restrictions." The statute there under consideration is practically identical with section 601, Code of Civil Procedure, and while the reasoning set forth in the opinion in that case, and taken particularly from the case of *Colfax National Bank v. Davis*, 50 Wash. 92, 96 P. 823, 16 Ann. Cas. 264, answers every objection urged by the appellants, it is too long to be set forth herein, but we think is absolutely conclusive against any other construction than that under section 601, Code of Civil Procedure, all the defendants must join just as the wording of the statute directs.

A different rule apparently prevails in the state of Montana, as appears from a consideration of the case of *Mullery v. Great Northern Ry. Co.*, 50 Mont. 408, 148 P. 323, but the statute there interpreted reads differently. In the case of *Chenoweth v. Great Northern Ry. Co.*, 50 Mont. 481, 148 P. 330, the Supreme Court of Montana again holds that where two defendants, sued jointly, are in fact hostile, so as to entitle them to separate peremptory challenges, but one of them sits by and allows the other to exercise the challenges alternately with the plaintiff without calling the court's attention to his rights to a separate challenge, such party is held to have waived his challenges. In the case at bar, it does appear that the court stated, while there was actually nothing before the trial court to be decided, its views as to how it would hold on the question of challenges, using these words: "In other words, I will let you know how the court will rule. You will know better how to protect yourself. It is my holding that you in the aggregate have but four peremptory challenges;" an examination of the record shows that the respective defendants, without any objection to any of the challenges made by either of the defendants, joined in all of the four peremptory challenges exercised by the defendants, and after the four peremptory challenges in which all of the defendants joined had been exercised, no challenge was interposed by either of the defendants that would give the court an opportunity to rule. On an examination of the cases relied upon by the appellants, touching the construction which should be given section 601 of the Code of Civil Procedure, we

find that they are based upon entirely different statutory or code provisions. The principal case, that of *Rutland v. St. Louis, etc., Ry. Co.* (Tex. Civ. App.) 274 S. W. 284, 285, among other things says: "The rule is to treat several defendants as one party within the meaning of the statute * * * declaring that 'each party to civil suit in the district court shall be entitled to six peremptory challenges,' unless such defendants have conflicting rights which the verdict of the jury will affect." Citing a number of cases. There does not appear to be anything in the opinion in that case, or in any of the cases cited by the appellants, corresponding to the provisions of our Code of Civil Procedure, requiring the parties to join in their challenges. We think the rule is well established in California and in other states having similar statutes or code provisions, that section 601 of the Code of Civil Procedure must be so construed as to require all of the defendants to join in the four peremptory challenges.

[10] Objection is also urged that the court permitted the plaintiff to exercise a peremptory challenge after once having passed the jury. Nothing is set forth showing that the appellants were injured by this ruling of the court. The plaintiff, in fact, was only allowed to exercise four peremptory challenges. In 15 California Jurisprudence, page 410, § 82, the rule applicable to this ruling of the court is thus stated: "One is not entitled to have any particular juror sit upon his case so that, as has been pointed out in another article, any error in allowing a challenge, either peremptory or for cause * * * is without prejudice, where it appears that a fair and impartial jury was obtained." See, also, *Jones v. Southern Pacific Co.*, supra.

[11-13] After testimony had been adduced relative to the rate of speed at which appellants' train was being propelled, both to the effect that it was in excess of 8 miles per hour, and also to the effect that it was not, an ordinance of the city of Stockton was introduced in evidence, which ordinance limits the speed of trains within the corporate limits of the city to 8 miles per hour. Upon the proposal of plaintiff's counsel to read the ordinance to the jury, counsel for appellants interposed the following objection: "And to the reading of the ordinance at this time, on behalf of the defendants whom I represent, I object to the reading of the ordinance on the ground that it is unconstitutional; that the defendant Atchison, Topeka & Santa Fé Railway Company is a common carrier of interstate commerce, and that as such no municipality, or either state or municipal ordinances, have power to place any burden or restriction upon interstate commerce, and that such power rests solely with the Congress of the United States, under the Constitution of the United States, and that any ordinance, or this ordi-

nance in particular, is unconstitutional so far as interstate commerce and this defendant is concerned." It may be here stated that the testimony indicated that the train involved was partly loaded with merchandise destined for places outside of California, and was carrying interstate commerce to that extent.

Upon this appeal, the objection taken in the trial court appears to be abandoned, and it is now urged that the regulation of the speed of trains through municipalities lies solely within the jurisdiction and power of the railroad commission, and that any attempted exercise thereof by an incorporated municipality is void. In the case of *Cleveland, Cinn., Chicago & St. L. Ry. Co. v. Grambo*, reported in 103 Ohio St. 471, 134 N. E. 648, 20 A. L. R. 1214, the Supreme Court of Ohio thus disposes of the constitutional question. (We are quoting from the syllabus): "An ordinance regulating the speed of trains through a municipality, enacted under the exercise of police power, which conforms to the limitations prescribed by the Legislature, is presumptively reasonable and valid, and not in conflict with the state or federal Constitutions. But the presumption may be rebutted, and in order to overcome such presumption a railway company must affirmatively show its unreasonableness." No testimony was offered in the instant case tending to show the unreasonableness of the ordinance limiting the speed of trains. The Ohio case to which we have just referred further holds: "That an ordinance regulating speed, passed in the proper exercise of the police power, in the interest of the safety and for the protection of the public, is competent evidence in a personal injury case, under the settled law of Ohio." The same rule prevails in California. As to the reasonableness of ordinances regulating the speed of trains in various municipalities, reference may be had to the annotation following the Ohio case, beginning on page 1222 of 20 A. L. R. A consideration of the cases there quoted leads to the conclusion that no objection could be urged to the reasonableness of the speed specified in the Stockton ordinance.

In 22 R. C. L. p. 800, it is said: "It is very generally held that ordinances regulating the speed of trains within city limits are police regulations, and that the power to pass them need not be given in express terms, but may be implied from the general powers of the city, as to abate nuisances and provide for the general welfare." We think no further citation is necessary in support of the power of municipalities to adopt ordinances regulating the speed of trains, and that such ordinances properly come within the purview of what is generally known as police powers.

In support of appellants' contention that the ordinance of the city of Stockton is inapplicable, and that it was error to read it to the jury and to instruct the jury with refer-

ence thereto, the following Illinois cases are called to our attention: In *City of Witt v. Cleveland, C. & St. Louis Ry. Co.*, 324 Ill. 494, 155 N. E. 325, the Supreme Court of Illinois held that the laws of 1921, p. 733, § 57, creating the public utilities commission, withdrawing from cities and villages powers theretofore exercised by them with reference to speed and operation of railway trains running through cities, and vested such power in what is now called the commerce commission, and therefore, that ordinances attempting to regulate the speed of trains, adopted by municipalities, were void. In the case of *Northern Trust Co. v. Chicago Rys. Co.*, 318 Ill. 402, 149 N. E. 422, 425, with reference to an ordinance requiring certain headlights to be upon street cars, it was held under the Public Utilities Act of 1913, which became effective January 1, 1914, inoperative and void, as the commission was given power to require every public utility to maintain and operate its equipment in such a manner as to promote and safeguard the public safety; to prescribe the installation, use and maintenance of appropriate safety devices or appliances; and to require the performance of any other acts which the public safety might demand. And further, that "the act charged the commission, so far as the operation of a public utility in the streets of a city was concerned, with the duty of protecting and promoting the safety of the public, and vested in the commission plenary power to perform that duty."

In the case of *Chester v. Chicago, B. & Q. Ry. Co.*, 247 Ill. App. 505, where a speed ordinance was being considered, the court said: "While prior to January 1, 1914, cities in this State had power to pass ordinances regulating the speed of trains while passing through such cities, the General Assembly by the passage of 'An act to provide for the regulation of public utilities,' approved June 30, 1913, in force January 1, 1914, created the Public Utilities Commission, and by 'an act concerning public utilities,' approved June 29, 1921, in force July 1, 1921, * * * created the Commerce Commission and vested it with general supervision of all public utilities, including the power, by general or special orders, rules or regulations, or otherwise, to require every public utility to maintain and operate its plant, equipment or other property in such manner as to promote and safeguard the health and safety of its employees, passengers, customers and the public, and to this end to require the performance of any act which the health or safety of its employees, passengers, customers or the public may demand. * * * By this act the General Assembly, in its discretion, withdrew from cities and villages the power theretofore exercised by them with reference to the speed and operation of railway trains and such power is now vested in the Commerce Commission, another agency of the government."

In this connection our attention is called to section 42 of the act (St. 1915, p. 137), relative to powers of the railroad commission, wherein it is authorized, "to require every public utility to construct, maintain and operate its line, plant, system, equipment, apparatus, tracks and premises in such manner as to promote and safeguard the health and safety of its employees, passengers, customers, and the public, and to this end to prescribe, among other things, the installation, use, maintenance and operation of appropriate safety or other devices or appliances, including interlocking and other protective devices at grade crossings or junctions and block or other systems of signalling, to establish uniform or other standards of construction and equipment, and to require the performance of any other act which the health or safety of its employees, passengers, customers or the public may demand." Further attention is called to the power of the railroad commission relative to street crossings, the installation, operation and maintenance of signalling devices, etc., which need not be further specifically mentioned. Under this section and the Illinois cases it is urged that no power exists outside of the railroad commission to enact any ordinances relative to the speed of trains within the corporate limits of municipalities. While the Illinois cases apparently support the contention of the appellants, an examination of the constitution of the state of Illinois reveals the fact that the Public Utilities or Commerce Commission Act, as it is now called in that state, has no constitutional limitation such as we find in our own organic instrument. By section 7½ of article 11 of our Constitution chartered municipalities are given very wide and extensive powers, limited only to the extent that their ordinances do not conflict with general laws.

Again, section 23 of article 12 of the Constitution under which the railroad commission of this state exists, contains the following: "From and after the passage by the Legislature of laws conferring powers upon the Railroad Commission respecting public utilities, all powers respecting such public utilities vested in boards of supervisors, or municipal councils, or other governing bodies of the several counties, cities and counties, cities and towns, in this State, or in any commission created by law and existing at the time of the passage of such laws, shall cease so far as such powers shall conflict with the powers so conferred upon the Railroad Commission; provided, however, that this section shall not affect such powers of control over public utilities as relate to the making and enforcement of local, police, sanitary and other regulations, other than the fixing of rates, vested in any city and county or incorporated city or town as, at an election to be held pursuant to law, a majority of the qualified electors of such city and county, or incorporated city or town, vot-

ing thereon, shall vote to retain, and until such election such powers shall continue unimpaired," etc.

While sections 6 and 8 of article 11 of the Constitution limit the authority of incorporated cities to a legislating upon municipal affairs, and in a manner so as not to contravene general laws, and is referred to in many of the cases bearing upon the powers of municipalities, it would appear by the express provisions which we have quoted from section 23 of article 12, of the Constitution, that if the subject legislated upon is a local police regulation, then and in that event it is within the reservation contained in the section, or rather, within the proviso contained within the section, notwithstanding that the section previously specifies that the powers conferred upon the railroad commission respecting public utilities is declared to be plenary and unlimited by any provision of the Constitution. Section 23 of article 12 must be read as a whole, and if it appears, as we have stated, that the subject legislated upon is exclusively local, and a police regulation in character, the authority to so legislate is vested in incorporated cities. We may further state that there is nothing in the record showing that the Legislature has ever passed any act regulating the speed of trains through incorporated municipalities, nor does it appear from the record that the railroad commission has ever enacted or promulgated any rules or regulations relative to the speed of trains through incorporated cities. From this it follows that the ordinance of the city of Stockton is not shown to be in contravention of any act of Legislature or of any rules or regulations promulgated by the railroad commission. That the character of signal devices to be given at railroad crossings, and the manner of constructing grade crossings, overhead crossings and underground passageways are subjects in which the general public are concerned, and therefore of state-wide and not purely local interests, does not detract in the least from the police power reserved to incorporated cities to enact ordinances safeguarding its inhabitants from the perils of excessive speed. The cases of *San Bernardino v. Railroad Commission*, 190 Cal. 562, 213 P. 980, *Civic Center Ass'n v. Railroad Commission*, 175 Cal. 441, 166 P. 351; *Pacific Tel. & Tel. Co. v. Eshleman*, 166 Cal. 640, 137 P. 1119, 50 L. R. A. (N. S.) 652, Ann. Cas. 1915C, 822, and *City of San Jose v. Railway Commission*, 175 Cal. 284, 165 P. 967, relied upon by the appellants, have to do only with the physical properties of railroads and matters of state-wide interest, and not with purely local police regulations coming within the proviso set forth in section 23 of article 12 of the Constitution.

[14] While practically all of the cases relating to speed ordinances hold that they may

be attacked on the grounds of unreasonableness, no such attack is made in this case, and therefore, we are not called upon to consider this phase of the ordinance. There being testimony in the record to the effect that the speed limit in the ordinance was being exceeded, the ordinance was properly admitted, and the jury correctly instructed in relation thereto.

[15] It is further insisted that the verdict of the jury exonerating the defendant Sweem, and holding the appellants liable, furnishes sufficient evidence of passion and prejudice on the part of the jury to warrant a reversal. It is likewise strongly argued that the weight of the testimony favors the appellants. In order that a full statement of the case might appear, we have set forth the facts in relation to the operation of the automobile by the defendant Sweem so that the rule relative to imputed negligence on the part of the plaintiff might be properly considered. While we may agree with the appellants that the jury should also have found against the defendant Sweem, and while we may also agree with the appellants that in view of the positive testimony that the whistle was sounded and the bell was ringing as the train approached the crossing, and while we may also agree with the appellants that the fact that the locomotive was equipped with an automatic bell-ringing device is persuasive in favor of the testimony given by the engineer and fireman, yet as there is testimony in the record to the contrary, the triers of fact having sufficient upon which to base their verdict, we are not at liberty to disturb the judgment entered thereon, because the testimony in the record apparently favors the appellants upon these issues. The case of *People v. McCalla*, which we have heretofore cited, is a good example of where the courts may not interfere because of the disparity of the verdict as to the different defendants involved. In that case two men were jointly indicted and tried for the crime of murder. One was convicted of murder in the first degree without recommendation. The other was convicted only of manslaughter. The judgment in that case was upheld without the court attempting to reconcile the two verdicts. Having accepted the testimony of the plaintiff, we may agree with appellants that the verdict should have been against all of the defendants, but as there is sufficient testimony in the record to support the verdict as returned, we are not called upon to reason why, as to the verdict rendered in favor of the defendant Sweem.

[16, 17] It is finally contended that the court erred in its instructions to the jury. In this behalf the appellants have failed to comply with the provisions of rule 8, relative to the rules governing appeals to this court; nevertheless, we have carefully read all the instructions given by the court, and the refused in-

structions requested by the appellants. This reading leads to the conclusion that the jury was correctly and painstakingly instructed. The only objection, if objection can be urged thereto, is that they were somewhat too voluminous. When a subject is once covered, it does not appear helpful to repeat an instruction in a little different language. The practice of requesting instructions couched in a little different language, relating to the same subject, neither aids the court nor assists the jury. The refused instructions in this case, when compared with the instructions given by the court, amount to nothing more than a repetition, in different language, of instructions actually given. The subjects upon which the refused instructions were requested, being sufficiently covered, no reason exists for disturbing the verdict for any alleged errors in relation thereto.

The judgment is affirmed.

We concur: FINCH, P. J.; R. L. THOMPSON, J.

104 Cal. App. 222

Ex parte HERRIFF.

In re BARUCH.

Cr. 1574.

District Court of Appeal, First District, Division 2, California.

Feb. 26, 1930.

1. Prisons ☞15—Order suspending parole, pending investigation of complaint did not cancel credits prisoner had earned (St. 1915, p. 981, § 1½).

Where state board of prison directors ordered that prisoner's parole be suspended pending investigation of a complaint and that prisoner be retaken and returned to actual custody to abide further order of board, effect of order was merely to terminate for time being right of prisoner to be outside of prison walls during remainder of term, and it did not *ex vi termini* purport to cancel any credits which prisoner had earned in view of St. 1915, p. 981, § 1½, providing that cancellation of credits shall not take place until hearing before board has been had so that therefore prisoner's term ran on without interruption and terminated before habeas corpus proceeding to gain his release.

2. Prisons ☞15—Whether credits of prisoner whose parole was suspended should be canceled to revive part of term cannot be inquired into after term had expired.

Where term of imprisonment of prisoner whose parole had been suspended pending investigation of a complaint had already expired prior to habeas corpus proceeding to obtain his release from prison, whether credits which prisoner had earned should be canceled could not be

inquired into for purpose of reviving part of term which had expired.

Application by Amy B. Baruch for a writ of habeas corpus prayed to be directed to the State Board of Prison Directors to secure the release of Lovren J. Herriff.

Prisoner discharged.

Milton T. U'Ren, of San Francisco, for petitioner.

U. S. Webb, Atty. Gen., and W. F. Cleary, Deputy Atty. Gen., for respondent.

Leo A. Cunningham, of San Francisco, for Sheriff of City and County of San Francisco.

STURTEVANT, J.

[1] This application involves the question as to when the term of the imprisonment of the petitioner expired or will expire. The petitioner was convicted of issuing a check with intent to defraud, and was sentenced to serve the term provided by law in a state prison. He was received at the prison September 4, 1922. His term was fixed at ten (10) years on July 14, 1923. The credits which he earned amounted to three (3) years and six (6) months. Nothing to the contrary appearing, his term would have expired March 4, 1929. He was granted parole September 11, 1927. Thereafter he was constructively a prisoner till the end of his term—a prisoner outside of the prison walls instead of inside. His term commenced from the date he was received at the prison. It ran uninterruptedly thereafter except as otherwise provided by statute or the rules of the board of directors of the prison enacted pursuant to statutes authorizing the enactment of said rules. It is not contended that said term was interrupted by the provisions of any statute. However, it is contended that the term was interrupted by an order made by the prison board. On February 9, 1929, that board made an order which recited certain facts evidencing a violation of parole and concluding "On motion duly made and carried, it was ordered that the above-named prisoner's parole heretofore granted, be suspended pending investigation of the complaint filed, and that the prisoner be retaken and returned to actual custody to abide the further order of the board." No "further order" was made by the board. Conceding, without deciding, that this order was within the power of the prison board, the effect of it was to terminate, at least for the time being, the right of the petitioner to be outside of the prison walls during the remainder of his term. It did not *ex vi termini* purport to cancel any credits. The statute authorizes the prison board, for violations of parole, to cancel credits (St. 1915, p. 981). But that statute provides that such cancellation shall not take place until a hearing before the board has been had (sec-

tion 1½). In the meantime, while it is clear the right to be outside of the prison walls may be terminated, the statute is silent regarding the running of the term. Therefore the petitioner's term ran on without interruption and terminated on March 4, 1929. From January 9, 1929, and down to the date of the filing of this petition, the petitioner has been in the custody of the peace officers in San Francisco by reason of certain other alleged offenses. But our statutes do not contain any provisions to the effect that imprisonment, on such new charges, has any effect on the term of imprisonment on which the prisoner was on parole. The record does not show any facts and counsel cite no law showing or tending to show that, at least temporarily, the petitioner could not, on February 9, 1929, or immediately thereafter, have been taken before the prison board to have a hearing on the question as to whether his credits should be canceled. If it had been done and the credits had been canceled, thereupon the petitioner could have been sent back to San Francisco to stand trial or he could have been retained at the prison to serve out such unexpired term. But, in following that procedure, all would have been done as provided by law and during and within the proper times.

[2] However, after the petitioner's term as fixed by law has expired, such matters may not now be inquired into for the purpose of reviving a part of the term which has expired. Ex parte Wadleigh, 82 Cal. 518, 521, 23 P. 190.

The prisoner is discharged.

We concur: NOURSE, Acting P. J., and DOOLING, Justice pro tem.

Action by Charles B. Ryan against Charles Edward Shannahan, doing business under the firm name and style of C. E. Shannahan & Co. and the Fidelity & Deposit Company of Maryland, to recover for rental of a gasoline shovel. From a judgment for plaintiff, the Fidelity & Deposit Company of Maryland appeals.

Affirmed.

Superseding opinion in 283 P. 341.

Joe Crider, Jr., and Clarence B. Runkle, both of Los Angeles, for appellant.

Andreani & Haines and John L. Bisher, Jr., all of Los Angeles, for respondent.

PRESTON, J.

This cause requires a construction by the court of the language of a surety bond, considered in connection with the contract to which it relates. The facts are not disputed.

Defendant Shannahan, under a written contract dated January 23, 1925, agreed to do certain work for Blue Diamond Company, a corporation, in connection with the construction by it of a branch railroad line in Nevada. Said defendant covenanted to furnish "all necessary material, superintendence, labor, tools, plant, equipment and transportation for and to perform, lay, execute, finish and complete in the most expeditious, substantial and workmanlike manner," all grading, pipe culverts, etc., for said branch line, as detailed in the general conditions and specifications constituting a part of the agreement of the parties. The general conditions of said contract provided: "The documents forming the Contract are complementary * * * They are intended to include all detail of labor and material reasonably necessary for the proper execution of the work. * * * They also provided: "The Contractor * * * shall protect and indemnify The Company from and against all claims against the said work for labor, material and/or supplies furnished the Contractor. * * * They further required that said defendant deliver to the corporation a good and sufficient surety company bond "as security for the faithful performance by the Contractor of all the covenants and agreements on the part of the Contractor contained in said Contract, as well as for the payment in full of all claims of all persons performing labor upon or furnishing materials to be used in said work, which bond shall have its terms to be made to inure as well as to the benefit of the Company, to the benefit also of such persons so as to give such persons a right of action to recover upon said bond in any suit brought to foreclose liens, or in a suit brought on said bond."

On the same day, pursuant to the above requirement, defendant Shannahan, as principal, and defendant and appellant, Fidelity & Deposit Company of Maryland, as surety,

209 Cal. 98

RYAN v. SHANNAHAN et al. ★
L. A. 12093.

Supreme Court of California.
March 12, 1930.

Rehearing Denied April 10, 1930.

1. Principal and surety ⇨59—Express terms of contract measure liability of surety.

Liability of surety is measured and bounded by express terms of its contract, and courts do not favor extending that liability by construction.

2. Railroads ⇨111—Railroad construction contractor's bond must be construed in light of contract it secures.

Bond of contractor agreeing to construct branch railroad line must be considered in light of contract which it secures.

3. Principal and surety ⇨59—Surety's liability is measured by language expressing it, read in light of circumstances.

Extent of surety's liability is measured by language used to express it, when read in light of circumstances attending transaction.

4. Railroads ⇨111—Rental and transportation of shovel used for railroad construction work held within contractor's bond for payment of all persons performing labor or furnishing material, when construed in light of contract and circumstances; "supplies."

Where contractor agreed to furnish all necessary material, superintendence, labor, tools, equipment, and transportation for, and to perform, lay, execute, finish, and complete in most expeditious, substantial, and workmanlike manner, all grading, etc., for railroad branch line, and contract also provided contractor should protect company from claims against work for labor, material, and/or supplies furnished the contractor, bond conditioned upon performance by contractor of all terms, covenants, and conditions of contract to be by contractor completed and performed, when read in light of contract and considered in connection with circumstances, held to cover rental and transportation of gasoline shovel used by contractor; word "supplies" including rental items.

[Ed. Note.—For other definitions of "Supply," see Words and Phrases.]

In Bank.

Appeal from Superior Court, Los Angeles County, Carl A. Stutsman, Judge.

executed a bond, to which was attached a copy of said contract, in the sum of \$15,000, conditioned as follows: "The condition of the above obligation is such, that whereas the above principal has entered into a written contract with the above named obligee, dated January 23, 1925. * * * Now, therefore, if the said principal shall well and truly keep and perform all of the terms, covenants and conditions of the said contract, to be by him completed and performed and shall pay in full, claims of all persons performing labor upon or furnishing material to be used in such construction work, then this obligation shall be null and void, otherwise to remain in full force and effect."

On January 21, 1925, two days prior to execution of the above documents, plaintiff and said Shannahan executed a written agreement whereby plaintiff rented to the latter a gasoline shovel—monthly rental \$650, all transportation charges to be paid by the renter—which shovel was transported to the place of and used by Shannahan in connection with the work performed under said construction contract with the Blue Diamond Company. Shannahan, however, failed to pay to plaintiff a balance of \$1,000, admittedly due as rental upon said shovel, and \$618.97 transportation charges advanced by plaintiff to procure its return. Plaintiff therefore instituted this action against both Shannahan and appellant surety company to recover said sums.

Upon the trial, defendant Shannahan did not question the said sums adjudged to be due plaintiff. In fact, he testified that he was ready and willing to pay said obligation and had the money therefor, but, under his contract with said surety, it had the right of assignment on money still due him from the Blue Diamond Company, which right of assignment it exercised; therefore, in order to pay plaintiff, it was necessary to have the surety's signature as well as his own on the check, and the surety had refused to sign. The court found that the bond covered said two items due plaintiff, and gave judgment in his favor as against both defendant Shannahan and the bonding company. Said company has alone appealed, disclaiming any liability on the bond for said indebtedness to plaintiff. The sole question presented by the appeal is whether or not its contention in this behalf is meritorious.

To state the matter another way, relying mainly upon the cases of *Wood, Curtis & Co. v. El Dorado Lumber Co.*, 153 Cal. 230, 94 P. 877, 16 L. R. A. (N. S.) 585, 126 Am. St. Rep. 80, 15 Ann. Cas. 382, and *French v. Farmer*, 178 Cal. 218, 172 P. 1102, 1103, appellant urges that the terms of its bond, conditioned upon full payment of "claims of all persons performing labor upon or furnishing material to be used in such construction work," cannot be held to constitute a promise to answer for

the debt of defendant Shannahan to plaintiff as, under said authorities, rental and/or transportation of machinery was not the performance of labor upon or the furnishing of material to be used in the construction work. In other words, it is appellant's further contention that, distinguishing claims of those furnishing supplies or machinery for the work from claims for materials, etc., actually used in the work, the word "in" should be given a constricted interpretation, thus narrowing application of the clause "labor * * * or material * * * used in such construction work" to matter actually entering into or becoming a part of the structure or improvement itself.

[1-3] We, of course, recognize the well-settled principle that the liability of a surety is measured and bounded by the express terms of its contract, and that courts are not swift to extend that liability by construction (*County of Glenn v. Jones*, 146 Cal. 518, 80 P. 695; Civ. Code, § 2836; 23 Cal. Juris, p. 1024, § 24, and cases there cited); yet we see no escape from the conclusion that, irrespective of the fact that the word "in" might in some instance be subject to the interpretation which appellant would have us place upon it, the claims presented by plaintiff here are amply covered by the language of said bond, which is to be considered in the light of the contract it secures. In the last analysis, the extent of a surety's liability is measured by the language used to express it, when read in the light of the circumstances attending the transaction. The following language found in the recent case of *Roberts v. Security Trust, etc.*, Bank, 196 Cal. 557, 238 P. 673, 677, is applicable here, even though in that case the contract was expressly incorporated by reference as a part of the bond, instead of merely being attached to it:

"Our Civil Code, § 2837, provides that, in interpreting the terms of a contract of suretyship, the same rules are to be observed as in the case of other contracts. In *Sather Banking Co. v. Briggs Co.*, 138 Cal. 724, 730, 72 P. 352, 354, this court said: 'While it is true that a surety cannot be held beyond the express terms of his contract, yet in interpreting the terms of a contract of suretyship, the same rules are to be observed as in the case of other contracts. Such construction does not mean that words are to be distorted out of their natural meaning, or that, by implication, something can be read into the contract that it will not reasonably bear; but it means that the contract shall be fairly construed with a view to effect the object for which it was given, and to accomplish the purpose for which it was designed. The old rule of *strictissimi juris* applies only to the extent, that no implication shall be indulged in to impose a burden not clearly inferable from the language of the contract, but does not apply so as to hold that the contract shall

not be reasonably interpreted as other contracts are."

In the case of *W. P. Fuller & Co. v. Alturas S. Dist.*, 28 Cal. App. 609, 612, 613, 153 P. 743, 745, the doctrine is set forth in this language: "It is elementary that: 'Sureties are never bound beyond the strict letter of their contract; that they have a right to stand upon the precise terms of their agreement, and that there is no authority for extending their liability beyond the stipulation to which they have chosen to bind themselves.' *Callan v. Empire Surety Co.*, 20 Cal. App. 483, 485, 129 P. 978, 981. But it is also elementary that a bond given to guarantee the execution of a contract according to its terms becomes a part of such contract, and to that contract the sureties become parties the same as though they had actually made and executed the contract itself. Therefore, in interpreting the language of the undertaking for the purpose of gathering its scope or the measure of the liability of the sureties, we must do so by treating or viewing the contract and the undertaking as a whole or as constituting an indivisible contract. In other words, we must, in order to ascertain the nature and extent of the liability to which the sureties have bound themselves, examine the undertaking by the light of the agreement of whose terms it guarantees the faithful performance."

See, to the same effect, *Hollenbeck-Bush, etc., Co. v. Amweg*, 177 Cal. 159, 170 P. 148; *Sather Banking Co. v. Briggs Co.*, 138 Cal. 724, 72 P. 352; *El Dora Oil Co. v. Gibson*, 201 Cal. 231, 256 P. 550.

[4] This bond is expressly conditioned upon performance by the contractor of "all the terms, covenants and conditions of the said contract, to be by him completed and performed." One of the covenants of the contract was that the contractor furnish "all material, superintendence, labor, tools, plant, equipment and transportation" for the performance of said work. Further, the contract was "intended to include all detail of labor and material reasonably necessary for the proper execution of the work." Can it be denied that the rental and transportation of this equipment by said contractor was not the furnishing of "equipment" and "transportation" for use in performing said work, within the meaning of said provisions of the contract?

Furthermore, as above stated, a copy of the contract was attached to the bond, and it is impossible to properly construe the language of the undertaking other than in the light of the contract, the faithful performance of which it secured. When considered in such light it is plain that the bond was intended to "protect and indemnify * * * against all claims against the said work for labor, material and/or supplies furnished the

Contractor." The word "supplies" has been expressly held to include rental items. *Sherman v. American Surety Co.*, 178 Cal. 286, 173 P. 161; *Bricker v. Rollins & Jarecki*, 178 Cal. 347, 173 P. 592.

Prior to its amendment in 1911, section 1183 of the Code of Civil Procedure contained the identical phrase found in this bond, "performing labor upon or furnishing materials" to be used in the work. Appellant therefore claims that the construction to be placed upon said clause in the case at bar must be gathered from the court decisions which construed said section and said language thereof as it then existed. The section was amended in 1911 to make it specifically cover such claims as the ones here presented. In this connection, appellant cites said case of *Wood, Curtis & Co. v. El Dorado, etc., Co.*, supra, which arose out of an attempt to enforce a mechanic's lien claimed to have been created under the section prior to the 1911 amendment, at which time it did not provide liens in favor of teamsters or draymen, but was limited in its application to mechanics, materialmen, and all other persons and laborers performing labor upon or furnishing materials to be used or consumed in the structure. The court held there that the plaintiff, by letting his horses to the contractor at a stipulated monthly price, could not be said to have bestowed labor upon the structure so as to entitle him to a lien for the rental of such horses under the terms of said section.

The determination of this cause, however, is not governed by the construction placed by said authority upon the clause in question as found in said section 1183 prior to amendment. The very fact that the section was expressly amended so as to leave it unhampered by such restriction argues strongly for a broader interpretation of the language, but we are not here required to either pass upon it or construe it. For, as above stated, we are not burdening appellant with liability based alone upon that provision of the bond. On the contrary, we hold appellant liable under the entire language of the condition of the bond, read and construed in the light of said contract in its entirety, and considered in connection with all the circumstances attending the transaction.

The opinion in the case of *French v. Farmer*, supra, also relied upon by appellant, is based solely upon the holding of the *Wood, Curtis Case*; recovery being therein denied under a common law bond for rental of mules, upon the ground that the renter was not a person "to whom any part of such work" was given. It is not in point because the provisions of the contract there under consideration were utterly unlike the provisions of the document before us. Furthermore, the court there recognized the rule above set forth, for it said: "* * * If it can be fairly said

from either the contract or the bond, which are to be construed together, that the parties intended to and did agree to pay such third person, a suit could be brought on such bond by such third person to recover the promise so made for his benefit (citing many cases)."

The authorities just discussed are reviewed in *Bricker v. Rollins & Jarecki*, *supra*, which case upholds the conclusion we have reached. It also expressly approves the doctrine of *French v. Powell*, 135 Cal. 636, 68 P. 92, a case wherein the rental of a team was held to be a proper charge recoverable in an action upon a bond. See, to the same effect, *Associated Oil Co. v. Commary-Peterson Co., Inc.*, 32 Cal. App. 582, 163 P. 702, and *Sherman v. American Surety Co.*, *supra*. The trend of recent similar decisions outside the state is in accord with this pronouncement. See *Brogan v. National Surety Co.*, 246 U. S. 257, 38 S. Ct. 250, 62 L. Ed. 703, L. R. A. 1918D, 776, and cases therein reviewed.

The judgment is affirmed.

We concur: WASTE, C. J.; CURTIS, J.; RICHARDS, J.; SEAWELL, J.

**PACIFIC FINANCE CORPORATION v.
HENDLEY et al.**

Sac. 4443.

Supreme Court of California.

March 20, 1930.

Chattel mortgages § 139—**Chattel mortgagee held not "buyer at executed sale" within statute providing when buyer acquires better title than seller has (Civ. Code, § 1142).**

Under Civ. Code, § 1142, providing that, where possession of personalty, together with power of disposal, is transferred to another, executed sale by latter while in possession to buyer in good faith and in ordinary course of business for value transfers to buyer title of former owner, though he may be entitled to rescind, chattel mortgagee *held* not "buyer at executed sale."

In Bank.

Appeal from Superior Court, Yolo County; W. A. Anderson, Judge.

Action by the Pacific Finance Corporation against J. T. Hendley, the Valley Investment Company, an association, and others. Judgment for defendant investment company was reversed by the District Court of Appeal (284 P. 736), and a petition for hearing was filed in the Supreme Court.

Petition denied.

A. G. Bailey, of Woodland, for appellant.
Neal Chalmers, of Woodland, for respondents.

PER CURIAM.

The petition for a hearing herein is denied. In denying said petition, we withhold our approval of that portion of said opinion which purports to hold that a mortgagee is protected by the provisions of section 1142 of the Civil Code in the same way and to the same extent that a buyer under an executed sale of personal property from a person having possession thereof with power to dispose of the same is afforded protection by said section. While in some cases the words "buyer" and "purchaser" are used synonymously, and in others a "purchaser" has been held to include a "mortgagee," we know of no authority, and none has been cited by the respondent, which goes so far as to hold that a mortgagee is ever "a buyer at an executed sale."

104 Cal. App. 249

**KLEPPER v. AMERICAN-LA FRANCE
FIRE ENGINE CO. OF CALIFOR-
NIA.**

Civ. 7271.

District Court of Appeal, First District, Division 2. California.

Feb. 28, 1930.

1. Brokers § 63(1)—**Broker may recover from principal not delivering goods to buyer and depriving broker of commission from buyer.**

Where principal agrees with broker that broker shall undertake to negotiate with third party for sale by principal to third party of personal property, broker to receive his compensation directly from third party out of proceeds of sale, and principal fails to make delivery of property to third party in accordance with terms of contract when executed, broker is entitled to recover from principal damages which will restore what broker has been unlawfully deprived of through nonperformance of principal.

2. Brokers § 82(1)—**Complaint against principal not delivering trucks and depriving broker of commissions he would have received from buyer stated cause of action.**

Amended complaint, alleging that defendant solicited plaintiff to procure orders for trucks and agreed that, if plaintiff would induce certain customer to order trucks at price agreed upon, defendant would make contract of sale with such customer so as to require customer to pay plaintiff all of purchase price of trucks over and above certain sum and that defendant agreed with customer to sell ten trucks but delivered only two, so that plaintiff lost right to receive commissions on sale of remaining trucks, *held* to state cause of action within rule

entitling broker to recover from principal where principal refuses to perform contract with third party and deprives broker of commission from third party.

3. Evidence ⇨441(9)—Evidence principal agreed with broker not to ask acceptance of trucks until needed by buyer held not inadmissible as attempt to vary terms of contract between principal and buyer.

In action by broker against principal failing to perform contract with third party for sale of trucks whereby broker would have received commissions from third party out of proceeds of sale, admitting parol evidence to prove that in oral contract between broker and principal it was agreed by latter that it would not ask acceptance of delivery of trucks to buyer until trucks were needed by buyer in connection with construction of dam held not error as attempt to vary terms of written contract between principal and buyer.

4. Brokers ⇨87—Statute on damages held inapplicable in broker's action against principal not delivering trucks to buyer and depriving broker of commissions from buyer (Civ. Code, § 3308).

Civ. Code, § 3308, fixing measure of damage for breach of seller's agreement to deliver personal property as value to buyer over amount which would have been due to seller under contract, held inapplicable in broker's action against principal failing to perform contract with third party and thus depriving broker of commissions he would have received from seller out of proceeds of sale of trucks.

5. Brokers ⇨87—Measure of damage for principal's failure to deliver goods contracted for, depriving broker of commission from buyer, was that likely to result in ordinary course of things (Civ. Code, § 3300).

In action by broker against principal failing to perform contract for sale of trucks with third party, and thus depriving broker of commissions he would have received from third party from proceeds of sale under oral contract with principal, measure of damage for breach was found in Civ. Code, § 3300, and was that which in ordinary course of things would be likely to result therefrom.

6. Brokers ⇨87—Broker held entitled to interest on commissions from date principal should have delivered trucks to buyer (Civ. Code, § 3287).

Where evidence showed that if principal had delivered trucks to buyer on February 24, 1926, commissions on sale would then have immediately become due to broker, and there never was at any time any dispute between parties as to amount of commissions, so that plaintiff was entitled to recover damages certain upon that particular day, he was entitled to recover interest thereon from that day in accordance with terms of Civ. Code, § 3287.

Appeal from Superior Court, Los Angeles County; Eugene P. McDaniel, Judge.

Action by R. C. Klepper against the American-La France Fire Engine Company of Cal-

ifornia for damages for breach of an oral contract. From a judgment for plaintiff, defendant appeals.

Affirmed.

Walter M. Campbell, of Los Angeles, for appellant.

Robert E. Austin and John N. Helmick, both of Los Angeles, for respondent.

NOURSE, Acting P. J.

Plaintiff sued to recover damages for breach of an oral contract. The cause was tried before the court sitting without a jury and resulted in a judgment for the plaintiff for \$9,459.48, with interest thereon from the 24th day of February, 1926. The defendant appeals upon typewritten transcripts.

[1] The first attack upon the judgment is that the amended complaint fails to state a cause of action. The case pleaded by the plaintiff is a simple case of an oral contract wherein the principal agrees with a broker that the broker shall undertake to negotiate with a third party for the sale by the principal to such third party of personal property, the broker to receive his compensation directly from the third party out of the proceeds of the sale. Here the plaintiff, who was the broker, pleads the terms and conditions of the contract with the defendant, who was the principal, and founds his cause of action on defendant's failure to make delivery of the property to the third party in accordance with the terms of the contract which was executed between the defendant and such third party. The action is plainly an action for damages for breach of contract—damages made certain by the express terms of the contract. Such an action finds support in the well-settled rule of law that where a broker undertakes to receive his compensation from a third party his principal is under no obligation to see that the broker is paid for his services unless the principal renders it impossible for the broker to become entitled to payment by the other side by refusing to perform the contract negotiated. This obligation of the principal is stated in 4 Ruling Case Law, p. 333: "When the employer violates his agreement in this respect and the broker sues for his commissions or their equivalent, he is permitted to recover not upon the theory that the contract holds the employer to their payment, but because the employer by violating the contract of employment has destroyed its obligatory force, and deprived the broker of the fruits of performance on his part, for which reason the latter is entitled to such a recovery in damages as will restore what he has unlawfully been deprived of through the nonperformance of his principal."

[2] Without reciting the allegations of the amended complaint in detail, it is sufficient to

point to the averment that the defendant solicited plaintiff to procure orders for eight designated automobile trucks manufactured by the defendant and expressly agreed that if the plaintiff would induce Orndorff Brothers to order and take such trucks from the defendant at a price agreed upon the defendant would make a contract of sale thereof with Orndorff Brothers so as to require said Orndorff Brothers to pay to plaintiff all of the purchase price of said trucks over and above the sum of \$4,223.87 for each of said trucks which defendant might be able to sell to Orndorff Brothers by or through the efforts of plaintiff; that this excess which was agreed to be the sum of \$1,554.92 would have been paid to the plaintiff out of the purchase price of each of said trucks but for the failure of defendant to carry out and complete its contract for the sale of said trucks to Orndorff Brothers. It was further alleged that two of said trucks were sold and delivered to Orndorff Brothers; that plaintiff received a stipulated commission on the sale of these two trucks amounting to \$2,979.84; that defendant agreed with Orndorff Brothers to sell them ten of said trucks at a price of \$5,778.79 each; that because of defendant's failure to make deliveries of the remaining eight trucks and to carry out its contract in that regard the plaintiff lost the right to receive from Orndorff Brothers his commissions on the sale of the remaining trucks amounting to \$12,569.36. This sum is alleged to be the amount of plaintiff's damage caused by defendant's breach of its contract with the plaintiff. The amended complaint clearly states a cause of action within the rule above noted.

[3] The argument is made that the trial court committed error in permitting parol evidence to prove that in the oral contract between plaintiff and defendant it was agreed by the latter that they would not ask acceptance of delivery of the trucks to Orndorff Brothers until the trucks were needed by Orndorff Brothers in connection with the construction of a dam, referred to in the evidence as the "Ross Construction Company job." The argument is that inasmuch as the written contract between defendant and Orndorff Brothers called for delivery of the trucks "as soon as possible," any evidence tending to show that a definite time for delivery was fixed was inadmissible as an attempt to vary the terms of a written contract. The point is without merit. The evidence was offered solely for the purpose of proving the oral contract between plaintiff and defendant. The terms of the written contract executed between defendant and Orndorff Brothers were not affected in any sense by the contract between plaintiff and defendant or by any of the evidence in relation thereto.

It is argued that the evidence is insufficient to support the findings that there was a con-

tract between plaintiff and defendant apart from the written contract between defendant and Orndorff Brothers; that Orndorff Brothers demanded delivery on the eight trucks covered by the order but received delivery of only two trucks and that defendant refused to deliver the remaining six trucks (the trial court found that but eight trucks were contracted for and not ten, as alleged in the complaint); and that defendant did not tender delivery of the trucks to Orndorff Brothers. We are at a loss to understand why the attack is made upon the judgment in this manner. Defendant prints in its brief portions of the testimony of the plaintiff and of D. P. Orndorff which fully support the findings of the trial court. Other testimony in the record including that of defendant's officers and employees merely adds to the positive testimony of the witnesses noted, so that there is not really so much as a conflict in the evidence before the trial court. The equities of the case are disclosed by defendant's admission that, on a later day, it delivered to Orndorff Brothers five of the six trucks contracted for at a slightly reduced price, thus defeating plaintiff of his commissions on the sale.

[4, 5] It is argued further that the trial court erred in its application of the rule as to the measure of damages, the point being that the case is controlled by section 3308, Civil Code, fixing the measure of damage for the breach of the seller's agreement to deliver personal property as the value to the *buyer* over the amount which would have been due to the seller under the contract. That this action is not based or controlled by this section of the Code it is too plain for argument. The further contention is made that inasmuch as the plaintiff was a general broker in the sale of automobile trucks he might have gone into the open market and purchased other trucks which would have satisfied Orndorff Brothers and might have sold these trucks to Orndorff Brothers in lieu of those agreed to be delivered by defendant, and by obtaining a commission on the sale of such trucks he might have lessened the damage caused by defendant's breach of its contract with him. Plaintiff cites decisions arising under sections 3308 and 3354 of the Civil Code, and cases arising in tort following the general principle that where the injury complained of is comparatively small and might have been prevented by the expenditure of a comparatively small sum of money by the plaintiff, the plaintiff may not recover because it is his duty to use all ordinary care to render the injury as slight as possible. It would serve no purpose to refer to the citations by name or to distinguish them from the case at hand. That they have no bearing upon the question raised here is apparent. The rule applicable here is found in *Hunt Bros. Co. v. San Lorenzo, etc., Co.*, 150 Cal. 51, 56, 87 P. 1093, 1095, 7 L. R. A.

(N. S.) 913, where it is said: "It is the well-settled general rule of damages for any breach of contract that the damages that can be recovered for a breach are only such as may reasonably be supposed to have been within the contemplation of the parties at the time of the making of the contract, as the probable result of a breach." Here the complaint alleged and the trial court found that the damages for the breach of the contract were determined and specified by the parties in the contract. In such a case the measure of damage for the breach is found in section 3300, Civil Code. It is that which, "in the ordinary course of things, would be likely to result therefrom."

[6] Finally it is argued that the trial court erred in awarding interest on the amount found due from February 24, 1926, the date of the breach. The evidence disclosed, and the court found, that if the defendant had delivered the remaining trucks to Orndorff Brothers on that date, the commissions on the sales amounting to \$9,459.48 would then have immediately become due to the plaintiff. There was never at any time any dispute between the parties as to the amount of these commissions. Plaintiff was then entitled to recover damages certain upon that particular day. He is therefore entitled to recover interest thereon from that day in accordance with the express terms of section 3287, Civil Code. Judgment affirmed.

We concur: STURTEVANT, J.; DOOLING, Justice pro tem.

104 Cal. App. 456

CITY OF MARYSVILLE v. FREEMAN et al.★
Civ. 4028.

District Court of Appeal, Third District,
California.

March 11, 1930.

Rehearing Denied April 10, 1930. Hearing Denied by Supreme Court May 8, 1930.

Municipal corporations §586—City could not recover personal judgment against property owner for expense of repairing sidewalks abutting lots after notice given pursuant to ordinance.

Municipality which pursuant to ordinance notified property owner to repair and construct sidewalk in front of lots, and on his failure to comply with the notice let contract for construction, paying agreed price to contractor, held not entitled to personal judgment against the property owner for the amount so paid the contractor, since to allow a personal judgment would be equivalent to taxing the entire estate of the property owner for the improvement.

Appeal from Superior Court, Yuba County; Eugene P. McDaniel, Judge.

Action by the City of Marysville against William Freeman and another. Judgment for defendants, and the city appeals.

Affirmed.

W. P. Rich and F. E. Carlin, both of Marysville, for appellant.

W. E. Davies, of Marysville, for respondents.

FINCH, P. J.

The complaint alleges and the court found that the defendants own three lots in the plaintiff city; that pursuant to ordinances of the city the defendants were duly notified "to repair and reconstruct" the sidewalk in front of said lots; that they failed and neglected to comply with the notice; that thereafter such proceedings were taken that the superintendent of streets let a contract "for the construction of said sidewalk * * * for the sum of \$217.95"; that the contractor constructed the sidewalk in accordance with the contract; and that the plaintiff paid him the agreed price therefor. This action is for the recovery of a personal judgment against the defendants for the amount so paid to the contractor. Judgment was entered in favor of the defendants, and the plaintiff has appealed therefrom.

A personal judgment against the defendants would become a lien on all their real property in the county, and could be made a lien on their lands in other counties, and their personal property would be subject to sale under execution issued on such judgment, thereby imposing the burden of a local improvement upon all of such property, contrary to the principle on which an assessment for local improvements is based. "To say that the owner of land bordering upon an improved street can be made personally liable for the payment of the improvement is equivalent to saying that his entire estate, real, personal and mixed, whether bordering upon the street or remote from it, whether within the corporate limits or without, whether benefited or not, shall be held responsible for the tax, which, in turn, is equivalent to saying that his entire estate may be taxed for the improvement in direct contradiction of the very terms of the power." Taylor v. Palmer, 31 Cal. 240, 254; Barber v. Galloway, 195 Cal. 1, 10, 231 P. 34; City Street Improvement Co. v. Pearson, 181 Cal. 640, 649, 185 P. 962, 20 A. L. R. 1317; Atchison, T. & S. R. Co. v. Reclamation Dist. No. 404, 173 Cal. 91, 93, 159 P. 430; Federal Construction Co. v. Ensign, 59 Cal. App. 200, 209, 210 P. 536; Flinn v. Zerbe, 40 Cal. App. 294, 295, 180 P. 650; 19 Cal. Jur. 194.

The judgment is affirmed.

We concur: PLUMMER, J.; R. L. THOMPSON, J.

104 Cal. App. 474

WEDDINGTON v. McCANN et al.
Civ. 5734.

District Court of Appeal, Second District, Division 2, California.

March 13, 1930.

1. Appeal and error ⇨1011(1)—Truth or falsity of conflicting evidence was question for determination of court trying case.

Where evidence on whether defendant received consideration for note was conflicting, its truth or falsity was a question for determination by court trying case.

2. Continuance ⇨24—Refusal to permit suspension of proceedings during trial to obtain and offer cumulative evidence held not error, suspension of proceedings during trial being matter of discretion.

In action on note against husband and wife, in which plaintiff offered evidence that each defendant had signed note and that plaintiff had given them her check for amount of note, and that check had been paid but had been lost or stolen, refusal to suspend proceedings to permit defendant wife to obtain and offer evidence from books of bank and from plaintiff's husband in support of her testimony that plaintiff did not give check to defendants *held* not error; suspension of proceedings during trial being matter of discretion.

3. New trial ⇨104(1)—New trial held properly denied, where additional evidence could have rendered probable no different result.

Court did not err in denying new trial upon mere suggestion of additional evidence which could render probable no different result.

4. New trial ⇨140(2)—Granting of new trial is within court's discretion, where material facts are contradicted by counter affidavits.

Where material facts are contradicted by counter affidavits, granting or denial of new trial is within discretion of court.

5. Appeal and error ⇨981—Ruling on motion for new trial for additional evidence will not be disturbed unless abuse of discretion clearly appears.

Motions for new trial for additional evidence are not favorably regarded, and ruling thereon will not be disturbed unless an abuse of discretion clearly appears.

Appeal from Superior Court, Los Angeles County; Franklin J. Cole, Judge.

Action by Marjorie Weddington against N. Elizabeth McCann and another, upon a promissory note. From a judgment for plaintiff, defendant named appeals.

Affirmed.

Chas. M. Easton, of Los Angeles, for appellant.

Willis S. Mitchell, of Los Angeles, for respondent.

CRAIG, J.

The defendant N. Elizabeth McCann appeals from a judgment rendered against herself and W. F. McCann, her husband, upon a promissory note, which they executed and delivered to the respondent.

The defendant W. F. McCann admitted due execution of the note, for value. Appellant denied liability, alleging a failure of consideration, and the principal question here presented is as to the sufficiency of the evidence in this respect. Respondent and her daughter testified that the defendants called at their home, that each signed the note in the sum of \$1,000 in their presence and in the presence of Fred Weddington, respondent's husband; and that Mrs. Weddington made and delivered to them her check for that amount; that the check was paid by the bank and returned to the payor bearing the usual evidences of cancellation, but that it had since been lost or stolen. Appellant admitted having so signed the note in controversy, but she testified that after so doing the plaintiff said: "I have already given Mr. McCann the money, before." And further: "There never was a \$1,000 check given to Mr. McCann or to me by Mrs. Weddington at any time." Her counsel thereupon requested a suspension of the proceedings and permission to obtain and offer if possible cumulative evidence from the books of the bank and from the plaintiff's husband, in support of this latter testimony. The request was denied, and judgment was awarded to the plaintiff. Thereafter a motion for new trial was presented upon the affidavit of Mrs. McCann's counsel, wherein it was averred that he had inspected the records of the bank and had taken the deposition of Weddington, showing that the purported check had not been so paid, and that it had never existed. Counter affidavits of the plaintiff and appellant's husband were also presented, which contradicted in detail the facts which were asserted in support of the motion. McCann swore: "I was present together with the defendant N. Elizabeth McCann and the plaintiff Marjorie Weddington, and her husband and Guy Weddington, in the Weddington home, at Lankershim, California, at which place and time the said \$1,000 promissory note was first signed by me and then signed by the defendant Elizabeth McCann and thereupon a check in the sum of \$1,000 at said time and place was signed by the plaintiff Marjorie Weddington and delivered to me in the presence of each and every of said persons," and that the same was by him deposited and credited to his account.

[1] Appellant complains that the presumption of consideration accompanying the written instrument having been overcome by her positive testimony to the contrary, the burden of proof shifted, and that a *prima facie* case

was not sustained by the plaintiff. This argument is refuted by questions in her brief from the testimony of the plaintiff's witnesses, as already above briefly stated. The evidence was conflicting, and its truth or falsity was a question for determination by the trial court.

[2-5] Finally, it is contended that the defendant was surprised by the testimony offered by the plaintiff, and that the court erred in denying either continuance or a new trial. The suspension of proceedings during trial is a matter within the discretion of the court. *Kahn v. Triest-Rosenberg Cap Co.*, 139 Cal. 340, 73 P. 164. It is obvious from the record before us that if granted in this instance it could have resulted only in a showing that the bank then had no record of the transaction. As already noted, appellant's codefendant swore that he received respondent's check for \$1,000 in the presence of four witnesses, including his wife, who alone denied its delivery. It is apparent that the court did not err in denying a new trial upon the mere suggestion of additional evidence which could render probable no different result. Where material facts are contradicted by counter affidavits, the granting or denying of a new trial is also within the discretion of the court. Such motions are not favorably regarded, and the ruling thereon will not be disturbed unless an abuse of discretion clearly appears. *Goodwin v. Snyder*, 70 Cal. App. 98, 232 P. 763; *Miles v. Miles*, 77 Cal. App. 219, 246 P. 143.

The judgment is affirmed.

We concur: WORKS, P. J.; IRA F. THOMPSON, J.

104 Cal. App. 400

**STATE COMPENSATION INSURANCE
FUND (PETERSON, Intervener) v.
ALLEN. ★
Civ. 4010.**

District Court of Appeal, Third District,
California.

March 8, 1930.

[Rehearing Denied April 7, 1930. Hearing Denied by Supreme Court May 5, 1930.]

1. Master and servant §354—Injured employee's claim against third party for damages held not waived by delay in filing employee's complaint in intervention, where state insurance fund, having paid medical and hospital charges, brought suit within statutory period (Code Civ. Proc. §§ 340, 387; Workmen's Compensation, Insurance, and Safety Act 1917, § 30(f)).

Where state compensation insurance fund, having expended money for hospital and medical fees for injured employee, brought action for damages against third party within limitation period prescribed by Code Civ. Proc. § 340, in-

jured employee's claim for damages was not waived by failure of such employee to file complaint in intervention within statutory period, under Workmen's Compensation, Insurance, and Safety Act (St. 1917, p. 860) § 30(f), which gives the state compensation insurance fund right to subrogation and permits it to enforce rights in its own name, and intervener was therefore not necessary party, and complaint in intervention which presented no new issues could be filed at any time prior to trial under Code Civ. Proc. § 387.

2. Negligence §134(3)—Whether subcontractor's employee using runway erected by contractor for running saw into building was licensee or invitee was question of fact, and jury's finding that he was licensee was supported.

In action against building contractor for injuries to subcontractor's employee sustained in fall from runway erected for purpose of moving circular saw into building, question whether the injured person was using the runway as licensee or invitee was one of fact, and evidence sustained finding of jury that he was a mere licensee.

3. Trial §296(9)—Instruction held not to invade jury's province in view of other instructions.

In action against contractor for injuries to subcontractor's employee falling off runway built to connect with building for purpose of transporting circular saw, instruction permitting jury to find that the injured foreman was mere licensee or that his invitation did not extend to use of runway held not erroneous as invading the province of jury by assuming he was a licensee, in view of other instructions.

4. Negligence §32(1)—Contractor constructing runway into building for sole purpose of moving saw owed no duty to subcontractor's employee to see that runway was safe, unless such employee used it by invitation.

Where general contractor constructed runway to building for sole purpose of conveying circular saw and thereafter its employees immediately proceeded to dismantle it, contractor was under no obligation to provide foreman employed by subcontractor with the use of the runway or to see that it was safe and secure for him, unless there was an express or implied invitation from contractor to such foreman to use it.

5. Negligence §32(1)—One owning or controlling property is not liable to licensee for injuries, unless willful and wanton.

Doctrine is well established that, except for willful and wanton injury, the owner or one in control of property is not liable for injuries sustained by a mere licensee or trespasser.

6. Trial §260(8)—Instruction as to liability of contractor to subcontractor's employee held sufficiently covered by instruction given.

In action against contractor for injuries to subcontractor's employee falling from runway constructed by contractor for purpose of transporting saw into building, instructions as to defendant's liability for negligence in construction

of runway if use thereof by employees of subcontractor was contemplated and reasonably necessary held sufficiently covered by instructions given.

7. Negligence ⚡32(2)—One invited upon premises for special purpose may be mere licensee with respect to certain parts of premises, approaches, or appliances.

It is well settled that one may be an invitee upon particular premises for a specific purpose and yet become a mere licensee with respect to certain parts of the premises, approaches thereto, or appliances contained within it, which were not intended for the use of the visitor.

8. Negligence ⚡32(2)—That subcontractor's employee used runway several times during morning of accident, without knowledge of contractor, did not establish invitation.

Fact that foreman employed by subcontractor used runway into building several times on morning of accident without knowledge of contractor was insufficient to constitute invitation on part of contractor, where runway was constructed for specific purpose of moving saw into building.

9. Appeal and error ⚡1003—Reviewing court will not consider fact that evidence would support contrary judgment.

Jury alone passes on weight and sufficiency of testimony, and reviewing court is concluded by verdict, and will not consider fact that evidence would have supported a contrary judgment.

10. Negligence ⚡124(3)—Evidence of general custom for workmen engaged in constructing steel frame building to use runway communicating therewith held inadmissible in action against contractor for injuries sustained by subcontractor's employee.

In action against contractor for injuries sustained by employee of subcontractor falling from runway constructed by contractor, evidence of general custom existing in California for all workmen engaged in the construction of steel frame buildings to use indiscriminately runway communicating therewith, regardless of class of employees, held inadmissible.

Appeals from Superior Court, San Joaquin County; George F. Buck, Judge.

Action by the State Compensation Insurance Fund against J. A. Allen, in which Victor Peterson intervened. Judgment for defendant, and plaintiff and intervener appeal.

Affirmed.

Ford, Johnson & Bourquin, Frank J. Creede, Thomas W. Slaven and Walter J. O'Connor, all of San Francisco, for appellants.

Neumiller & Ditz, of Stockton, for respondent.

ROLFE L. THOMPSON, J.

This is an appeal from a judgment for the defendant following the verdict of a jury,

in a suit for damages for personal injuries. The chief controversy arises over the question as to whether the intervener was an invitee or a mere licensee in his use of a runway over an excavation adjoining a building, from which he fell in attempting to cross in the course of his employment.

The defendant was a general contractor to whom the construction of the Union Safe Deposit Bank building at Stockton had been awarded. The intervener, Victor Peterson, was employed as foreman of the steel structure workmen by the Williams Construction Company, a subcontractor of the defendant. The steel frame for the building had been completed. The area reserved for sidewalks adjoining the building had been excavated to be used as an extension of the basement. This space was 9 feet wide and 12 feet in depth and was still uncovered. The concrete walks had not yet been laid. For the purpose of conveying a 700-pound circular steel saw into the building, the defendant constructed a runway across this open space the night before the accident occurred. It was built by laying four 2 by 10 inch planks which were 14 feet in length across this open space. They were placed at an angle of 20 per cent. from a direct line between the wall of the building and a temporary plank walk bordering the excavation on the outer side. There is a conflict of evidence as to whether another plank runway had been used at this same place across the open space prior to the construction of the one which was used to transport the saw into the building. The planks of this runway overlapped the steel girder of the building upon which they rested 2 or 3 feet. At the other end of the runway the planks overlapped the sidewalk about a foot and were toenailed to the planks of the walk to prevent them from slipping. Midway beneath this runway upright timbers which were 2 by 6 inches in diameter were placed, to which a cross-ledger was spiked to support the planks of the runway. After the saw had been taken into the building the following morning and deposited on the beams of the floor, the workmen immediately commenced to dismantle the runway to use the planks as a platform for the saw. There is evidence to support the assertion that three planks had been removed and that one plank only remained to span the opening. This plank was found in position after the accident had occurred, which was about 11 o'clock a. m. on July 3, 1924. Peterson claims to have used this runway several times that morning for taking materials to and from the building. The defendant testified that he had no knowledge that it was being used by any one except for the purpose of transporting the saw, which was the only purpose for which it was constructed. At the time of the accident Mr. Peterson threw

a heavy coil of rope, blocks, and tackle over his shoulder, and thus burdened attempted to cross to the building upon this plank. He claims there were then two planks of the runway remaining, and that one of them gave way causing him to fall into the basement. The jury, however, was entitled to assume from the defendant's evidence that there was but one plank left and that this plank remained in proper place after the accident. This left the question to be determined by the jury as to whether the intervener may not have lost his balance and fallen from the plank into the basement through no fault in the construction or maintenance of the runway. He was precipitated into the excavation and was impaled on a reinforcement rod which extended upward from the concrete wall at the bottom. The bar entered his left leg below the hip and came out through the abdomen near the navel. He was very seriously injured.

The suit was commenced by the State Compensation Insurance Fund in behalf of Peterson and also to recover the hospital and medical fees which it had expended for his treatment. The complaint also charged the defendant with negligence in the construction and maintenance of the runway and prayed for damages for the injuries sustained by Mr. Peterson. A demurrer was overruled, which was urged on the ground of nonjoinder of parties plaintiff and that the State Compensation Insurance Fund lacked jurisdiction to maintain the action so far as damages for the personal injuries of the employee were concerned. At the time of the trial, over the objection of the defendant, Peterson was permitted to file a complaint in intervention. The defendant controverted all the material allegations of the complaint and charged the intervener with contributory negligence.

[1] It is contended by the respondent that since the accident occurred July 3, 1924, and the complaint in intervention was not filed by Victor Peterson, the injured person until July 23, 1926, his claim for damages was waived by virtue of the statute of limitations as provided by section 340 of the Code of Civil Procedure.

The permission of court granting leave to file the complaint in intervention was harmless since the plaintiff, State Compensation Insurance Fund, by the incurring of obligations and payment of medical and hospital charges in behalf of the insured was subrogated by statute to all the rights of an employer and was authorized to enforce such claims in its own name. Workmen's Compensation, Insurance, and Safety Act, St. 1917, p. 831; *Morris v. Standard Oil Co.*, 200 Cal. 210, 252 P. 605. *City of Sacramento v. Central Calif. Traction Co.*, 78 Cal. App. 215, 222, 248 P. 307. Section 30, subdivision (f)

of the Workmen's Compensation Act, provides: "Where any employer is insured against liability for compensation with any insurance carrier and such insurance carrier shall have assumed the liability of the employer therefor * * * or shall have paid any compensation for which the employer is liable, or furnished or provided any medical services required by this act, such insurance carrier shall be subrogated to all the rights and duties of such employer and may enforce any such rights of its own name."

The intervener was therefore not a necessary party to the action. The complaint was filed by the State Compensation Insurance Fund within the statutory limitation period of one year from the time when the injuries were sustained by the insured, and contained all the necessary allegations upon which the intervener's claim was founded. The complaint in intervention presented no new issues and was therefore entitled to be filed at any time prior to trial. Section 387, Code Civ. Proc.; 16 Cal. Jur. 544, § 141; *Rabe v. Western Union Tel. Co.*, 198 Cal. 290, 299, 244 P. 1077.

[2] The record contains evidence which may be held to support an implied finding of the jury to the effect that the intervener was guilty of contributory negligence in venturing upon a single plank laden as he was with a cumbersome burden of heavy rope and tackle.

The appellants assert that in passing over the runway to the building upon a mission incident to his employment, the intervener was an invitee of the defendant who owed him the duty to exercise ordinary care in the construction and maintenance of the runway. Upon the contrary, the defendant asserts that the intervener as the employee of a subcontractor was a mere licensee in the use of this runway which was constructed for the sole purpose of transporting the saw into the building, and that he therefore owed him no duty except to refrain from willfully or wantonly injuring him, or from laying a dangerous trap which would expose the intervener to great peril. The defendant claims that although the intervener may have been an invitee with relation to his occupation in other parts of the building or upon other approaches thereto, still he was a mere licensee in the use of this particular runway which was constructed only for the conveyance of the saw into the building.

The problem as to whether the intervener was using this particular runway as a licensee or as an invitee presents rather a close question of fact. The implied finding of the jury, however, to the effect that he was a mere licensee, finds support in the record, and must therefore be sustained.

[3] Two instructions upon the subject of licensee and invitee were given to the jury,

at the request of the defendant, which are challenged as erroneous. They are in the following language:

(1) "If you find from a preponderance of the evidence that Victor Peterson was a mere licensee at the time he is alleged to have been on the alleged runway, then you are instructed that he took upon himself the risk of the alleged runway as he found it, and the defendant owed him no duty of seeing that the alleged runway was safe for his attempted use, and your verdict should be for the defendant."

(2) "If you find from a preponderance of the evidence that Victor Peterson was an invitee on the premises under the control of the defendant, but that the invitation did not extend to the use of the alleged runway, then you are instructed that said Victor Peterson was a mere licensee at the time he is alleged to have been on the alleged runway, and the defendant owed him no duty of seeing that the alleged runway was safe for his attempted use, and your verdict should be for the defendant."

It is asserted that the foregoing instructions invade the province of the jury by virtually assuming that the intervenor was a mere licensee while the evidence conclusively establishes the fact that he was in fact an invitee.

Obviously, this criticism is not merited. Each instruction is based upon the express condition that the jury shall first find from a preponderance of the evidence that Mr. Peterson was either an invitee or a licensee. The determination of his relationship toward the defendant was left entirely with the jury. Moreover, these instructions should be construed with relation to the three following instructions, two of which were given at the request of the plaintiffs and which adequately apply the doctrine of the law respecting the liability of an employer toward a licensee or an invitee as contended for by the appellants:

(3) "If you believe from the evidence that Victor Peterson used the runway on July 3, 1924, and at the time he fell, at the invitation, express or implied, of the defendant, then I instruct you that as a matter of law Victor Peterson was an invitee and had a right to use said runway. And in that event if you believe that the said runway gave way and as a proximate result of any negligence on the part of the defendant or any of his servants or employees acting within the scope of their employment, your verdict should be for the plaintiff unless it has been proven that Victor Peterson himself was guilty of negligence which was a proximate cause of his injury."

(4) "It is not necessary in this case that there should have been an express invitation by the defendant to Victor Peterson to use

said runway; circumstances themselves may be sufficient to imply such an invitation. For invitation, as the law construes it, may be either express or implied."

(5) "It is admitted in this case that Victor Peterson was an employee of J. G. Williams Construction Company, and not of defendant J. A. Allen, and that said J. A. Allen was under no contractual duty by any contract to construct, secure and support any runway for said Victor Peterson, and you must, before you can find for the plaintiff and against the defendant, find, from a preponderance of the evidence, that there was an invitation, either express or implied, extended by said J. A. Allen to said Victor Peterson to use said runway as a walkway, and if no such invitation were extended, then you are instructed that said Victor Peterson was a mere licensee at the time he is alleged to have been on said alleged runway, and said J. A. Allen owed him no duty of seeing that said alleged runway was safe for his attempted use."

Instruction No. 4 informs the jury that an invitation to use a particular runway may be either express or implied from the surrounding circumstances. No. 3 declared that if he used the runway at the invitation of the defendant either express or implied and was thereby injured as a result of the negligence of the defendant or his employees, he was entitled to recover damages. The instruction last above quoted correctly states that as an employee of the Williams Construction Company, the defendant was not obligated to provide the intervenor with a runway upon which to enter the building, and that unless the jury should find that Peterson was invited by the defendant, either expressly or by implication, to use the runway, he would be a mere licensee in such use, under which circumstances the defendant would be under no obligation to see that it was safe and secure.

[4] The appellants insist that this application of the law is erroneous; that when an employee is actually engaged in the performance of his work, it is inconsistent to say that he may still be acting as a mere licensee. The authorities which are cited upon this subject will not sustain that conclusion. Obviously, the relationship of licensee or invitee must depend upon the nature of the employment and the circumstances under which the service is performed. In the present case the intervenor was not an employee of the defendant. The runway was not constructed for the use of workmen in general who were employed upon the building. It was for the exclusive purpose of conveying the saw into the structure. After the object for its construction had been accomplished, the defendant's employees immediately proceeded to dismantle it. The defendant was not aware that Peterson was making use of it as a convenient way to go and come from the building. Pe-

terson knew why it was constructed. He knew that it was being dismantled. He did not ask for permission to use it. It may not be said that it had been used so long or commonly as to imply an invitation or acquiescence in its use. While undoubtedly Mr. Peterson as foreman for the Williams Construction Company had a lawful right to the use of the building and other approaches there-to necessary for the reasonable performance of his duties, the jury were authorized to find from all the facts of the case that as between himself and the defendant he was a mere licensee in the use of this particular runway.

[5] It is, of course, true that even though the intervenor was a mere licensee upon the runway at the time he was injured, still the defendant would be liable for conduct which would result in wilfully or intentionally inflicting the injuries. An owner of property may not construct a device which will become a trap or expose even a mere licensee or trespasser to great peril, without liability. As Mr. Justice Harlan well said in the case of *Bennett v. Louisville, etc., Ry. Co.*, 102 U. S. 577, 580, 26 L. Ed. 235, "The owner is liable to invited guests for injuries occasioned by the unsafe condition of the land or its approaches, if such condition was known to him and not to them, and was negligently suffered to exist, without timely notice to the public, or to those who were likely to act upon such invitation." 20 R. C. L. 56, § 52.

In the present case it is not contended, and the evidence will not support the assertion, that the defendant maintained a trap at the peril of employees, or that he willfully, wantonly, or knowingly built or maintained a runway to injure the intervenor or anyone else.

The doctrine is well established that except for willful and wanton injury the owner or one in control of property is not liable for injuries sustained by a mere licensee or trespasser. *Means v. Southern Cal. Ry. Co.*, 144 Cal. 473, 77 P. 1001, 1 Ann. Cas. 206; *Jacobson v. Northwestern Pac. Ry. Co.*, 175 Cal. 468, 472, 166 P. 3; *Lucas v. Walker*, 22 Cal. App. 296, 301, 134 P. 374, 379; 45 C. J. 796, § 201; 20 R. C. L. 57, § 53, 2 *Sherman & Redfield on Negligence*, p. 1220, § 705; *Thompson on Negligence*, § 685.

[6] Error is charged in the refusal to give plaintiff's instructions 9 and 10. The first charged the jury that a contractor is bound to use ordinary care in the construction of a runway to render it safe for the purpose for which it was intended, and that if the jury found this particular runway was permitted to remain after the saw had been deposited in the building, with the intention that it should thereafter be used by the workmen generally as a runway to the building, the defendant would be liable for negligence in its construc-

tion and maintenance. The second instruction informed the jury that even though Mr. Peterson could safely enter the building by means of ladders or runways other than the one upon which he was injured, that privilege would not necessarily preclude him from the right to also use this saw-runway, and if the jury found that *his use of the latter runway was contemplated* and reasonably necessary for the performance of his work, the defendant would be liable for negligence in its construction or maintenance. These instructions embrace correct statements of the law.

The refusal to give these instructions, however, was not error for the reason that they were amply covered by others. For instance, the jury was charged that: "If you believe * * * that the use of the runway by Victor Peterson * * * was a use thereof contemplated by the defendant * * * and that his fall was proximately caused by the failure * * * to exercise ordinary care to make said runway safe and suitable for such use * * * you must return a verdict in favor of plaintiff."

The jury was also charged: "Although toward an employee of his subcontractor a general contractor is not obligated to exercise ordinary care in the construction of runways, the use of which is merely convenient to the employee of such subcontractor, the general contractor is, however, bound to exercise ordinary care to make runways safe and suitable for the use of employees of such subcontractor whose use thereof is contemplated and reasonably necessary to the performance of the work. * * * If you believe * * * that the use of said runway by Victor Peterson * * * was a use thereof contemplated by the defendant," it was the duty of the defendant to use ordinary care to safely construct and maintain the runway.

Other instructions which were given substantially cover the same principles. The jury was clearly informed that although a general contractor was not ordinarily liable for a lack of care in the construction or maintenance of runways or appliances not intended for the use or benefit of the subcontractor or his workmen, still if the general contractor knew they were likely to be so used, he would be liable for injuries sustained through a lack of ordinary care, even to a licensee who had no absolute invitation or right to use the same. This was as favorable a declaration of the law as the appellants were entitled to. In *Pettyjohn & Sons v. Basham*, 126 Va. 72, 100 S. E. 813, 816, 38 A. L. R. 391, the court said: "In order for the plaintiff to occupy the position of invitee, it must appear that the use was not merely convenient, but reasonably necessary for the work to be done."

And in the case of *Bottum's Adm'r v. Hawks*, 84 Vt. 370, 79 A. 858, 864, 35 L. R. A. (N. S.) 440, Ann. Cas. 1913A, 1025, it is said:

"Neither silence, acquiescence, nor permission * * * standing alone, is sufficient to establish an invitation. A license may thus be created, but not an invitation."

In the Pettyjohn Case, *supra*, the facts were quite similar to those of the present case. The opinion in that case aptly distinguishes between an invitee and a mere licensee. Basham was a plumber who was working for a subcontractor of Pettyjohn in the construction of a house. The latter had erected a scaffolding on the outer wall of the building for the purpose of encasing the window frames in the gable. This work had been completed. The scaffolding was permitted to remain in place. To complete his work of plumbing, Basham climbed onto this scaffolding through the gable window and proceeded to the end thereof with the object of reaching the roof. He stepped upon the ends of some loose timbers which gave way and he fell to the ground, sustaining severe injuries. A judgment, which was recovered by Basham in the trial court, was reversed on appeal on the ground that he was a mere licensee on the scaffolding toward whom the general contractor ordinarily owed no duty to exercise care. The court said: "If Basham was a mere licensee, then he took upon himself the risk of the scaffold as he found it, and cannot recover; but if he was an invitee, and the invitation extended to that use of the scaffold, then Pettyjohn & Sons are liable to him for the injury sustained in consequence of its fall. * * * Usually, an invitation will be inferred where the visit is of common interest or mutual advantage to the parties while a license will be inferred where the object is the mere pleasure or benefit to the visitor. * * * In the case at bar, the evidence fails to show that the use of the scaffold by Basham for getting upon the roof was for the common interest and mutual benefit of both parties. It was built for use in doing work on the face of the gable, and was never intended to be used as a means of access to the roof. * * * If the scaffold was attractive, the plaintiff was not a child, and temptation was not invitation. If simply convenient, the use of it was as a licensee and not as an invitee. * * * In order for the plaintiff to occupy the position of invitee, it must appear that the use was not merely convenient, but reasonably necessary for the work to be done. * * * Mere convenience is not invitation. * * * The fact that access by way of the scaffold was 'easy and convenient' did not warrant the implication of an invitation to use it, when another means of access existed that was perfectly safe, easy, and convenient."

[7] It is well settled law and in accordance with reason that one may be an invitee upon particular premises for a specific purpose and yet become a mere licensee with respect to certain parts of the premises, approaches to it, or appliances contained within it, which were not intended for the use of the visitor. *Powers v. Raymond*, 197 Cal. 126, 239 P. 1069; *Kennedy v. Chase*, 119 Cal. 337, 52 P. 33, 63 Am. St. Rep. 153; *Peebles v. Exchange Bldg. Co. (C. C. A.)* 15 F.(2d, 335; *Lindholm v. Northwestern Pac. R. R. Co.*, 79 Cal. App. 34, 39, 248 P. 1033; 45 Cal. Jur. 830, § 240.

[8] The court did not err in instructing the jury that certain specific facts standing "alone" would not constitute an invitation for Peterson to use the runway. Customary and general use of a runway for a long period of time might reasonably imply knowledge thereof or acquiescence on the part of the one in control of it. In the present case, however, there was no evidence of general or continued use of this particular runway. The most that can be said is that Peterson used it several times the morning of the accident, without the knowledge of the defendant. This use will not constitute invitation.

[9] After a careful examination of all the instructions given and refused, we find no reversible error, and we are satisfied that the jury was very fully and fairly charged as to the essential issues involved. The fact that the evidence would have supported a contrary judgment is not a matter for this court to consider, since it is concluded by the verdict of the jury which possessed the sole province of passing upon the weight and sufficiency of the testimony.

[10] Nor do we think the court erred in sustaining defendant's objection to plaintiff's effort to prove that a general custom existed in California for all workmen engaged in the construction of a steel frame building to indiscriminately use a runway communicating therewith, regardless of the class of employees to which they belong. The general custom of workmen to use a common runway communicating with a steel structure in the process of building, will in no way aid in determining whether an employee of an entirely different contractor has a right to use a special runway which was constructed for a particular purpose, or to decide whether the injured party acted as an invitee or a mere licensee in his use thereof.

The judgment is affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

CARD v. BOMS.★
Civ. 5828.

District Court of Appeal, Second District, Division 2, California.

March 7, 1930.

Hearing Ordered by Supreme Court
May 5, 1930.

1. Evidence ⇨222(1)—Witnesses ⇨379(1)—
Prior statement of party may be considered, not only for impeaching his testimony, but as admission against interest.

Any prior statement made by party to the action may be considered, not only for the purpose of impeachment of his testimony or credibility as a witness, but as an admission against interest.

2. Evidence ⇨265(1)—Jury may give credit to party's prior admissions, where such admissions conflict with his testimony.

Where testimony given by party to the action when on the witness stand differs materially from his prior admissions, conflict in the evidence is created, and jury may give credit to prior admissions rather than to sworn statements of the party as a witness.

3. Automobiles ⇨245(26)—Evidence in action for injuries held insufficient to make issue for jury of identity of defendant as driver of automobile which struck plaintiff.

In action for injury to one struck by automobile, in which the evidence for plaintiff failed to identify the driver of the car but merely showed that it was a touring car of one of two makes with its top up and that defendant was arrested about five miles away from the scene of the accident half an hour later, intoxicated and driving car of one of these makes with headlights, fender, and running board in damaged condition, and that defendant had then admitted having left town with car uninjured and had been unable to account for damaged condition, *held* that evidence was insufficient to make issue for jury of identity of defendant as driver of automobile which struck plaintiff.

4. Evidence ⇨601(5)—Jury may not make finding of identity on mere conjecture in absence of any evidence thereof.

Though it is not necessary that identification be made absolutely by any one witness, since it is a matter for the jury to determine from all the circumstances and evidence on the subject, this rule does not justify a finding of identity in the absence of any evidence thereof and upon mere conjecture or speculation.

Appeal from Superior Court, Los Angeles County; Edward T. Bishop, Judge.

Action by Walter D. Card against C. A. Boms. From a judgment for defendant notwithstanding the verdict, plaintiff appeals.

Affirmed.

Morris Abraham and Charles I. Rosin, both of Los Angeles, for appellant.

Joe Crider, Jr., and Clarence B. Runkle, both of Los Angeles, for respondent.

BURNELL, Justice pro tem.

October 13, 1925, at about 1 o'clock a. m., the plaintiff was pushing a hand cart in a northerly direction on Hill street, between Third and Fourth streets, in the city of Los Angeles, and was proceeding on the right-hand side of the street near the curb when he was struck from behind by an automobile traveling in the same direction, and which continued on its course without stopping. He brought this action to recover damages for the injuries thus sustained, and the court having denied a motion for nonsuit and one for a directed verdict in favor of the defendant, the jury brought in a verdict for plaintiff, whereupon the court, on its own motion, ordered judgment for the defendant, notwithstanding the verdict. Thereafter a judgment was entered for defendant reciting that it appeared to the court that the evidence was insufficient to justify a verdict in favor of plaintiff, and it is from this judgment that the appeal is taken.

The only question presented to us is whether or not the court below was justified in making the order on which the judgment was based, and that question has been narrowed down, by a stipulation filed in this court, to a consideration of the sufficiency of the evidence with respect to the identification of the defendant as the driver of the car which ran into the plaintiff and thus caused his injuries.

The plaintiff himself did not see either car or driver, being rendered unconscious by the collision. The accident was witnessed by two persons, one of them a police officer. Their testimony may be thus summarized: Officer Ackers, standing at Fourth and Hill streets, noticed the automobile which struck the plaintiff, just prior to the impact. It was traveling "probably around twenty or twenty-five miles an hour." He *thought* it had no lights, or that the lights were very dim. Seeing that the plaintiff was in danger of being struck, the officer started to blow his whistle, but before he could do so the automobile had hit the plaintiff "and kept on going" north on Hill street, the driver increasing its rate of speed after striking plaintiff. The car "was a touring car, either a Maxwell or a Dodge," with the top up. The testimony of the other eyewitness to the accident was the same in all particulars as that of Officer Ackers except that the former testified positively as to the absence of lights and said that he could not observe whether the driver was a man or a woman. The defendant was arrested at about 1:30 the same morning by Officer Beck on North Broadway, at a point some five miles distant from the scene of the collision, and after a chase of about nine blocks. The officer's attention was called to defendant's car by the fact that it was being driven at

a speed of over thirty miles per hour, "swaying from one side to the other," without lights and with the right running board splintered, the top torn and one headlight bent. (In addition to this damage, other witnesses testified that the right front fender was bent.) The defendant, who was traveling in a northerly direction at the time, failed to stop when the officer ordered him to do so, but kept on going until the latter "shot in the street." The automobile driven by the defendant was a Maxwell touring car and its top was up. He himself was intoxicated to the point where "he could not stand erect very well," and when asked what had occasioned the damage to his car "he said he hit something, and did not know what it was; thought it was a lamp post," but did not know when or where the accident occurred. About 2:10 a. m. of the same day, when questioned at the receiving hospital, the defendant failed to reply to a number of inquiries, but did say that he "had had a drink" and that since he had last got into his automobile "he had struck something at some place, but he did not know what it was nor where." About 9:30 that morning the defendant's statement was taken down in shorthand at the city jail and later transcribed. This statement, identified by Detective Lieutenant Stevens and the stenographer who took it down, was in substance as follows: Defendant left his place of business at about 9:30 the previous evening and went to a poolroom, where he engaged in playing pool and drinking "moonshine" liquor until he started for his home at an hour not specified in the statement, feeling the effects of his libations. His usual homeward route took him east on Eight street as far as Hill street, and north on the latter through the Hill street tunnel to Temple street, thence to Broadway "and straight out North Broadway." Asked as to whether he had taken that route on the previous evening, he replied, "I think so." He did not recall hitting an old man on Hill street, between Third and Fourth streets, and said the headlights on his car at the time he left the poolroom were "in perfect condition" and that his fenders were not dented, and admitted that his car was damaged, as above stated, when he was arrested. He further said he was so intoxicated when he started home that he really did not know what occurred during the drive. At the trial the defendant, called to the stand under section 2055, Code of Civil Procedure, gave an entirely different version of his actions. He placed the time of his arrest on North Broadway at 12:30 or 12:45, which was prior to the occurrence of the accident, and swore that he had been working at his place of business on West Eighth street the previous evening until approximately 12:15 or 12:20 a. m.; that while he had had a drink or two during the afternoon he had not partaken of any intoxicating liquor in the evening; and that he was not under the in-

fluence of liquor at all. He said that when he started home his lights were in working order, but that he had forgotten to turn them on; that there were no dents in the fenders of his car, but that the running board was "slightly damaged." He described his course of travel as one which would have taken him some five blocks west of Hill street and the scene of the accident, and said this was his usual way of going home. He denied having had any collision at all. Interrogated as to the statement made by him at the jail, he admitted being questioned by Officer Stevens, but denied that he had been asked or had stated that he had been in a poolroom, denied that he had said he had left his place of business at 9:30, and denied that he had admitted drinking liquor or that he had given his route as north on Hill street and past the place of the accident, or that he had in fact taken that route.

[1,2] It is urged by respondent that the statement claimed to have been made by him when questioned at the city jail cannot be considered as any evidence of the facts therein stated, and that it was admissible solely for the purposes of impeachment. Hence, he argues, it cannot be used to establish the fact that he took a homeward route, on the morning of the accident, which carried him over Hill street and past the place of the accident. The general rule is thus stated in *Albert v. McKay & Co.*, 174 Cal. 451, 163 P. 666, 668: "When a witness is impeached by proof of prior inconsistent statements, the effect is merely to discredit him as a witness. The former statements made by him are incompetent for any other purpose. They do not constitute evidence of the truth of the facts so stated by him." This rule, however, applies only to prior statements made by witnesses who are not parties to the action. In the case of the latter it is subject to the qualification that any statement made by a party to the action may be considered, not only for the purpose of impeachment of his testimony or credibility as a witness, but as an admission against interest. *Gates v. Pendleton*, 71 Cal. App. 752, 236 P. 365; *Hall v. Bark "Emily Banning"*, 33 Cal. 522. Where the testimony given by a party to the action when on the witness stand differs materially from his prior admissions, a conflict in the evidence is created and the jury has the right, if it gives any credence to him at all, to believe his admissions rather than his sworn statements as a witness in court. *Gates v. Pendleton*, *supra*. If, however, we may assume that the jury in the instant case rejected the defendant's testimony and accepted his statement, made at the jail, all that is thus supplied by way of identifying defendant as the driver of the automobile which struck the plaintiff are the facts: (1) That he left the poolroom at an unspecified hour sometime between 9:30 p. m. and the time of his arrest at 1:30 a. m.; (2) that his car was uninjured when he started home, and

damaged when he was arrested; (3) that his usual route would have taken him past the place of the accident.

[3, 4] Taking into consideration only the evidence which is most favorable to the plaintiff, the established facts are these: Plaintiff was struck at about 1 a. m. by an automobile not identified as to license number, color, number of passengers, sex of driver, or otherwise than that it was a touring car of one of two makes, with its top up and its lights unlit; the defendant was arrested about five miles away from the scene of the accident half an hour later, intoxicated and driving a car of one of these makes with the headlights, right fender, and running board in a damaged condition, for which he failed to account. In our opinion there was an utter lack of evidence from which the jury could have properly identified the defendant as the person responsible for the injury to the plaintiff. It is true that it is not necessary that identification be made positively by any one witness and that it is a matter for the jury to determine from all the circumstances in evidence on the subject (*People v. Franklin*, 46 Cal. App. 1, 188 P. 607; *People v. Hrkaj*, 85 Cal. App. 301, 259 P. 353; *People v. Wilson*, 76 Cal. App. 688, 245 P. 781); but this does not justify a finding of identity in the absence of any evidence thereof and upon mere conjecture or speculation (*Nichols' Applied Evidence*, vol. 5, p. 4738).

We have examined the decisions cited by appellant and find the facts in each of them readily distinguishable from those in the case before us. Thus in *Szopieray v. West Berkeley Express, etc., Co.*, 194 Cal. 106, 227 P. 720, while there was no direct evidence that the injury to a three year old child was caused by the movement of an unattended horse-drawn truck belonging to the defendant, there was testimony that the child was close to and playing with one of the hind wheels of the truck immediately before the accident, and that the injury was caused by a crushing weight passing over the child's leg. Blood stains were found on the roadway near where the child was found after the accident. There was no intimation in the evidence that any other vehicle had passed along the street or had been near the child. There was also the testimony of one witness that just before the child was found injured he heard some one "holler Whoa." In *State v. Elliott*, 94 N. J. Law, 77, 110 A. 135, where the defendant was convicted of manslaughter, the question was presented as to the identification of his automobile as the one which had struck and killed the deceased and then sped away. The opinion does not review all of the evidence on this point, but does refer to a police officer "seeing the defendant's car, a high-power Packard, approaching at 40 miles an hour," watching it, and shortly after it had passed seeing a human body "fly [up] in the air," and states

that shortly after the accident "a car answering the description of the car in question, driven by this defendant," was halted. It is further stated that "at the trial testimony of an adequate character was adduced regarding identification of the men in the car, as well as the general contour of the car itself, from which a jury might reasonably infer that the car in question was the same instrumentality which caused the homicide." (Italics ours.)

In *Bowling v. Roberts*, 235 Pa. 89, 83 A. 600, the court held that the identity of the automobile which caused the accident was established by testimony as to its size and the peculiar decorations which adorned it, corresponding in description to a car owned by the defendant, which was the only one in the vicinity so decorated. In *O'Malley v. Public Ledger*, 257 Pa. 19, 101 A. 94, the evidence as to identification included that of witnesses to the accident who observed the defendant's name painted on the side of the automobile which struck the plaintiff. In *People v. Franklin*, supra, there was, in addition to other circumstances, the testimony of three witnesses who, while they would not positively state that the defendant was the man they had seen at the scene of the crime, picked him out, each separately, from a number of other prisoners as resembling him. In *People v. Wilson*, supra, the prosecuting witness testified that the man who had rifled his pockets resembled the defendant, although he had not seen the robber's face but only his back and shoulders. In that case the court observed that there might have been peculiarities about these which constituted a sufficient foundation for identification. In *People v. Fowler*, 30 Cal. App. 183, 157 P. 540, there was an identification of the eyes of the defendant, who had worn a mask while committing the burglary and homicide, and testimony that on being interrupted in the commission of their crime the three men involved had fled and had been seen to run into a public park, from which two men emerged very shortly thereafter, followed by a third man who was without a hat. A few hours later a hat bearing the defendant's initials was found in the park at the place where the three men had crossed it.

In all of these cases there were facts and circumstances from which an inference of identity might well be drawn; in the instant case there were none. There was no testimony as to the appearance or even the sex of the driver of the automobile which struck the plaintiff, nor was there any as to any peculiarity of the car itself whereby it might have been distinguished from other cars of either of the two well-known makes, of which there are in all probability many hundreds in Los Angeles and vicinity.

The judgment is affirmed.

We concur: WORKS, P. J.; IRA F. THOMPSON, J.

104 Cal. App. 490

CLINTON v. CITY OF SANTA CRUZ.

Civ. 6988.

District Court of Appeal, First District, Division 2, California.

March 14, 1930.

Municipal corporations Ⓒ741(1)—It was unnecessary for individual to present claim to council before suing city to recover damages as for deceit.

Individual suing city to recover damages as for deceit need not allege nor prove that, before commencing action, he presented claim to council of city, in view of charter not providing that in an action for damages it is condition precedent that plaintiff must first present his claim to city council.

Appeal from Superior Court, Monterey County; H. G. Jorgensen, Judge.

Action by Delmar S. Clinton against the City of Santa Cruz. Judgment for plaintiff, and the defendant appeals.

Affirmed.

John H. Leonard, of Santa Cruz, and Carl E. Lindsay, of Fresno, for appellant.

Byrne & Lamson and Paul S. Jordan, all of San Francisco, for respondent.

STURTEVANT, J.

The plaintiff sued to recover damages as for deceit. The trial court made findings in favor of the plaintiff, and from a judgment entered thereon the defendant has appealed.

The defendant complains because the plaintiff did not allege nor prove that, before commencing his action, the plaintiff presented his claim to the governing board of the defendant. *Yolo County v. City of Sacramento*, 36 Cal. 193, 197. The case is not in point. The city of Sacramento was, at that time, acting under a special statute. St. 1863, p. 415. In that act it was provided: "The inhabitants thereof are hereby made and constituted a body politic and corporate under the name and style of 'City of Sacramento', by which name they shall be known in law * * * may sue and be sued * * * provided, further, that no action shall be commenced or maintained against the city until the claim, account, or demand upon which it is founded has been presented to, and, either in whole or in part, been rejected by the Board of Trustees. * * *" The charter of the defendant contains no such provision. St. 1911, p. 1865, § 5. Again, it cites and relies on *Bancroft v. City of San Diego*, 120 Cal. 432, 52 P. 712. That case was brought to recover damages for injuries caused to the property of the plaintiff by the act of the defendant in changing the grade of the street on which plaintiff's property abutted. The charter of

the city of San Diego contained a provision as follows: "All claims for damages against the city must be presented to the Common Council and filed with the Clerk within six months after the occurrence from which the damages arose." St. 1889, p. 658, § 10. A similar differentiation exists as to *Bigelow v. City of Los Angeles*, 141 Cal. 503, 75 P. 111; *Farmers, etc., Bank v. City of Los Angeles*, 151 Cal. 655, 91 P. 795; *Crim v. City & County of San Francisco*, 152 Cal. 279, 92 P. 640; *Western Salt Co. v. City of San Diego*, 181 Cal. 696, 186 P. 345; and *Morris v. City and County of San Francisco*, 59 Cal. App. 364, 210 P. 824. But this plaintiff cites no such provision as being contained in the charter of this defendant. Finally, the defendant cites and relies on sections 179, 180, 181, and 185 of its charter. No one of those sections uses the word damages nor any other language showing that in an action for damages it is a condition precedent that the plaintiff must first present his claim to the city council of Santa Cruz. *Adams v. City of Modesto*, 131 Cal. 501, 63 P. 1083. We find no error in the record.

The judgment is affirmed.

We concur: NOURSE, Acting P. J.; BURROUGHS, Justice pro tem.

104 Cal. App. 301

FAVALI et al. v. RICHARDSON et al.
Civ. 4014.

District Court of Appeal, Third District, California.

March 4, 1930.

1. Trial Ⓒ159—Insufficiency of complaint is not ground for granting nonsuit (Code Civ. Proc. § 581).

Under Code Civ. Proc. § 581, insufficiency of complaint is not ground for granting nonsuit.

2. Appeal and error Ⓒ927(3), 989—To determine if defendant was entitled to nonsuit, evidence is stated in light most favorable to plaintiff on appeal and contradictory evidence is disregarded.

On appeal to determine if defendant was entitled to nonsuit, the evidence is stated in light most favorable to plaintiff and contradictory evidence is disregarded.

3. Appeal and error Ⓒ837(11)—Hearsay evidence, admitted without objection, was considered on appeal in deciding whether nonsuit justified.

On appeal to decide whether nonsuit was properly adjudged, court considered hearsay evidence which had been admitted without objection.

4. Partnership ⚡55—That vendor held out another as partner and kept account book under joint names held to support inference of partnership.

Evidence that vendor of property spoke of another as partner, introduced him as such, and kept account book under joint names, *held* sufficient to support inference that they were partners.

5. Estoppel ⚡63—Sale of vendor's personality by purchasers knowing of liens estopped purchasers from setting up liens as excuse for nonperformance of exchange of farms.

Where purchasers sold personality of vendor on farm after date performance of contract to exchange farms could have been enforced, with knowledge of liens against property, they were estopped to set up such liens as an excuse for not consummating agreement.

6. Partnership ⚡156—Where one partner was estopped to set up defense, other was equally estopped.

Both partners were equally estopped to set up defense against consummating agreed exchange of land, where one partner was estopped.

7. Estoppel ⚡110—Vendor could prove estoppel without specially pleading it, where purchasers set up liens as affirmative defense for nonperformance of exchange.

Where purchasers set up liens on property as excuse for nonperformance of agreed exchange, vendor could prove purchasers were estopped without specially pleading estoppel.

8. Fraud ⚡64(1)—Where plaintiff claimed he was defrauded in transaction involving exchange of land, evidence held not to warrant nonsuit.

In action for damages for conspiracy to defraud, etc., in contract for exchange of land, where after time for performance had passed defendant sold some of plaintiff's personality knowing certain claims due against land, evidence *held* not to warrant nonsuit.

Appeal from Superior Court, San Joaquin County; C. W. Miller, Judge.

Action by Antonio Favali and others against J. A. Richardson and others. From a judgment of nonsuit, plaintiffs appeal.

Affirmed in part, and reversed and remanded in part.

Phillip M. Carey, of Oakland, J. O. Stemmler, of Stockton, Marvin B. Sherwin, of Oakland (Robert Collins, of Richmond, of counsel), for appellants.

Berry & Watson, of Stockton, for respondents.

FINCH, P. J.

This is an action for damages. A judgment of nonsuit was entered in favor of the defendants, and the plaintiffs have appealed. It is not contended that the judgment is erroneous except as to the defendants Richard-

son and Lewis, who will be referred to herein as defendants and respondents.

[1] Respondents contend that the judgment was properly entered on the ground that the complaint does not state facts sufficient to constitute a cause of action. Insufficiency of a complaint is not a ground for granting a nonsuit. Code Civ. Proc. § 581; Pacific Finance Corporation v. Roffalli (Cal. App.) 276 P. 1064; Loop Bldg. Co. v. De Coe (Cal. App.) 275 P. 881; Scott v. Sciaroni, 66 Cal. App. 577, 226 P. 827. The complaint charges that the defendants entered into a conspiracy to defraud the plaintiffs and made false representations which induced the plaintiffs to enter into the agreement involved in the action; that by the terms thereof the parties agreed to exchange properties owned by them respectively; that the plaintiffs conveyed their properties to the defendants in accordance with the agreement, but that the defendants "failed, refused and neglected to, and by reason of the falsity of said representations * * * could not transfer" their property to the plaintiffs "or anything of value whatsoever." The answers admit that Lewis and his wife entered into an agreement with the plaintiffs for the exchange of the properties described in the complaint; that the former received a part of plaintiffs' personal property and sold it; that while Lewis and his wife agreed to pay an incumbrance of \$22,400 upon the plaintiffs' land there were additional incumbrances thereon in the form of liens for irrigation and county taxes in the sum of more than \$1,000 at the time of the execution of the agreement, and that thereafter the plaintiffs permitted a judgment against them in favor of J. M. Culpepper for the sum of \$2,829.60 to become a lien on the land; that the plaintiffs "failed and refused to discharge or remove the aforesaid additional encumbrances" and admitted that "they were unable to comply with their said agreement"; and that thereafter the "defendants gave notice in writing to the plaintiffs that all interest of the plaintiffs in or to" the land which Lewis and his wife had agreed to convey to them "was terminated and ended." The truth of the foregoing allegations as to tax and judgment liens was admitted at the trial.

[2] The agreement in question recites that the plaintiffs are the owners of 220 acres of land, referred to by the parties as the Culpepper ranch, "subject to an encumbrance * * * in the sum of \$22,400," and a herd of dairy cattle and other personal property; and that Lewis and his wife are the owners of 80 acres of land, referred to as the Farmington vineyard, subject to a trust deed given as security for the payment of \$10,000 and a second trust deed for \$7,000; and that they own the personal property on the land. The

agreement provides for the exchange of such properties, the grantees to assume and pay the indebtedness incumbering the respective lands to be conveyed to them, and Lewis and his wife to pay the sum of \$1,040 to the plaintiffs "at the time of the execution and delivery of deeds and bills of sale." Under well-settled rules relating to the right of a defendant to a nonsuit, the evidence will be stated in the light most favorable to the plaintiffs.

June 28, 1924, J. W. Fitzgerald entered into an agreement to sell the Farmington vineyard to Fred Bruggisser. July 2, 1924, Bruggisser assigned all his "right, title and interest" under the agreement to Richardson. Fitzgerald thereupon executed a conveyance of the land to Richardson, who executed a trust deed conveying the land to Fitzgerald as security for the payment of \$15,000 of the purchase price. Both instruments were placed in escrow to be delivered upon the payment by Richardson of \$5,000 on the indebtedness secured by the trust deed. Richardson also gave Bruggisser a trust deed, subject to the one first mentioned, to secure payment of \$7,000. Richardson was induced to purchase the property by Lewis, who was thereupon placed in charge thereof. October 2, 1924, Richardson agreed to convey all his "right, title and interest" in the land to Lewis and his wife. October 14, 1924, Lewis and his wife entered into the aforesaid agreement with the plaintiffs. Both parties went into possession under the agreement, but no deeds of conveyance or bills of sale were ever executed. November 5, 1924, Lewis sold at public auction a part of the cattle which the plaintiff had agreed to convey and received therefor more than \$5,000, out of which sum he paid them \$1,040 in accordance with the agreement. January 23, 1925, counsel for the plaintiffs notified Lewis that "unless the agreement * * * is closed within the coming week, we have been instructed to commence suit to enforce the same." January 29, 1925, Richardson and Lewis indorsed upon the face of their agreement of October 2, 1924, a purported cancellation thereof and signed the same. Neither of their wives, however, signed the indorsement. On the next day thereafter Lewis and his wife assigned all their interests in various properties to Richardson and his wife as security for the payment of the assignor's promissory note for \$10,260. The plaintiffs were unable to pay the amount of the aforesaid tax and judgment liens on the Culpepper ranch and, about February 3, 1925, Richardson told them they must discharge these liens within one week or he would not carry out the terms of their exchange agreement with Lewis and his wife. February 10, 1925, Richardson served notice of forfeiture on the plaintiffs and a demand for possession of the Farmington vineyard. The plaintiffs refused to surrender possession. The interest on Richardson's note to Bruggis-

ser was payable semiannually. Richardson testified that he failed to pay the first installment of interest amounting to \$245 when it became due and that Bruggisser thereupon commenced proceedings to sell the Farmington vineyard under the terms of the trust deed securing payment of the note for \$7,000. After these proceedings were commenced, Wilson Walker purchased the note from Bruggisser and, notwithstanding the fact that he had been associated with Richardson in business for several years, an association which continued until March, 1926, Walker carried out the proceedings commenced by Bruggisser and purchased the property at the sale thereunder on November 14, 1925. Thereafter Walker caused the plaintiffs to be ejected from the property. At the trial, in May, 1928, Lewis, who was examined by the plaintiffs as an adverse witness, referring to the cancellation of his agreement to purchase Richardson's interest in the property, testified: "At a later date I acquired that interest in the property again, and I have had an interest in that property until the present day." It does not appear when or how such later interest was acquired by Lewis.

Lewis and Richardson had been "good friends" for at least ten years. They had been associated together in "a dozen or so" business transactions, Richardson frequently advancing Lewis' share of the money involved therein. Some of such business transactions were mere loans by Richardson to Lewis. It does not appear that any money passed between Richardson and Lewis in any of their transactions relating to the Farmington vineyard.

[3] One of the plaintiffs testified that when Lewis first interviewed them relative to an exchange of properties he said, "I have a partner, rich fellow, in San Francisco"; that prior to the auction sale he said: "I was see my partner in San Francisco. I find out we cannot keep care of those cows, * * * so we figure to have auction sale." While, as against Richardson, the foregoing is hearsay evidence only of a partnership, it was admitted without objection and is therefore to be considered in determining whether it was error to grant the motion for a nonsuit, in the determination of which question contradictory evidence is to be disregarded. *Lucy v. Davis*, 163 Cal. 611, 615, 126 P. 490; *Menefee v. Raisch Improvement Co.*, 78 Cal. App. 785, 789, 248 P. 1031; *Fong Lin v. Probert*, 50 Cal. App. 339, 344, 195 P. 437. Richardson attended the auction sale of the plaintiffs' cattle on November 5, 1924. Lewis there introduced him to the plaintiffs, saying, according to the testimony of the plaintiffs, "I will introduce my partner, Mr. Richardson." Another witness testified: "Mr. Lewis say, * * * 'This is Mr. Richardson, my partner, that I tell you before,' * * * Q. Then they

were partners, as you said, he was a partner in the auction sale? A. Was partner in auction sale and the land too." Another witness testified that before the sale commenced Richardson said, "We going to have a nice sale." A page of Lewis' account book was admitted in evidence, reading as follows:

Farmington Vineyard

W. R. Lewis and J. A. Richardson

	To Whom	Paid	For	Rec'd
July 2/24	J. W. Fitzgerald	20,000-		
	Sacco Realty Co.	1,000-		
	Standard Oil Co.	122.95	Fuel	
	J. W. Fitzgerald	1,255.80	Shook assigned to Natoli	
	" "	36. -	Nails "	
	" "	170.25	Tractor hire & sulphur	
	J. B. Gondolfo	159.50	Labor	
	Nat Gonia		Labor	
	Fred Bruggisser		Labor	
	D. Natoli on acct.			500.00 Grapes
	" " " "			36.00 Nails
	" " " "		Assigned shook contract	1255.80 Shook
	W. R. Lewis	5.80	Labor, Pliers & Bread	
	Nat Gonia	6.65	Box making	
	D. Natoli			6.65 Box Making
	Fred Beck	25. -	Trip on Loan	
	Fred Bruggisser	7000 -	2nd Trust Deed on vineyard	
	Fred Bruggisser			7000) assignment to J. A. Richardson of Ferreira
				1700) & Simon notes refer to notes 20% discount.

[4] Treating the foregoing evidence as uncontradicted, as is required on a motion for a nonsuit, it cannot be held insufficient to support an inference that Lewis and Richardson were partners in the ownership of the Farmington vineyard and in the agreement to exchange it for the property of the plaintiffs.

One of the plaintiffs testified that prior to the execution of such agreement he said to Lewis, "We got some * * * taxes to pay, state taxes, irrigation taxes." * * * I said, 'Mr. Lewis, we got that to pay, and we aint got no money, only got stock, we had the stock clear,' and he said, 'It is all right, I take care of that, you people got to pay it extra.' * * * He no say much time, was give plenty of time to pay, any time get the

tion in connection with his subsequent conduct.

The same witness testified that shortly after the execution of the exchange agreement the plaintiffs were served with a summons in an action commenced against them by Culpepper and in which the aforesaid judgment against them was entered; that thereafter on the same day Lewis went to the Culpepper ranch and stated that he and his partner had decided to sell the cattle thereon; that the witness said: "Mr. Lewis, this morning we got a paper served on us here. * * * We got note for \$2,500. * * * I got to go down town and see Culpepper.' Mr. Lewis said, 'You no need lose time, you keep still here, keep working on here and keep care of the cow, because going to have

auCTION sale on November 5th. I going to take this Culpepper judgment that time, and I going to buy from Culpepper, and I going to give an extension of this \$2,500, give you plenty of time to pay when you get down there on the vineyard, then you can pay every year, pay the interest, then pay the balance a little bit at a time, whatever you can.'" The summons was then delivered to Lewis, and the plaintiffs gave no further attention to the action, but relied on Lewis' promise to take care of the matter. He allowed the suit to go to judgment and then took an assignment of the judgment.

[5-8] The agreement contains the following: "This agreement is to be consummated and concluded by the execution and delivery of deeds and bills of sale and the payment of money as herein provided, all within ten days from date hereof. * * * Time is of the essence hereof and of each and every part hereof." The agreement is dated October 14, 1924. Neither of the parties had tendered performance prior to the auction sale, which was held more than ten days after the execution of the agreement. At the time of such sale, therefore, the plaintiffs were under no legal obligation to make the agreed exchange of properties. Their live stock and other personal property were then unincumbered. They could have borrowed money thereon with which to pay the liens upon the Culpepper ranch and the amount of their promissory note for which Culpepper was given judgment, but after Lewis' sale of such personal property they had no means of raising the money required for that purpose. With full knowledge of the tax liens on the Culpepper ranch, which he had promised to take care of, and with full knowledge of the Culpepper note and the suit thereon, which note he had agreed to pay, Lewis proceeded to sell the plaintiffs' personal property as his own, thereby rendering the plaintiffs financially unable to satisfy the liens on the Culpepper ranch. Under such circumstances Lewis is estopped to set up such liens as an excuse for not consummating the agreed exchange of properties. His partner, Richardson, of course, is equally estopped. If it be contended that the plaintiffs did not plead an estoppel, the answer is that the existence of the liens in question were set up as an affirmative defense by the defendants, and "all affirmative matters by way of replication are deemed to have been pleaded, and plaintiff may make proof of any appropriate fact tending to disprove or avoid the new matter set up as a defense as fully as if it had been specially pleaded." 21 Cal. Jur. 165.

It appears that the plaintiffs are inexperienced in business transactions and that the defendants are shrewd business men. The evidence shows that the plaintiffs ex-

perienced on the Farmington vineyard the sum of \$2,000 in money and performed labor thereon of the reasonable value of \$4,000, while Richardson received the whole of the returns from the crops produced thereon by the plaintiffs, amounting to \$5,500. If the judgment is permitted to stand, the result will be that, in addition to their financial embarrassment, the plaintiffs have suffered a direct loss of more than \$10,000.

Nothing said herein is intended as an expression of opinion as to the weight of the evidence or the proper judgment finally to be entered. Those are matters which have no place in the consideration of a motion for a nonsuit.

The judgment of nonsuit in favor of the defendants J. A. Richardson and William R. Lewis is reversed, and the judgment in favor of the other defendants is affirmed.

We concur: PLUMMER, J.; R. L. THOMPSON, J.

104 Cal. App. 466

PEOPLE v. GAYLORD.
Cr. 1554.

District Court of Appeal, First District, Division 1, California.
March 13, 1930.

1. Criminal law ⇨1171(1)—District attorney's incorrect reading of date, erroneously stated in accomplice's confession as that on which crime was committed, held not prejudicial error.

In trial for robbery, committed by defendant and another on May 21st, district attorney's statement that crime occurred on such day in reading accomplice's confession, which recited that it was committed on May 22d, to impeach accomplice's testimony, held not prejudicial to defendant, where there was no evidence of any other crime committed by them together, and confession was correctly read to jury at different times.

2. Criminal law ⇨724(1)—District attorney's reference to defendant as trapped rat held not improper.

Reference by district attorney to defendant as a rat caught in a trap held not improper.

Appeal from Superior Court, City and County of San Francisco; Walter Perry Johnson, Judge.

Daniel Gaylord was convicted of robbery in the second degree, and he appeals.

Affirmed.

Alfred J. Hennessy, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Alberta Bedford, Deputy Atty. Gen., for the State.

TYLER, P. J.

Appellant was charged by information with the crime of robbery. He was tried and convicted of robbery in the second degree. Motion for a new trial was made and denied. This is an appeal from the judgment and order.

As grounds for reversal, appellant assigns misconduct of the district attorney and alleged error in the admission of certain evidence. The facts show that one Andrew Ababurke was on the 21st day of May, 1929, held up and robbed by two men at the entrance to his home at 1857 Larkin street, San Francisco. He was relieved of his pocket-book, which contained a sum of money. Appellant and one Earle were arrested the following day as the perpetrators of the crime. Both parties admitted that they had committed the offense, and appellant consented to take the officers to the place where the purse was hidden. Certain police officers accompanied him to the locality indicated, where the purse and appellant's overcoat were found. After the recovery of the articles named, the officers proceeded with appellant to the police station, where he signed a written confession of his guilt. Earle also signed a statement to the effect that he and appellant had committed the crime; that appellant flourished a revolver while he abstracted the purse from the pocket of the victim.

[1, 2] At the trial appellant claimed the confession was written by an officer, and he did not know its contents, and, further, that he was not the party who accompanied Earle when the crime was committed. In explanation of his knowledge as to the location of the purse and the overcoat, appellant testified that Earle and one Meyers had visited him at his room and informed him that they had committed the crime; that he thereupon became frightened, and he and Earle hid the articles in the place where they were subsequently found. Earle, called as a witness, testified that appellant took no part in the robbery, but that the same had been committed by himself and one Jack Meyers. To disprove his testimony, the statement which he had signed at the time of his arrest implicating appellant was read to him. This statement recited that the robbery had been committed on May 22d, and the district attorney in reading the same erroneously stated that it had occurred on the 21st of May. Appellant contends that this act of the district attorney constituted such error as deprived appellant of a fair trial, as the confession referred to a different crime. The date of the robbery, as charged and proved,

occurred on the 21st day of May, 1929, and this was the only crime referred to in the evidence. The police officer in reducing the confession of the witness to writing erroneously recited that the crime had occurred on the 22d of May. There was no contention that any other crime had been committed by appellant and Earle, and, in fact, it was the only robbery so far as the record shows that they ever committed together. Moreover, on the evening of the 22d, both Earle and defendant were in custody after the hour of 8 o'clock p. m. The statement was correctly read to the jury at different times, and it was only offered to impeach the testimony of Earle. Under all the circumstances, it is manifest that appellant was in no manner prejudiced by the incorrect reading of the confession. Appellant complains of the fact that he was referred to by the district attorney as a rat caught in a trap. We see no error in the use of this figure of speech. The court instructed the jury that they were not to be influenced thereby. There is no merit in the appeal.

The judgment and order appealed from are affirmed.

We concur: KNIGHT, J.; CASHIN, J.

OSWALD et al. v. JOHNSON, State Treasurer,
et al. ★
Civ. 5656.

District Court of Appeal, Second District, Division 2, California.

March 3, 1930.

Rehearing Denied April 1, 1930. Hearing Granted by Supreme Court April 28, 1930.

1. Taxation $\S$ 251—One claiming benefit of exception to or exemption from law providing for taxation must affirmatively show himself within exempted class.

Where one claims benefit of an exception to or exemption from a law providing for taxation, he must affirmatively show that he comes within class specifically made exempt from taxation.

2. Licenses $\S$ 19(3)—Rule that taxing law must be construed strictly extends to exemptions and impositions.

Requirement that taxing law is to be construed strictly extends to exemptions as well as to impositions of law precluding court from reading into Gasoline Tax Act (St. 1923, p. 575) $\S$ 11, as amended by St. 1925, p. 660, $\S$ 4, any extension of exemptions therein specifically provided.

3. Licenses $\S$ 16(9)—Fuel used in rollers and tractors in construction of highway closed to public held subject to tax (Gasoline Tax Act 1923, $\S$ 11, as amended by St. 1925, p. 660, $\S$ 4).

Gasoline fuel used in operation of rollers and tractors in highway construction work, which

were not at any time operated over any highway or portion thereof that was not under construction or repair, and closed to public, held subject to tax under Gasoline Tax Act (St. 1923, p. 575) § 11, as amended by St. 1925, p. 660, § 4, which does not indicate that highways under construction or repair, and for that reason closed to public travel, shall be deemed to have lost character as public highway, and which act provided for refund of tax on gasoline used other than in motor vehicles operated upon public highways.

Appeal from Superior Court, Los Angeles County; John L. Fleming, Judge.

Action by George H. Oswald and John P. Oswald, a copartnership, doing business under the fictitious name of Oswald Brothers Paving Company, against Charles G. Johnson, as State Treasurer of the State of California, and another. From an adverse judgment, the defendants appeal.

Reversed.

U. S. Webb, Atty. Gen., and John L. Flynn, Deputy Atty. Gen., for appellants.

George De Lany Blair, of Los Angeles, for respondents.

BURNELL, Justice pro tem.

The action resulting in the judgment from which this appeal was taken was brought against the state treasurer and the state controller to obtain reimbursement of gasoline taxes paid by the plaintiffs on fuel used in the operation of certain rollers and tractors during the month of January, 1926. The complaint alleged that in the operation of their business of constructing and paving highways in the state of California the plaintiffs used certain rollers and tractors propelled by gasoline, but which "were not at any time operated or propelled over any highway or portion thereof that was not under construction or repair, and closed to the public." To this complaint the defendants interposed a general demurrer, which was overruled, and upon their failure to answer the judgment from which they appeal was taken against them.

The only question presented for our consideration is whether or not the complaint set up facts sufficient to constitute a cause of action for a refund of taxes within the purview of section 11 of the Gasoline Tax Act (St. 1923, p. 571). That section, as amended in 1925 (St. 1925, p. 660), and as it stood at the time this action was commenced, provided that any person who should "buy and use any motor vehicle fuel for purposes other than in motor vehicles operated, or intended to be operated upon the public highways of the State of California or export the same for use outside of this state," or who should "buy any motor vehicle fuel and use the same exclusively in the transportation of rural free delivery mails," and who should have paid the tax

on such fuel "either directly or to the vendor from whom it was purchased, or indirectly by the adding of the amount of such tax to the price of such fuel," should "be reimbursed and repaid the amount of such tax paid by him" upon presenting to the state controller "an affidavit accompanied by the original invoices showing such purchase," stating "the total amount of such fuel so purchased and [that] the same has been used by said consumer for the transportation of rural free delivery mails or for uses other than in motor vehicles operated upon any of the public highways in the State of California."

That the rollers and tractors mentioned in the complaint are "motor vehicles" is not questioned, the Gasoline Tax Act itself defining the term "motor vehicle" as including "every vehicle operated upon the highways of this state which is propelled by the use of motor vehicle fuel," while the latter term is defined as including gasoline as well as other fuels. That the vehicles in question were operated upon highways is alleged in the complaint. The theory of the respondent plaintiffs is that they are entitled to the refund because their vehicles were "used in the construction and repair of highways while such highways were closed to public use."

[1, 2] The section of the statute relied upon in instituting this action provided, in effect, for an exemption from the tax imposed upon every gallon of motor vehicle fuel distributed (save in original packages imported into the state) throughout the state of California. If the plaintiffs were entitled to a refund it could only be because the fuel used by them and on which they had paid the tax was used in a manner or for a purpose clearly falling within one of the exemptions specifically included in the section. It is a firmly established principle of law that one who claims the benefit of an exception to or exemption from a law providing for taxation must affirmatively show that he comes within a class specifically made exempt from such taxation. *Cottle v. Spitzer*, 65 Cal. 456, 4 P. 435, 52 Am. Rep. 305. The only exemption specified by the Gasoline Tax Act which could possibly apply to the plaintiffs is that as to motor vehicle fuel used "for purposes other than in motor vehicles operated, or intended to be operated upon the public highways of the state of California." But that exemption is inapplicable because it contains no qualification based upon the condition of highways as open or closed to general use. If the fuel was used in the operation of such vehicles upon such highways, it is not exempt from the tax, for there is no language in the act indicating expressly or even impliedly that for the purposes of the act highways under construction or repair, and for that reason closed to public travel, shall be deemed to have lost their character as public highways while so closed; nor does any law, statutory or other-

wise, to which our attention has been called so provide. The rule that a taxing law is to be construed strictly "extends to exemptions, as well as impositions" (Estate of Bull, 153 Cal. 718, 96 P. 366), and we cannot read into the act any extension of the exemptions therein specifically provided.

[3] The complaint, which alleged that the vehicles belonging to the plaintiffs were propelled by gasoline and were operated on and over highways in this state, failed to state a cause of action for a refund of the tax paid on the fuel so used, and the demurrer should have been sustained.

Judgment reversed.

We concur: CRAIG, Acting P. J.; IRA F. THOMPSON, J.

104 Cal. App. 477

PEOPLE v. RIGA.

Cr. 1911.

District Court of Appeal, Second District, Division 2, California.

March 13, 1930.

Criminal law ⚖️1071—Statute fixing time for application for transcript held mandatory and unambiguous (District Court of Appeal Rule 2, § 7).

District Court of Appeal Rule 2, § 7, providing that application for transcript must be filed within five days after giving notice of appeal and that appeal shall be dismissed if such application is not filed within said time, *held* mandatory and unambiguous.

Appeal from Superior Court, Los Angeles County; Walton J. Wood, Judge.

Proceeding by the People against Thomas Riga. Judgment for plaintiff, and defendant appeals. On motion to dismiss the appeal.

Appeal dismissed.

Richard L. North, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and John L. Flynn, Deputy Atty. Gen., for the People.

.. CRAIG, J.

The application for transcript and statement of grounds of appeal was not filed by the appellant in this case within the time specified by Rule II, section 7, and a motion is made on behalf of the people that his appeal be dismissed, but it is to be observed that the present counsel of record for appellant did not become his counsel until long after this time had elapsed.

Upon an appeal by the defendant in a criminal case, it is required that he file such application and statement within five days after giving notice of appeal, and that, "if such application is not filed within said time, the appeal shall be dismissed."

In denying a motion to dismiss, upon rehearing, after a decision upholding an order of dismissal previously granted by the District Court of Appeal, the Supreme Court held that an appeal in all respects sufficient except for technical defects in form or substance, wherein the application had been filed in time, need not be dismissed. *People v. Bryant* (Cal. Sup.) 278 P. 1025. The only reason there mentioned for relaxing the rule was that "appellants substantially complied with section 1247, Penal Code, and the defect worked no injury to anyone"; that the legislation was then new and might have been misleading. In *People v. Davis* (Cal. App.) 284 P. 516, relied upon by the people in the instant case, an appeal was dismissed for failure to file an application as required; it appearing that the rule had then been in operation for a period of seventeen months. Section 1247 of the Penal Code, which prior to its repeal was similar in effect to the rule in question, was repeatedly construed to be mandatory. *People v. Flaherty*, 61 Cal. App. 775, 215 P. 699; *People v. Hill*, 78 Cal. App. 615, 248 P. 714; *People v. Shaw*, 81 Cal. App. 312, 253 P. 747. Likewise section 660 of the Code of Civil Procedure, providing that the power of a superior court to pass upon a motion for new trial within two months would automatically work a denial of the motion, was by this court deemed mandatory. It was there concluded that the power to consider such a motion was limited to the specified period of time, and that the last day would be excluded if it fell upon Sunday or upon a holiday. *Holquin v. Allison* (Cal. App.) 274 P. 1037. Said section and the present rule are not in their language substantially unlike. By the former it is ordained: "The power of the court to pass upon a motion for a new trial shall expire *within* two months. * * * If such motion is not determined *within* said two months, the effect shall be a denial of the motion without further order of the court." Section 7 of Rule II (204 Cal., p. xliii) provides that, "*within* five days after giving notice of the appeal," such application must be filed, and that, "if such application is not filed *within* said time, the appeal shall be dismissed." In construing the limitation of time within which to consider a motion for new trial, it was said in *Bidwell v. Sonoma County Trans. Co.*, 39 Cal. App. 330, 178 P. 722, 723, wherein a hearing by the Supreme Court was denied: "Without advertent to the evident intent of the Legislature * * * section 660 is specific as to the time within which the court

may pass upon a motion for a new trial, and in the most positive terms confines the power of the court to perform that particular act to the period named, and, going even further, provides that, failing action by the court within said time, the motion is automatically deemed denied."

Whether a duty of one of the parties be to initiate proceedings preliminary to appeal, or to bring them before the court for consideration, we think the specification of a definite time in positive terms within which he must act is mandatory and leaves no room for its performance at a later date. Enactments directing that, for a failure to observe their plain and certain mandates, a proceeding in the one case shall be dismissed, and in the other that it shall be deemed at an end, are not in this respect capable of differentiation. We think the rule before us is unambiguous.

The appeal is dismissed.

We concur: WORKS, P. J.; IRA F. THOMPSON, J.

104 Cal. App. 492

PEOPLE v. HANN.
Cr. 1900.

District Court of Appeal, Second District, Division 1, California.
March 14, 1930.

1. Burglary — Defendant entering dwelling house in nighttime during absence of occupants held guilty of burglary in first degree (Pen. Code, § 460).

In prosecution for burglary, where it appeared that defendant unlawfully entered dwelling house in nighttime, during absence of occupants, defendant held guilty of burglary of first degree under Pen. Code, § 460.

2. Burglary — Burglarized house was an "inhabited dwelling house" within burglary statute, notwithstanding occupants were away on trip (Pen. Code, § 460).

In prosecution for burglary, where it appeared that defendant made entry into dwelling house in nighttime, during absence of occupants, contention that house at time of burglary was not "inhabited dwelling house," within scope of Penal Code, § 460, held unavailing, notwithstanding fact that occupant and family were away on trip to other state.

[Ed. Note.—For other definitions of "Inhabited Dwelling House," see Words and Phrases.]

Appeal from Superior Court, Los Angeles County; William T. Aggeler, Judge.

Paul Hann was convicted of burglary of the first degree, and he appeals.

Affirmed.

W. W. Judd, of Los Angeles, for appellant.
U. S. Webb, Atty. Gen., and Ralph O. Marron, of San Francisco, for the People.

PER CURIAM.

By the information, defendant was charged with the crime of burglary, committed as follows: That at the time and place stated, he did wilfully, etc., enter the dwelling house of one Munro with intent to steal, etc., the goods and personal property of Munro. To this charge the defendant pleaded guilty. It thus became the duty of the court to ascertain and determine the degree of this crime as committed. Pen. Code, § 1192. The court found that the crime was burglary of the first degree, and judgment was entered accordingly.

[1, 2] On this appeal from the judgment, appellant makes the single contention that the court erred in its determination that said burglary was of the first degree. The unlawful entry was made in the nighttime, and during the absence of the occupants. The defendant was not armed with any deadly weapon. Burglary of an inhabited dwelling house or building, committed in the nighttime, is burglary of the first degree. Section 460, Pen. Code.

It is the contention of appellant that the house of Munro, at the time of said burglary, was not "an inhabited dwelling house." The facts were that on July 18, 1929, Munro was living at the described premises with his wife and son. On that date, they went away for a trip to the eastern states, and did not return until August 27th. On leaving their home they closed and locked the house, leaving therein their household furnishings and personal property. They did not give to any one permission to enter the house or move any of the property during their absence. On the night of July 18th, during said temporary absence of the occupants, the burglary was committed by the defendant.

Upon the stated facts we are satisfied that the crime was burglary of the first degree. *People v. Allard* (Cal. App.) 279 P. 182; 4 R. C. L. 427; 2 Am. St. Rep. 389; *State v. Mason*, 74 Ohio St. 65, 77 N. E. 283; *Olds v. State*, 19 Ala. App. 162, 95 So. 780.

Judgment is affirmed.

104 Cal. App. 420

MORTARA v. RIZZI.

Civ. 4021.

District Court of Appeal, Third District, California.

March 10, 1930.

Reformation of instruments $\Rightarrow$ 46—**Finding in action to reform contract for sale of land held sufficient to establish mutual mistake in omitting agreement to assume lien arising from dissolution of Irrigation district (Civ. Code, § 1578, subd. 1).**

In action to reform contract for sale of land on ground of mutual mistake, finding that defendant prior to execution of agreement had knowledge of existence of judgment dissolving irrigation district and of lien created thereby, which defendant agreed to assume but which agreement was inadvertently omitted, though not a specific finding of mutual mistake, was nevertheless sufficient, in that it reasonably appeared from facts found that there was such mistake within meaning of Civ. Code, § 1578, subd. 1.

Appeal from Superior Court, Shasta County; Walter E. Herzinger, Judge.

Action by Albert Mortara against John Rizzi. Judgment for plaintiff, and defendant appeals.

Affirmed.

James T. Matlock and M. J. Cheatham, both of Red Bluff, for appellant.

Carter & Smith and L. C. Smith, all of Redding, for respondent.

FINCH, P. J.

This is an action to reform a contract for the sale of land, by the plaintiff to the defendant, on the ground of mutual mistake and for other relief. The plaintiff was given judgment, and the defendant has appealed. The appellant contends that neither the evidence nor the findings show a mutual mistake.

The court found that prior to and at the time of the execution of the contract the land was incumbered by the lien of a judgment rendered in a proceeding for the dissolution of the Happy Valley irrigation district; that "prior to the execution of said agreement said defendant had knowledge of and knew of the existence of said judgment of dissolution and the lien thereby created"; that "it was understood and agreed by and between plaintiff and defendant that defendant was to assume and agreed with plaintiff to pay any and all liens existing against said property"; that in the drafting of said agreement there was inadvertently omitted therefrom a covenant obligating the defendant to pay and discharge "any lien or encumbrance caused by reason of the dissolution of the Happy Valley Irrigation District"; that "said agreement as it is written does not express the true agreement

or mutual understanding of the parties thereto, and that the only way whereby said contract can be made to express the true intent and agreement of said parties is to insert the clause hereinabove noted."

It is true that there is no specific finding of mutual mistake, but it reasonably appears from the facts found by the court that there was such a mistake, and therefore it must be held that the findings are sufficient. *Horton v. Winbiger*, 175 Cal. 149, 154, 165 P. 423; *Holmes v. Anderson*, 90 Cal. App. 276, 288, 285 P. 1010; *Shindelar v. Hadacheck*, 88 Cal. App. 319, 321, 263 P. 305; *Robertson v. Melville*, 60 Cal. App. 354, 358, 212 P. 723.

While the testimony given by the parties themselves is conflicting, that of the draftsman who drew the contract clearly shows that the defendant agreed to assume and pay the said judgment lien, and that a covenant binding him to pay the amount thereof was omitted from the contract through a mutual mistake of law, as that term is defined by section 1578, subdivision 1, of the Civil Code.

The judgment is affirmed.

We concur: PLUMMER, J.; R. L. THOMPSON, J.

104 Cal. App. 331

GUBIN v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al.

Civ. 7224.

District Court of Appeal, Second District, Division 2, California.

March 5, 1930.

Mandamus $\Rightarrow$ 40—**Mandamus held not proper remedy to compel superior court in divorce action to receive excluded testimony (Code Civ. Proc. §§ 1881, subd. 1; 2055).**

Where testimony of witness in divorce action called to stand, under Code Civ. Proc. § 2055, was excluded on objection under section 1881, subd. 1, providing that neither wife nor husband may be examined for or against the other without the other's consent, mandamus held not proper remedy to compel superior court to receive such testimony.

Original application by Rhonie Gubin for a writ of mandamus prayed to be directed to the Superior Court of the State of California, in and for the County of Los Angeles, and Hon. Warren V. Tryon, Judge of Department 42 thereof, to compel respondent to receive testimony in an action of divorce.

Writ denied.

C. C. Montgomery, Ben C. Cohen, and Sam Wolf, all of Los Angeles, for petitioner.

Paul W. Schenck, of Los Angeles, for respondents.

IRA F. THOMPSON, J.

The petitioner seeks the writ of mandate to compel the respondent court to receive testimony. Simply stated, the proposition presented to us in this: The petitioner here sued her husband in the respondent court for divorce and incidentally for a division of the community property. She joined the defendant's brother, Oscar Gubin, and his wife, Bertha Gubin, as defendants, alleging that the two latter held the record title to property, which in truth and in fact belonged to herself and her husband as community property. After Bertha Gubin was called to the stand under section 2055 of the Code of Civil Procedure, her counsel objected to plaintiff's counsel interrogating her with respect to the sources from which the money was secured with which the property was purchased, on the ground that by subdivision 1 of section 1881 of the Code of Civil Procedure neither a wife nor a husband may be examined for or against the other without the other's consent. This objection was sustained, the trial judge indicating that he would also uphold counsel's contention that the husband could not be examined for or against the wife without her consent. It is this line of testimony which the petitioner asks us to compel the trial judge to receive. This we must decline to do, not on the ground that the testimony is not receivable, which point we expressly disclaim any intention of passing upon in this proceeding, but for the reason that we cannot make use of this high prerogative writ for the purpose here sought.

We are fully aware of the confident reliance placed by petitioner on the cases of *Johnston v. St. Sure*, 50 Cal. App. 736, 195 P. 947, and *Wissman v. Cabaniss*, 34 Cal. App. 487, 168 P. 150, but we think those authorities fail to hit the mark. In neither of the cited instances was the appellate tribunal called upon to direct a trial court during the trial of the action what evidence it should receive. In both cases the deposition of the spouse was being taken and the writ was utilized for the purpose of directing the judge taking the deposition to receive the testimony. That is quite different from attempting to prevent the court from committing error during the progress of a trial. We adhere to the opinion written by us in *Short v. Superior Court*, 94 Cal. App. 664, 271 P. 783, 784, wherein we said: "The law enjoined upon respondent court no duty to receive any particular evidence in petitioner's suit for divorce. The only duty of the court was to try the action and to render judgment. This it has done. If any errors have been committed during the progress of the trial, they cannot be corrected by means of the writ of mandate."

It is asserted that because Oscar Gubin applied for and was denied a writ of prohibition

by another division of this court at a time when testimony was being taken by a court commissioner, to prevent him from receiving the same character of evidence which it is now sought, by this proceeding to compel the respondent court to admit, we are bound by that refusal, although the denial was *ex parte*. Our attention is directed to *Reilly v. Police Court*, 194 Cal. 375, 228 P. 860, to support the argument, in which case it was decided that the denial of a writ of prohibition by the District Court of Appeal without the filing of a written opinion, to prevent an inferior court from proceeding with the trial of an action, is a bar to a subsequent application to the Supreme Court for the same relief upon the same facts. The correctness of this conclusion cannot be doubted. But in the instant cause we can very properly assume that the writ of prohibition was denied for the same reason that the peremptory writ of mandate here sought should not issue, i. e., that a proper case was not made out for the use of the writ.

A writ of mandate is denied.

We concur: WORKS, P. J.; CRAIG, J.

104 Cal. App. 458

**ZECCHINI v. CHICAGO FIRE & MARINE
INS. CO.
Civ. 7265.**

District Court of Appeal, First District, Division 2, California.
March 12, 1930.

Insurance $\Rightarrow$ 282(1)—Fire policy covering building, fixtures, and equipment held not void, because building contained personal property insured bought on conditional sales contracts (Civ. Code, § 2612).

Where fire insurance policy by its terms divided property into three items—\$3,000 on main building, \$3,500 on fixtures and equipment, and \$500 on adjacent building—policy was not void, because insured had in building items of personal property which he had purchased on conditional sales contracts, under clause providing that entire policy should be void, if interest of insured was other than unconditional and sole ownership in property covered in whole or in part by policy, since policy did not purport to cover property purchased under conditional sales contracts, and there was no breach of warranty under Civ. Code, § 2612.

Appeal from Superior Court, Los Angeles County; Walter J. Desmond, Judge.

Action by P. G. Zecchini against the Chicago Fire & Marine Insurance Company to re-

cover on a fire insurance policy. From a judgment for plaintiff, defendant appeals.

Affirmed.

W. W. Hindman, of Los Angeles, for appellant.

Frankley & Spray, of Los Angeles, for respondent.

STURTEVANT, J.

The plaintiff commenced an action to recover on a fire insurance policy. The trial court made findings in favor of the plaintiff, and, from a judgment entered thereon, the defendant has appealed. The property burned in the fire included a gas and oil station and restaurant, together with the contents. Prior to the issuance of the policy the plaintiff had purchased on the installment plan the lot and the improvements that were then on it, and thereafter he had moved onto the lot another building and had furnished both buildings. Among other things he had in the buildings certain personal property which he had purchased and had fully paid for and which were of the value of \$750. He had in the buildings other personal property which had been purchased on conditional sales contracts and on which he had made some payments, but a comparatively small amount of the total purchase price. Thereafter on February 12, 1926, defendant issued its policy insuring the plaintiff in the sum of \$7,000. The policy by its terms divided the property into three items: \$3,000 on the main building, \$3,500 on fixtures and equipment, and \$500 on a small building adjacent and referred to as the rest-room. On March 31, 1926, the property was totally destroyed by fire. On the 17th day of May, 1926, the plaintiff presented to the defendant a proof of loss in which the plaintiff itemized his loss item by item, including, among other things, the articles of personal property which he had purchased under conditional sales contracts. Pursuant to a covenant contained in the policy, upon the demand of the defendant, the plaintiff appeared before a notary public on July 26, 1926, and was examined under oath regarding the items of his loss and his title to each item. At that time he stated the facts, and it is not contended that he did not state the facts truly. When the case was brought to trial the plaintiff's attorney waived all claim regarding the properties purchased under conditional sales contracts. Acting on such waiver the trial court allowed nothing on the items so waived, but ordered judgment for \$750 on the personal property that had been fully paid for and \$3,000 on the buildings. At this time the defendant contends that the contract was entire; that the plaintiff was not the owner of the property purchased under the conditional sales contract; that therefore the policy never attached either as to the personal property

or the buildings. The policy contained numerous conditions, among others, "matters avoiding policy." That clause, omitting irrelevant parts, provided: "Unless otherwise provided by agreement endorsed hereon or added hereto this entire policy shall be void * * * (b) if the interest of the insured be other than unconditional and sole ownership * * *" on the property covered in whole or in part by the policy.

On the face of the policy there is no clause which specifically included the personal property which had been purchased under conditional sales contracts. There is no clause which even purports to cover the interest of the plaintiff in such property. Therefore as to the personal property the case falls directly within the rule stated in *Coniglio v. Connecticut Fire Ins. Co.*, 180 Cal. 596, 599, 182 P. 275, 5 A. L. R. 805. The court has neither the right nor the inclination to place a strained construction on the language of the policy to include the property purchased under conditional sales contracts and thereupon declare that there was a breach of warranty. Civ. Code, § 2612. Nothing to the contrary appearing, under well-settled rules, we are bound to hold that the policy never even purported to cover the property so purchased under conditional sales contracts. If we are correct in this conclusion, and we have no doubt whatever on the subject, it follows that the other contentions made by the defendant need not be discussed. We find no error in the record.

The judgment is affirmed.

We concur: NOURSE, Acting P. J.; BURROUGHS, Justice pro tem.

104 Cal. App. 493

PEOPLE v. MANES. ★

Cr. No. 1890.

District Court of Appeal, Second District, Division 2, California.
March 14, 1930.

Rehearing Denied March 28, 1930. Hearing Denied by Supreme Court April 10, 1930.

1. Forgery $\S$ 44(1/2)—Evidence held to sustain conviction of forgery.

In prosecution for forgery, evidence held sufficient to sustain conviction.

2. Criminal law $\S$ 1129(2)—Assignments of error without attempting to assist appellate court by making application of law to instances assigned held insufficient.

In prosecution for forgery, where defendant on appeal made several assignments of error but did not attempt to assist appellate court by making application of law to any of instances he assigned as erroneous, defendant's assignments held insufficient, as it is duty of counsel to present argument and authority to appellate

court in such manner as to indicate error complained of.

3. Criminal law $\Rightarrow$ 1037(2)—**Defendant could not complain of misconduct of district attorney, where trial court was not asked to correct harm, if any.**

In prosecution for forgery, where counsel for defendant urged that district attorney was guilty of misconduct but did not ask trial court to correct harm if any was done, defendant could not complain of misconduct on appeal.

4. Criminal law $\Rightarrow$ 954(1)—**Defendant not asking for new trial on ground that time for pronouncing judgment had elapsed held not entitled to new trial on such ground (Pen. Code, § 1191).**

Where, in prosecution for forgery, verdict was returned on August 14, 1929, and defendant waived time for sentence and made oral application for probation, which was denied on September 12, and defendant then made motion for new trial but not on ground that time for pronouncing judgment had elapsed, even if waiver of time for sentence by defendant on August 14 did not carry time beyond 20-day period mentioned in Pen. Code, § 1191, defendant *held* not entitled to new trial on such ground, inasmuch as he did not ask for it.

5. Criminal law $\Rightarrow$ 957(5)—**Overruling motion for new trial based on misconduct of juror supported by affidavit held proper, where affiant's information and belief was based on statement of juror.**

Trial court's refusal to grant motion for new trial supported by affidavit presented by defendant and sworn to by another, on information and belief, to effect that he had been informed by unnamed juror that jury had found out defendant had spent five years in penitentiary, which was probably why she was scared to take stand, *held* proper.

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Beatrice H. Manes was convicted of forgery, and she appeals.

Affirmed.

A. Brigham Rose, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Lionel Browne, Deputy Atty. Gen., for the People.

IRA F. THOMPSON, J.

This is an appeal from a judgment pronounced upon the verdict of a jury finding the defendant guilty of forgery and from an order denying her motion for a new trial. The first reason assigned by appellant for a reversal of the judgment and order is that the evidence is insufficient to establish the offense. We shall refer to the testimony produced by the prosecution for the purpose of supporting the verdict.

[1] The lady to whom we shall hereafter refer as Peggy Tompkins, which was her maiden name, had been married to a man by

the name of Murphy and had been divorced prior to her acquaintance with the appellant and the man with whom appellant lived and who was known as August W. Manes, but whose real name was Poolitzski or Povlitzski. These three persons lived in the same bungalow court for some time prior to August 24, 1928, and had become very friendly. Peggy Tompkins had loaned to August Manes various sums of money approximating \$200. On the date mentioned, August Manes sold to Peggy Tompkins a lot in Huntington Park for the total sum of \$800, representing to her, in the presence of appellant, that it was a great bargain and saying to her that she could pay him \$60 down; that he would apply what he owed her; and that the remainder could be paid at the rate of \$15 per month. Peggy Tompkins says that she paid him the \$60 (the sum of \$600 appears in one instance in the record, but otherwise the sum referred to is \$60), and signed one or two papers for the purchase, one of which papers said the lot was owned by a Mrs. Olive Mills. About a week or so later Manes and appellant moved from the bungalow court. On August 29, 1928, a deed from Olive H. Mills conveyed the lot in question to August W. Manes and Beatrice H. Manes, as joint tenants. A deed dated August 25, 1928, signed by appellant and Manes, conveyed the property to "Peggy Tompkins, wife of Harold Tompkins," although she was in fact unmarried at the time. Peggy Tompkins did not see the deed prior to its recordation. On August 24, 1928, a deed of trust to the Los Angeles-First National Trust & Savings Bank as trustee for the benefit of Olive H. Mills, and to secure the payment of the sum of \$800, payable at the rate of \$15 per month, appears to have been executed. These two deeds and the trust deed were all filed for record on December 14, 1928. The record indicates that the trust deed here mentioned was one of those signed by Peggy Tompkins on August 24, 1928, although the pages were so turned that the witness did not understand she was signing a trust deed. She did not acknowledge her signature before a notary. On October 10, 1928, Manes and the appellant went to the office of the Pacific States Savings & Loan Company where Manes introduced the appellant as Peggy Tompkins. There they made final arrangements for a loan of \$3,100, and the appellant, as Peggy Tompkins, signed a trust deed and note for that amount. She also represented that the property was her separate property and that her husband was in the navy and for that reason could not sign the papers. About \$2,600 of the loan was paid out to a man named Robert B. Cook, a contractor, who built a house upon the lot. Cook was not a witness in the case, but there can be no doubt that the Pacific States Savings & Loan Company were defrauded by the execution by appellant of the note and trust

deed in the name of Peggy Tompkins. The evidence is ample to justify the jury's verdict. In fact, it is so self-evident that discussion is not necessary.

[2] Counsel has grouped together six assignments of error relating to the reception and rejection of testimony, i. e., set one instance after another down without further argument than to say in each case that it is error or prejudicial to the right of the defendant. Following all of these assignments he cites some authorities relating to cross-examination, but in no place does he attempt to assist us by making application of the law to any of the instances he assigns as erroneous. This is insufficient. However, we have been at pains to examine the entire record, largely because it has been difficult to understand the brief of counsel, and we have failed to discover any error in any of the assignments. Under a heading of "Point three" counsel says: "The court erred by virtually declaring a blockade against defense evidence." He then cites subdivisions 1, 3, 7, and 15 of section 1870 of the Code of Civil Procedure. Without further ado he then quotes 15 instances in which the court rejected testimony offered by the appellant. No other or further argument is made and no effort made to apply the three fundamental rules of evidence to the assignments of error. We have time and again pointed out to counsel that it is their duty to present their argument and authority to us in such a manner as to indicate the error complained of, and that in case of their failure so to do we are not called upon to assume their labors. But again we say that we have discovered no error.

[3] Counsel assures us that the district attorney was guilty of misconduct. At no place did he ask the court to correct the harm if any was done, and this would be a sufficient answer to appellant's claim in this regard. In addition to that, however, we find no misconduct on the part of the district attorney. And finally, the learned trial judge was meticulously careful in his admonitions to the jury to disregard all extraneous matter, including the remarks of counsel. Not once, but several times, he advised them of their duty in this particular.

The same failure to argue or aid us with authority is apparent when counsel presents certain instructions which were given and certain others which were requested and not given. We have examined the instructions and are of the opinion that the jury was fully and fairly advised of its duty and of the law applicable to the issues of the case.

[4] The verdict was returned on August 14, 1929. The defendant waived time for sen-

tence and made oral application for probation. The time for passing on the application was set for August 22, 1929, and on that date, with the defendant and her counsel in court, it was continued to September 12, 1929. On September 12, the application was denied and defendant made a motion for a new trial, not upon the ground, however, that the time for pronouncing judgment had elapsed, which motion was denied on September 16, and sentence pronounced. It is now asserted that the court had lost its jurisdiction to sentence the defendant. Assuming that the waiver of time for sentence by the appellant on August 14 did not carry the time beyond the twenty-day period mentioned in section 1191 of the Penal Code, we have a situation exactly parallel to that considered in *People v. Okomoto*, 26 Cal. App. 568, 147 P. 598, 600. There the court said: "Here it appears that the defendant was entitled to a new trial; but it further appears that a new trial was not refused, inasmuch as he did not ask for it. * * * It has been held by this court that, in the absence of any objection made by the defendant at the time of pronouncing judgment, and in the absence of any demand made by him for a new trial upon the ground that the legal time limit had expired, the court might rightfully enter the judgment." *People v. Polich*, 25 Cal. App. 464, 143 P. 1065. A similar opinion was indicated by this court in the case of *In re Hemstreet*, 18 Cal. App. 639, 123 P. 984, where it was said that, under those sections of the Penal Code, the trial court should, 'upon application therefor,' grant defendant a new trial." (Italics ours.) The proper course of procedure is set forth again in *People v. Winner*, 31 Cal. App. 352, 160 P. 689.

[5] The last contention of appellant is that the trial court should have granted a new trial upon an affidavit presented by her and sworn to by one Paul Angelillo to the effect that he had been informed by an unnamed juror on the day of the verdict that they had found out appellant "had spent five years in the penitentiary for the same sort of stuff and has been pulling these fast ones for a long time; that's probably why she was scared to take the stand." It is manifest from the affidavit that affiant had no personal knowledge of the facts. His information and belief was based solely upon the indefinite and uncertain statement made to him by the juror. The trial court was governed by the rule announced in *People v. Albori* (Cal. App.) 275 P. 1017, and properly denied the motion for a new trial based on the ground discussed.

Judgment and order affirmed.

We concur: WORKS, P. J.; CRAIG, J.

34 Cal. App. 418

GRAY v. HALL et al.
Civ. 5758.District Court of Appeal, Second District, Division 2, California.
March 10, 1930.**1. Limitation of actions** § 29(2)—**Four-year limitation applies where debtor made payment with indication he intended the account to remain open** (Code Civ. Proc. § 337, subd. 2).

To bring an account within the limitation of four years, under Code Civ. Proc. § 337, subd. 2, it should not alone be one where payment had been made leaving balance due, but one in which payment was made with indication of debtor that he intended account to remain open.

2. Limitation of actions § 29(2)—**Where only showing of open account was payment of \$400 and memorandum in diary of steps taken to accomplish inspection of land, two-year limitation applied** (Code Civ. Proc. § 339).

Action on "open book account" for services of inspection and report on land was barred by Code Civ. Proc. § 339, after two years, where only showing of open account was payment of \$400 claimed to be final payment by debtor and memorandum in diary of steps necessary to accomplish object of inspection and report on land.

Appeal from Superior Court, Los Angeles County; Walter Guerin, Judge.

Action by F. A. Gray against Albert J. Hall and another. From judgment for plaintiff, defendants appeal.

Reversed.

N. B. Nelson, of Los Angeles, for appellants.
Seth B. Smith, of Los Angeles, for respondent.

CRAIG, Acting P. J.

The plaintiff and respondent, as assignee of an alleged claim for personal services and expenses in the sum of \$977.62, instituted an action upon an "open book account." Judgment was rendered in his favor for \$798.62, and the defendants appealed.

Among other grounds of defense, it was contended that the cause of action was barred by section 339 of the Code of Civil Procedure. It appears that the only evidence offered by the plaintiff in support of the alleged book account consisted of entries in a diary from which the witness refreshed his memory. He testified to various conversations, journeys of persons to certain lands of the defendants, the making of surveys, drawings, and charges therefor, and that the sum of \$400 had been

paid on account. There was no showing of even a pretended "account" as contemplated by the Code of Civil Procedure.

[1] We think the instant case is squarely within the rule announced in *Merchants' Collection Agency v. Levi*, 32 Cal. App. 595, 163 P. 870. The only question there presented was as to whether the account was such that an action might be maintained thereon within four years from its inception, or was barred after the expiration of two years by the provisions of section 339 of said Code. Two purchases had been charged upon the books of a large mercantile establishment, for which no payments on account had been made, but we think the principles no less applicable to the facts here presented. It was there said that to bring an account within the limitation of four years it should not alone be one whereon payments had been made, leaving a balance due, but one in which after the payment of amounts there was an indication of the debtor that he intended the account to remain open. That "the intent of the legislature in amending subdivision 2 of section 337 of the Code of Civil Procedure, so as to include open book accounts, was to take accounts out of the category of simple accounts to which it had been long held the provisions of section 339 of the Code of Civil Procedure had application, and place such accounts in the same category with mutual, open, and current accounts whereon the balance remaining due from time to time was the result of mutual transactions other than mere money credits."

[2] It is conceded that the original entry related the consummation of but one transaction—the inspection and report upon a tract of land in the San Jacinto mountains. Plaintiffs' assignors and their engineers went upon the ground, performed services, and made a report, at a per diem of \$30 in addition to the expense of transportation and maintenance. The defendants paid them the sum of \$400, and contended that they had agreed to pay no more. It is clear that mere memoranda in a diary of various steps necessary to the accomplishment of this object cannot be deemed a series of mutual transactions other than a simple account, even if dignified by the characterization of bookkeeping of any character. *Tipps v. Landers*, 182 Cal. 771, 190 P. 173.

The judgment is reversed.

We concur: **IRA F. THOMPSON, J.;**
NORTON, Justice pro tem.

FALLIS et al. v. JULIAN PETROLEUM CORPORATION et al.*
Civ. 6272.

District Court of Appeal, Second District,
Division 2, California.

March 5, 1930.

Rehearing Granted April 4, 1930.

1. Landlord and tenant ⚭79(2)—Relation of landlord and tenant existed between original lessor and lessee's assignee entering into possession.

Assignee of lease, on accepting assignment, became liable only to lessee, but, on entry into possession, the relation of landlord and tenant was created between the original lessor and the assignee, and its holding created a privity of estate.

2. Damages ⚭40(2)—Neither party determines extent to which experiment shall proceed, where profits are wholly speculative and success or failure is of mutual interest.

When profits from enterprise are wholly prospective and speculative or conjectural, and success or failure of the experiment is of mutual interest, neither party to contract is arbiter to extent to which, or diligence with which, operations shall proceed.

3. Damages ⚭6—Parties to contract are relegated to equitable proceedings, where profits are wholly conjectural and it is impracticable to estimate damages (Civ. Code, § 3301).

If compensation or penalty is not specified by the parties as provided by Civ. Code, §§ 1670, 1671, or if it is impracticable or extremely difficult to estimate damages, and the contract involves experiment of mutual interest, profits of which are wholly prospective and conjectural, parties are relegated to proper proceedings in equity for relief, and, under Civ. Code, § 3301, are precluded from recovering damages.

4. Mines and minerals ⚭78(1)—Lessor held not entitled to damages for failure to drill well to required depth, where rental was payable from oil produced and quantity of oil at lower levels was unknown (Civ. Code, § 3301).

One leasing real property for oil and gas prospecting by agreement under which lessee was to drill to depth of 5,200 feet for oil and gas, and to pay as rental \$2,500 from the first production and one-sixth of all other production, held not entitled to damages from sublessee for failure to drill to the required depth, where it was not shown how deep well would have to be drilled to reach oil, or what would be the probable regularity of flow, if any, or the market value of the product, since, under the circumstances, the amount of damages or rental was wholly unascertainable, and therefore, under Civ. Code, § 3301, damages could not be recovered.

IRA F. THOMPSON, J., dissenting.

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Action by Garland P. Fallis and another against the Julian Petroleum Corporation and the Courtney Petroleum Company. From an adverse judgment, plaintiffs appeal.

Affirmed.

Harold C. Morton and Fredericks, Hanna & Morton, all of Los Angeles, for appellants. Anderson & Anderson and A. G. Ritter, all of Los Angeles, for respondent.

CRAIG, J.

By a contract dated February 26, 1925, the appellants leased to the defendant Courtney Petroleum Company for a period of five years certain real property upon which the latter agreed to drill to a depth of 5,200 feet for oil, gas, and other allied products, and to pay as rental \$2,500 from the first production, and one-sixth of all other production. The lessee drilled to a depth of 4,158 feet, whereupon, by written assignment and a collateral contract, it delivered possession to respondent Julian Petroleum Corporation. The lessors do not appear to have consented to the assignment. On December 20, 1926, the lessors commenced this action against their original lessee and its assignee by a complaint consisting of three causes of action, embracing said lease and contemporaneous agreements, alleging that the Julian Corporation had not drilled to a depth exceeding 4,162 feet, that both companies had ceased operations, and that, through their negligent and unworkmanlike conduct of the project, production had failed. The original lease provided that "the terms and conditions hereof shall be binding upon, and accrue to the benefit of the heirs, executors, successors and assigns of the respective parties hereto, and an acceptance of an assignment hereof, by any person, shall be construed as a promise on his part to be bound by and perform all of the lessee's covenants herein contained. Time is of the essence of this lease." By the assignment it was agreed that the Courtney Company sold and conveyed to the Julian Corporation "all of the right, title and interest of the original lessee and present owner in and to said lease and all rights thereunder." The collateral agreement recited that said assignment was made upon conditions and covenants not contained therein, but which were contained in the collateral contract; that, if the well be put on production at a depth less than 4,600 feet, but should make less than 350 barrels, it should be deepened to a specified horizon located approximately 5,000 feet to 5,100 feet; that the assignee "does not undertake to complete said well as a producing oil well at said depth, but does agree to properly drill the same to said depth and there endeavor in the usual and customary manner to place the same on production." By the terms of the original lease, it was recited that it was impossible to determine from current develop-

ments as to the necessary depth of the well, but that at a later date the parties would confer regarding the progress of other wells in that vicinity, and "determine what is the best to do for their mutual interests," and the lessors, reserved the right to terminate the lease for failure to perform any of its terms or conditions upon ten days' notice of election so to do. Neither of these two provisions appears to have been observed by the parties. The plaintiffs alleged that, "had a well been drilled on said leased property as so required by said lease to a depth of fifty-two hundred (5,200) feet, or production at a lesser depth, a well producing oil and gas in large and commercial quantities would have resulted"; that one-sixth of the production would have been worth \$65,000; that the Julian Corporation failed to continue drilling to a depth of 5,200 feet, or to a lesser depth at which mineral in paying quantities might be found; and that it had not paid the \$2,500 nor placed the well on production by diligent or continuous operation in good faith.

The respondent Julian Corporation interposed a demurrer to the complaint, upon general grounds, and specifically urging that it failed to allege any obligation of said corporation to drill to a depth of 5,200 feet, what if any would have been the initial production, how long the well would have produced, or at what rate, or the price of oil over any period of production, or upon what basis the plaintiffs computed the amount of \$67,500 for which they prayed judgment. The demurrer was sustained without leave to amend as to the Julian Corporation, and the plaintiffs appealed.

[1] The first point advanced by appellants is well taken. While the respondent, by accepting an assignment of the lease, became liable only to the lessee, its entry into possession created the relation of landlord and tenant between the original lessor and the assignee, and its holding created a privity of estate. *Bonetti v. Treat*, 91 Cal. 223, 27 P. 612, 14 L. R. A. 151; *Webb v. Jones*, 88 Cal. App. 20, 263 P. 538.

[2, 3] It is observed that the sublessee did not agree with the lessee to drill below 5,100 feet, nor to complete a producing well, and that the original parties did not confer regarding surrounding developments as to means or methods contributing to their mutual benefit. However, regardless of these omissions, without some knowledge as to the necessary depth, the probable regularity or volume of flow, if any, or the market price of such products, the amount of damages or rentals is wholly unascertainable. While, as argued by appellants, a demurrer admits the pleaded facts, the allegations and constituent contracts concede that respondent's sole neglect or evasion consisted of a failure to drill to a depth of 5,200 feet, that it agreed to pay no rental except from production, and that it

did not contract to furnish a producing well. Respondent agreed to drill but 5,100 feet, and its experienced drillers may have determined at a depth of 4,162 feet that further expenditures for that purpose would be futile. Damages for the breach of covenants such as are here presented may be agreed upon in advance, and an amount so fixed will be presumed as adequate compensation for losses incurred by a lessor through failure of performance by the lessee. Civ. Code, § 1670, 1671. When profits are wholly prospective and speculative or conjectural, and the success or failure of such an experiment is of mutual interest, neither party is the arbiter of the extent to which or the diligence with which operations shall proceed. *Brewster v. Lanyon Zinc Co.*, 140 F. 801, 72 C. C. A. 213. Hence, if the compensation or penalty be not specified by the parties, or if it be impracticable or extremely difficult of estimation, they are relegated to proper proceedings in equity for relief. *Hanlon Drydock, etc., Co. v. McNear*, 70 Cal. App. 204, 232 P. 1002; *Brewster v. Lanyon Zinc Co.*, supra; *Craig v. Wade*, 159 Cal. 172, 112 P. 891. "No damages can be recovered for a breach of contract which are not clearly ascertainable in both their nature and origin." Civ. Code, § 3301.

[4] In the instant case even the initial payment of \$2,500 is dependent only upon a mere venture, and is wholly contingent upon uncertainties the extent of which cannot be estimated or determined judicially in dollars and cents. It is a matter of common knowledge that the success or failure of such enterprises, and the casualties and incidental effort and expense of production, if any result, are matters ever held in suspense until mineral is found or the project is abandoned. By the most favorable reading of the complaint and the contract of the parties, this fact appears to have been recognized. It was expressly stated that "the lessee agrees as a further consideration to pay the lessors one-fourth ($\frac{1}{4}$) of the entire production from the lease, of all oils or other hydro-carbons;" "said twenty-five hundred dollars (\$2,500) oil bonus to be paid out of twenty-five per cent (25%) of the gross production of oil, gas and other hydro-carbons;" "a one-sixth royalty and the twenty-five hundred dollars (\$2,500) provided for in said lease to be paid out of twenty-five per cent (25%) of the first oil."

The principles above announced were aptly applied in the case last cited (*Craig v. Wade*, supra), wherein the plaintiff sought to recover upon alleged misrepresentations as to the value of certain oil properties. Our Supreme Court there said: "Twenty thousand dollars may have been expended in sinking a well which has not yet reached oil sands, and which may never reach them. To a sanguine man in the expectation of soon striking oil, the well may have a value of many hundreds of thousands of dollars. To the pessimistic

man, who believes oil will never be struck, the \$20,000 expended is money lost, and the well is valueless. So, too, if oil be in fact found, the duration of its flow is entirely uncertain, and the flow itself may increase or decrease without apparent reason. If the well yields 100 barrels of oil to-day, it may yield 1,000 barrels, or none at all, to-morrow. To place a value in terms of money upon such a flowing well must therefore itself of necessity be a matter of opinion merely, since it is not within human knowledge to foresee the contingencies which may result in greatly enhancing or utterly destroying its output."

There are other decisions in this state of like import. *Esccondido Oil Co. v. Glaser*, 144 Cal. 494, 77 P. 1040; *Burrows v. Petroleum Development Co.*, 181 Cal. 253, 184 P. 5; *Sledge v. Stolz*, 41 Cal. App. 209, 182 P. 340.

Authorities upon which the appellants rely in support of their theory of recovery are not persuasive, since they either sound in tort or arise from facts furnishing fixed bases for the estimation of damages, such as the known production of other wells in the immediate locality, as was the case in *Wheeland v. Fredonia Gas Co.*, 92 Kan. 50, 139 P. 1010. We think the rules applicable to the instant case are so well established that to confuse them with distinctions would serve no good purpose.

I concur: WORKS, P. J.

IRA F. THOMPSON, J.

I dissent. The third cause of action in particular alleges that the leased premises were in proven oil territory; that the drilling of a well to the required depth of 5,200 feet in a workmanlike and careful manner and with due diligence would have resulted in the production of oil and gas in large quantities; that, by reason of the negligent failure to drill to the depth mentioned, the property was drained of its oil and its gas pressure reduced by wells on adjacent and surrounding property; that, by reason thereof, plaintiffs have been damaged in the sum of \$67,500. There is also an allegation that the defendants well knew that "highly prolific oil and gas producing sands underlay said property" at the time of the execution of the lease and prior to the assignment to the defendant. The last averment is tantamount to an allegation that the parties had in contemplation the possibility of the property being drained of its mineral substance by the surrounding wells, or at least it is readily amendable to state that ultimate fact. I do not find the California authorities relied upon to be in point. Concededly, they establish the rule of law that in similar instances liquidated damages are permissible on account of the extreme difficulty of fixing damages arising from the breach of such a contract.

The language of *Parkinson v. Langdon*, 36 Cal. App. 80, 171 P. 710, 712, indicates, however, that the difficulty of measuring the damage does not of necessity mean that he who is wronged by the breach of a solemn obligation shall be remediless. It is there said: "The line of distinction between profits which are remote, consequential, or not within the contemplation of the parties, and those which are proximate and absolute and certain, and within the contemplation of the parties, 'seems to rest in the question whether they are to arise directly out of the contract in question or its subject-matter, and to constitute the immediate fruits of the contract, or whether they are to result from collateral engagements or enterprises. Where the profit to be made was the inducement to the contract, such profit is the measure of damages. So a recovery may be had for the loss of profits which are the direct and immediate fruits of the contract itself. Such profits are not to be regarded as consequential, remote, or speculative in character, but are regarded as part and parcel of the contract itself, entering into and constituting a portion of its very elements, something stipulated for, and the right to the enjoyment of which is just as clear and plain as to the fulfillment of any other stipulation.' *Id.* The foregoing is about as satisfactory an explanation of the philosophy of the rule as we can find in the books, and, it seems to us, furnishes a safe guide to a solution of the question here. The contract plainly shows that the land was to be planted to a specific crop, and none other. Both parties understood this and contracted with reference to that understanding. Plaintiff's compensation was to be measured by an agreed per centum of this specific crop, and not otherwise. Given, land suitable for growing beans; condition of soil, climate, moisture, etc., favorable to the production of a profitable crop, and nothing supervening to prevent such result except the failure of the contracting party to do what his contract required of him, it seems to us we have a clear case where the loss to the lessor 'is such as might naturally be expected to follow from the breach,' and that he would be entitled to the 'profits which would ordinarily and naturally, and in the usual course of things, have been derived from performance,' and furnishes an instance where 'the loss flows directly and naturally from the breach of the contract itself,' and is recoverable, since the loss is 'naturally incident to the contract, and may be fairly supposed to have been within the contemplation of the parties when it was made.'" To the same general effect, reference may be had to *Sanford v. East Riverside Irr. Dist.*, 101 Cal. 275, 35 P. 865, and *Meer v. Cerati*, 53 Cal. App. 497, 200 P. 501.

I am convinced that the court should have permitted the plaintiffs to make proof, if such they could, of the allegation that they had

been damaged by the draining of their property by surrounding wells. A few quotations from persuasive authorities in other jurisdictions will indicate the reasons I entertain for such opinion.

In *Blair v. Clear Creek Oil & Gas Co.*, 148 Ark. 301, 230 S. W. 286, 288, 19 A. L. R. 430, we find two pertinent expressions of the court as follows:

"The record shows that drilling wells is very expensive and is only undertaken where the lessee has a large area of acreage in a block. It is a matter of common knowledge that the landowner is not equipped with machinery for drilling and could not purchase such machinery on short notice, if able to do so. Hence, when he leases his land to another with the exclusive right to drill for oil and gas on it for a stipulated period of time, there is an implied covenant on the part of the lessee to protect the land at least from wells drilled by him on adjoining property which will necessarily draw the gas from the lessor's land. If there had been no lease on his land, the lessor could have had all the time during which the wells were drilled on adjoining land to have arranged for the drilling of an offset well on his land and in case a producing well was brought in on the adjoining land which would draw the gas off his own land. Of course, if he failed to make such an arrangement, the loss would fall upon himself. In case, however, he has leased his land to another and has given the lessee the exclusive right to drill on his land for gas, it is obvious that the mere right of forfeiture in case the lessee would not drill a protection well would not afford him adequate relief. * * *

"It appears from the record that expert witnesses acquainted with the gas field may testify with reasonable accuracy as to the number of wells which should have been drilled on the leased land for protection from drainage. Such witnesses might also testify with reasonable accuracy as to the quantity of gas obtained from the wells. They did say that the sand in which the gas was found was sufficiently porous that a well would draw from underneath the ground gas for a distance of a quarter of a mile in all directions. The record in the case also shows that the three wells operated by appellee on the adjacent tract will in due course of time draw all the gas from underneath the land of appellants. The lessee under the facts disclosed by the record is liable to the lessors for their proportionate share of the gas taken by the wells drilled so near their boundary lines as to draw off the gas underneath their land. There is no reason why it cannot be ascertained with reasonable certainty what quantity and quality of gas has been and will be taken from appellants' land through the wells drilled and operated by appellee on the adjoining land. *Culbertson v. Iola Portland Ce-*

ment Co., 87 Kan. 529, 125 P. 81, Ann. Cas. 1914A, 610."

And on rehearing it was also said: "From the evidence already taken it would seem that the gas-producing on the leased premises and the land adjacent thereto is of uniform character, and that expert witnesses can with a reasonable amount of certainty tell the amount of gas that will be drawn from the leased premises by the wells dug near the boundary line by the lessee on the adjacent premises. When the amount of gas that will be drawn from the leased premises is ascertained, the amount of damages to be recovered can be readily fixed by the royalty that the lessor was to receive."

In *Daughetee v. Ohio Oil Co.*, 263 Ill. 518, 105 N. E. 308, 310, in which case the plaintiff sought to recover damages for the breach of a covenant requiring the lessee to drill additional wells after the first one had proved the territory, the opinion reads in part as follows: "Plaintiff in error contends that, even if a right of action exists, no recovery can be had because the damages are uncertain, remote, and speculative. This point is preserved by an exception to the refusal of the trial court to hold as law a proposition embodying plaintiff in error's view upon this point. It is undoubtedly the law that, where speculation or conjecture must be resorted to for the purpose of determining whether the injury results from the wrongful act charged or from some other cause, then the law denies the injured party his action for damages. This is only another way of stating the familiar rule that damages must be the proximate result of the injury complained of. This rule was announced by this court in *Indianapolis, Bloomington & Western Railway Co. v. Birney*, 71 Ill. 391, which is relied on by plaintiff in error in support of this contention. The right of recovery being assumed, plaintiff in error cannot escape liability because the damages are difficult of exact ascertainment. The nature of the inquiry here is such that it is practically impossible to ascertain with mathematical certainty the exact amount of defendant in error's damages. This, however, affords no answer to a cause of action resulting from the breach of contract or a duty imposed by law. The unliquidated damages growing either out of breach of contract or the commission of a tort are seldom susceptible of exact measurement. If such exactness were required, the law of damages would be of little practical value. The rule is that, while the law will not permit witnesses to speculate or conjecture as to possible or probable damages, still the best evidence of which the subject will admit is receivable, and this is often nothing better than the opinion of well-informed persons upon the subject under investigation. *Chamberlayne on Evidence*, § 2332. Plaintiff in error does not contend that the court allowed improper and irrelevant evi-

dence to be introduced in regard to the damages."

In *Culbertson v. Iola Portland Cement Co.*, 87 Kan. 529, 125 P. 81, 83, Ann. Cas. 1914A, 610, we read: "Since the number of wells to be drilled on the land was not specified, there was an implied obligation on appellants to fully develop the land and put down as many wells as were necessary to secure to appellee his proportionate share of the pool of gas. *Kleppner v. Lemon*, 176 Pa. 502, 35 A. 109; *Thornton on Oil and Gas*, § 91. According to the findings, appellants failed to develop the land in such a way as to give appellee his proportionate share of the gas produced from the pool, and that to have done so would have required the sinking of at least another well. Having failed in this respect, the appellee is entitled to recover his share of the gas actually taken from his land, without regard to which side of the line the wells through which it was taken were sunk. The quantity so taken appears to have been fairly well established by the evidence. In *Howerton v. Gas Co.*, 82 Kan. 367, 369, 108 P. 813, 814, 34 L. R. A. (N. S.) 46, it was said that: 'No reason is seen why witnesses of experience, acquainted with the gas field, may not testify with reasonable accuracy as to the number of wells which should have been drilled on the leased land, both for protection from drainage by neighboring leaseholds and to obtain the gas underneath the land.'"

And lastly I quote from *Wheeland et al. v. Fredonia Gas Co.*, 92 Kan. 50, 139 P. 1010, as follows:

"This action was brought for failure to develop the land, a trial was had, and evidence was produced. Under these conditions, it was impossible for the appellees, there being no further development of the land, to prove the actual amount of damages they had suffered. The nature of the case is such that it is impossible to tell what a well will develop until it is sunk, and yet experts in oil territory are able to furnish reasonably accurate estimates of what a certain territory will produce, estimating from producing wells in the locality. This the appellants did in this case. The appellee demurred to their evidence, and the court sustained the demurrer. There was evidence tending to show that the one well was not sufficient development to protect the land from the gas being drawn from it by wells on adjacent lands. * * *

"The plaintiff in this action followed the procedure indicated by these decisions and offered the only evidence possible to establish a claim for damages, to wit, the opinions of experts. To say that the evidence in this case did not furnish a reasonable basis for estimating damages is to override the reasoning of all these cases. All the business of leasing lands for development is based upon the opinions of men engaged in the business as

to the value of the tracts leased for that purpose, and it is competent evidence; although it is impossible thereby in a particular case to show the exact amount of damage which has been suffered, it is sufficient to enable a jury to estimate the damages and to find accordingly."

The judgment should be reversed.

104 Cal. App. 369

WISEMAN et al. v. SKLAR et al.★

Civ. 5770.

District Court of Appeal, Second District, Division 1, California.

March 6, 1930.

Rehearing Denied April 1, 1930. Hearing Denied by Supreme Court May 5, 1930.

1. Assignments ⇨117—Original contractor for removal and alteration of building after illegal assignment thereof was entitled to recover amount due as being at all times responsible thereunder (Civ. Code § 1457).

Where contract for removal and alteration of building was illegally assigned without consent of owners, the original contractor was entitled to recover against owners for amount found to be due thereunder in view of fact that owners were not injured by reason of performance by another under assignment and original contractor, under Civ. Code, § 1457, was at all times responsible to owners under contract.

2. Assignments ⇨116—Neither contractor nor owners could complain of judgment against contractor in favor of assignee of contract performing it.

Where contract for removal and alteration of building was assigned without consent of owners and judgment thereafter recovered for amount due in favor of original contractor against owner, neither original contractor nor owners could complain of judgment in favor of assignee against original contractor in that owner had full protection from liability beyond single payment of judgment and original contractor was not out anything and thereby had no cause to complain.

3. Appeal and error ⇨1036(1)—Owners sued by assignee of contract for removal and alteration of building were not prejudiced by bringing in of original contractor as party plaintiff (Code Civ. Proc. §§ 389, 473, 578, 580).

Where contract for alteration and removal of building was assigned without owners' consent, the owners were not prejudiced by reason of action of court in subsequent action to recover by assignee in permitting original contractor to be brought in as a party plaintiff, in accordance with provisions of Code Civ. Proc. §§ 389, 473, 578, 580, in view of fact that judgment rendered therein gave them full protection from liability beyond a single payment of judgment.

4. Pleading ⇨243—Court has power to allow amendment to complaint so it does not affect substantial rights of parties.

It is always in the power of the court to allow an amendment to a complaint, so it does not

affect the substantial rights of parties, and, unless there is evidence of gross abuse of discretion in exercise of power, it is no ground for reversal of judgment.

5. Judgment ⇨235—Two or more persons joining as plaintiffs need not necessarily both recover.

Where two or more persons join as plaintiffs in an action at law, it is not the law that both must recover or none.

6. Appeal and error ⇨1036(1)—Defendant's objection to bringing in of additional party plaintiff will not, of itself, justify reversal.

When a judgment, if satisfied, will protect defendant from further suit, annoyance, or loss, and the action has afforded defendant opportunity to assert all defenses, causes of action on cross-complaint and counterclaims available to him, and time allowed for preparation for trial, defendant's objection to bringing in of additional party plaintiff, of itself, will not justify reversal.

CONREY, P. J., dissenting.

Appeal from Superior Court, Los Angeles County; Frank C. Collier, Judge.

Action by E. C. Wiseman and Sidney J. Kass against Joseph Sklar and another. From the judgment, plaintiff last named and defendants separately appeal.

Affirmed.

See, also, 274 P. 764.

Andreani & Haines, John L. Bisher, Jr., and Fred W. Morrison, all of Los Angeles, for appellants Sklar.

Edward Brody, of Los Angeles, for appellant Kass.

William Ellis Lady, of Los Angeles, for respondent.

CRAIG, Justice pro tem.

Plaintiff Kass and the defendants Sklar appealed separately from the judgment of the superior court, but have presented their appeals under a combined transcript and on combined briefs. There is, therefore, no occasion for separate discussions of the appeals.

The defendants were the owners of an improved lot and a vacant lot in different sections of Los Angeles. They desired to have the building moved from the one lot to the other and there repaired, altered, and improved. They had had various dealings with plaintiff Sidney J. Kass, then engaged primarily in the real estate business, and had confidence in his integrity and ability. They asked said Kass to undertake the supervision of the proposed work. Intervening conversations, if any, are not shown by the evidence, but, on October 5, 1922, said Kass presented to defendants a form of agreement between defendants and plaintiff E. C. Wiseman. Defendants declined to execute such

contract with Wiseman. Thereupon Wiseman's name was removed and the name Sidney J. Kass inserted, and the agreement was then signed by both defendants and by Sidney J. Kass. Immediately thereafter, and without the knowledge of defendants, said Kass assigned said agreement to Wiseman. Wiseman thereupon commenced the work and carried same to completion. During all of the work defendants thought that Wiseman was merely the foreman of Kass under the contract, and they did not know of the assignment until suit was commenced. The contract, after describing the properties, provides: "The party of the second part (Kass) agrees to furnish all necessary plans and details to complete this work; also to act as agent and generally superintend the work and purchase all materials and make all necessary contracts for labor, materials and other supplies pertaining to said construction. Best endeavors are to be used to make purchases at lowest possible price, discounts to be obtained where possible and allowed to parties of the first part. * * * The parties of the first part agree to pay all bills and make all payments and advance necessary funds upon certificates rendered by the party of the second part as the work progresses. All materials are to be contracted for in the names of the parties of the first part. In settlement for the above services and all other services rendered by the party of the second part, necessary and incident to the moving, alteration, construction and completion of said building improvement work, said parties of the first part agree to pay, and the party of the second part agrees to receive ten per cent. (10%) of the actual total net cost of all materials used and all labor performed in the construction and completion thereof; said ten per cent. (10%) commission to be paid as the work progresses, the first and fifteenth of each calendar month."

During the progress of the work defendants conferred from time to time with Kass; they paid \$700 to Kass, who paid same to Wiseman; they paid Wiseman direct on bills presented \$2,645, and they paid materialmen, etc., direct, the sum of \$3,035.91, making a total expenditure by them of \$6,380.91. There were left unpaid amounts aggregating \$1,651.08.

Appellants in their opening brief state: "That during the progress of such removal operations, plaintiff Sidney J. Kass conducted himself as though he still retained the contract and that during the progress of the said work defendants frequently consulted said Kass relative to certain expenditures to be made to said Wiseman, whom the defendants believed to be an employee of said Sidney J. Kass."

Said Wiseman commenced this action as sole plaintiff; the trial judge decided that Kass was a necessary party to the full disposition of the matter and ordered Kass brought in either as a party plaintiff or defendant. He came in as a plaintiff with Wiseman and amended pleadings were filed accordingly. During the trial, and apparently by stipulation, the court appointed an expert, who inspected the work and reported to the court, and the court found that the work had been performed in a good, workmanlike manner and that the prices obtained were fair and reasonable. The court determined that the contract was not assignable, but that since the work had been done, and defendants had the benefit thereof, they should be required to pay therefor, hence the court gave judgment in favor of plaintiff Kass against both defendants for said \$1,651.08, together with interest from the date of completion, making a total judgment of \$2,113.38. The court then adjudged: "That plaintiff Sidney J. Kass holds such judgment in trust for his coplaintiff E. C. Wiseman and to that end the said Wiseman is entitled to a judgment against the said Sidney J. Kass for said sum of \$2,113.38. That within ten days from notice of entry of this judgment the said Kass shall execute and deliver a good and sufficient assignment of his said judgment against the said Sklars, to said Wiseman, whereupon all claims of the said Wiseman against said Kass hereunder shall be satisfied and discharged. That if said Kass shall fail, refuse or neglect to execute said assignment within said period of ten days as herein ordered, the county clerk of Los Angeles county shall forthwith execute said assignment as the act of, and for the said Kass, with the same force and effect as if said Kass had executed the same, and forthwith deliver the same to said Wiseman, whereupon the said Wiseman shall be the owner of said judgment and all rights, benefits and privileges thereunder and all claims of said Wiseman against said Kass hereunder shall be satisfied and discharged."

The specifications of errors contained in the bill of exceptions have been combined into a lesser number in the points presented in appellants' opening brief, and we consider the points as stated in said brief to be the matters upon which appellants now rely. These points are: "(1) The evidence does not support the judgment in favor of plaintiff Sidney J. Kass against defendants or either of them; (2) The evidence does not support the judgment in favor of E. C. Wiseman and against plaintiff Sidney J. Kass or against defendants or either of them; (3) The court erred in permitting the amendment of the complaint making Sidney J. Kass a party plaintiff."

Upon point 1, appellants argue that because Sidney J. Kass assigned the agreement,

together with all his right, title, and interest therein, to plaintiff E. C. Wiseman without the knowledge or consent of defendants or either of them, and further because said Kass testified "that he had no money due or owing to him from defendants or either of them, under or by virtue of the contract, or otherwise, for the reason that he had" assigned said contract, and, further, because Kass had agreed to render personal services and had not rendered any personal services or furnished any materials, under no circumstances could plaintiff Kass be entitled to a judgment against defendants or either of them. Appellants therefore conclude that the judgment in favor of Kass and against defendants is wholly unsupported by any evidence and is contrary to the findings of the court. Upon this subject, the court found "that at the time the said Kass assigned his interest in said contract to the plaintiff Wiseman, he, the said Kass, requested the said Wiseman to proceed with said work just the same as if he, the said Kass, were in charge thereof, and in truth and in fact all of said materials and labor and services were furnished and performed by the said Wiseman under his said assignment of said contract," also, "that the defendants Sklar have received the benefit of the goods, wares and merchandise, labor and services of the reasonable value of \$8,031.30, ostensibly furnished by plaintiff Kass but in reality furnished by the plaintiff Wiseman."

These findings are supported by the evidence, but the real question is whether they (with the other findings of fact) will support the conclusion of law that Kass is entitled to a judgment against defendants.

"The burden of an obligation may be transferred with the consent of the party entitled to its benefit, but not otherwise, except. * * *" Civ. Code, § 1457.

"It is not meant by this section to imply that a third person cannot assume the obligations of a contract between other parties, but only that he cannot relieve a party therefrom his obligations without the consent of the creditor." Code commissioner's note (No. 10), under section 1457, Civ. Code, Kerr's 1920 Cyclopedic Codes of California.

The Supreme Court said in *Anderson v. De Urioste*, 96 Cal. 404, 407, 31 P. 266, 267, in reference to this note: "We think this the correct construction of the section, and it was in effect so held by this court in *Cutting Packing Co. v. Packers' Exchange*, 86 Cal. 574, 25 P. 52, 10 L. R. A. 369, 21 Am. St. Rep. 63."

"The obligations of an assignor of a contract continue to rest upon him and he will be required to respond to the other party to the contract in the event of a default on the part of the assignee." 5 Cor. Jur. 977; *Anderson v. De Urioste*, supra; *Brady v. Fowler*, 45 Cal. App. 592, 595, 188 P. 320.

[1] It is therefore apparent that, irrespective of the legality or lack of legality of the assignment, plaintiff Kass was at all times responsible to defendants under the contract. If Kass was responsible to defendants, then it must necessarily follow that defendants were responsible to said Kass (or his assignee) under the contract. The court found, upon sufficient evidence, that the work was done in a good workmanlike manner and that the prices were fair and reasonable. It is therefore apparent that defendants have not been injured by the fact that performance was done by Wiseman under an assignment found by the court to be invalid for the reason that said contract was by law not assignable, rather than done by Wiseman as an employee of Kass, as supposed by defendants during the progress of the work.

Undoubtedly that part of the contract which called for the purchasing by Kass of materials in the name of defendants is not capable of assignment. But all accounts, if any, contracted by Wiseman in the name of defendants were inspected and paid by defendants prior to the commencement of this action. As to the materials and labor furnished and paid for directly by Wiseman, defendants made no objection to same not being directly in their names until in this action and, in fact, they paid on same all but above-stated balance. Since they have not been injured and have what they expected to get, they cannot now be heard to complain.

[2] We turn next to the second point raised by appellants, to wit, that the evidence does not support the judgment in favor of E. C. Wiseman and against plaintiff Sidney J. Kass or against defendants or either of them.

As regards the defendants, it will suffice to say they are not concerned with what happens to the judgment against them and in favor of Kass so long as they have full protection from liability beyond a single payment of said judgment. This protection they have under the judgment as rendered. Likewise, plaintiff Kass has no cause to complain. He has not been out anything, and cannot now be called upon for anything further under the contract.

[3] As to the third point, to wit, that the court erred in permitting the amendment of the complaint making Sidney J. Kass a party plaintiff, defendants argue that thereby and by the judgment they have been deprived of a complete defense which they had on the original complaint as against the plaintiff Wiseman, to wit, a lack of privity of contract.

"The court may determine any controversy between parties before it, when it can be done without prejudice to the rights of others, or by saving their rights; but when a complete determination of the controversy

cannot be had without the presence of other parties, the court must then order them to be brought in, and to that end may order amended and supplemental pleadings, * * * to be filed. * * *" Code Civ. Proc. § 389. "The court may in furtherance of justice, and on such terms as may be proper, allow a party to amend any pleading or proceeding by adding or striking out the name of any party * * * The court may likewise, in its discretion, after notice to the adverse party, allow, upon such terms as may be just, an amendment to any pleading or proceeding in other particulars." Code Civ. Proc. § 473. "Judgment may be given for or against one or more of several plaintiffs, and for or against one or more of several defendants; and it may, when the justice of the case requires it, determine the ultimate rights of the parties on each side, as between themselves." Code Civ. Proc. § 578.

"The relief granted to the plaintiff, if there be no answer, cannot exceed that which he shall have demanded in his complaint; but in any other case, the court may grant him any relief consistent with the case made by the complaint and embraced within the issue." Code Civ. Proc. § 580.

[4,5] "It is always in the power of the Court to allow an amendment to a complaint, so it does not affect the substantial rights of the parties; and, except there is evidence of a gross abuse of discretion in the exercise of this power, it is no ground for the reversal of the judgment." Polk & Hensley v. Coffin & Swain, 9 Cal. 58; Curtis v. Nye & Nissen, 86 Cal. App. 507, 261 P. 747; Rabe v. Western Union Tel. Co., 198 Cal. 290, 244 P. 1077. Where two or more persons join as plaintiffs in an action at law, it is not the law that both must recover or none. Cullen v. Foster, 39 Cal. App. 625, 179 P. 695; Curtis v. Nye & Nissen, supra.

Appellants state in their reply brief: "The evidence fully discloses that Kass did not ask to be brought in as a party plaintiff, but was brought in over his objection by order of court." We cannot agree with this statement. The bill of exceptions shows that "plaintiff (Wiseman) upon the suggestion of the trial court, asked leave to amend the complaint by adding plaintiff Sidney J. Kass as a party plaintiff, to which defendants objected; thereupon the court ordered the complaint to be amended making Sidney J. Kass also a party plaintiff." Thereafter the amended complaint was filed. Defendants answered without demurrer and thereafter went to trial. The order re amendment was made March 4, 1927, and the trial was thereupon continued to and had on March 31, 1927. The findings of fact as made by the trial court contain the following recital: "The said Sklars further urge the defense

that as Kass was the real contractor and was not a party to the action they could not offset any claim, which they claimed to have against him for failure to do the work properly and for excessive charges and other defenses. * * * "It therefore became apparent to the court that a complete determination of the controversy could not be had without the presence of said Kass as a party hereto, thereupon the said court ordered plaintiff Wiseman to immediately bring in the said Kass, either as a party defendant or a party plaintiff, and by amended or supplemental pleadings, in order that full and complete justice might be done between all the parties hereto." Said Kass did come in as a party plaintiff, he did not object to so doing, and his appearance was voluntary, i. e., without service of any process. Had he not have come in voluntarily, doubtlessly he would have been brought in as a party defendant, but the fact remains that he did come in voluntarily.

In the case of *Martin v. Howe*, 190 Cal. 187, 193, 211 P. 453, 456, the Supreme Court again declared, as said court had declared theretofore in *Grain v. Aldrich*, 38 Cal. 514, 99 Am. Dec. 423: "Legal and equitable relief are administered in the same forum, and according to the same general plan. A party cannot be sent out of court, merely because his facts do not entitle him to relief at law, or merely because he is not entitled to relief in equity, as the case may be. He can be sent out of court only when, upon his facts, he is entitled to no relief, either at law or in equity."

In the case of *Taboada v. Sociedad Espanola*, etc., 191 Cal. 187, 215 P. 673, 675, 27 A. L. R. 1508, the Supreme Court said: "It is clear that a right result was reached, and under the provisions of section 475 of the Code of Civil Procedure and the requirements of the provisions of section 4½ of article 6 of the Constitution, no miscarriage of justice having resulted, the error, if any, of the trial court in overruling the demurrer, cannot be availed of to secure a reversal of the judgment. *Atlas Development Co. v. National Surety Co.*, 190 Cal. 329, 212 P. 196. In *Pleasant School Tp. v. Fultz*, 79 Ind. App. 27, 137 N. E. 60, the court, applying a statute similar in effect to the provisions of the above-cited sections of the Code and Constitution, held that 'no objection taken by demurrer and overruled shall be sufficient to reverse the judgment if it ap-

pear from the whole record that the merits [of the cause] have been fairly tried and determined.'"

[6] When a judgment, if satisfied, will protect defendant from further suit, annoyance, or loss, and the action has afforded defendant the opportunity to assert in that action all the defenses, causes of action or cross-complaint and counterclaims available to him as against the cause of action, and time has been allowed for preparation for trial, defendant's objection to the bringing in of an additional party plaintiff, of itself, will not justify a reversal of that judgment.

We deem it unnecessary to determine here-in whether or not the coming in of Kass as a party plaintiff was in law an error, because we cannot see that defendants have in any manner been prejudiced thereby. No judgment shall be set aside for any error as to any matter of pleading or of procedure, unless, after an examination of the entire case, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice. Section 4½, art. 6, Const. We have made such examination and have found no miscarriage of justice.

The judgment is affirmed as to both appeals.

I concur: HOUSER, J.

CONREY, P. J. (dissenting).

I dissent. If it be true, as seems to be conceded, that Wiseman had no cause of action against the defendants, it must follow that the controversy between the plaintiff and the defendants would necessarily be determined completely by the judgment that would have been rendered. Kass had no interest, either legal or equitable, in the controversy between those parties. The defendants had a right to have that controversy ended by a decision on its merits, without the intervention of a new plaintiff who had no interest in the pending claim of the plaintiff against the defendants.

If Wiseman had any right of action against Kass, it was a right of action at law for money due on a contract of employment. He had no lien of any kind on the indebtedness of the defendants to Kass. From every point of view, the decision of the trial court is clearly against law.

104 Cal. App. 460

PRITCHARD v. KING et al.
Civ. 7048.

District Court of Appeal, First District, Division 2, California.

March 12, 1930.

Appeal and error ⇨78(3)—Until judgment in main case had been entered, defendant could not appeal from judgment dismissing cross-complaint (Code Civ. Proc. § 963, subd. 1).

Defendant could not take appeal from judgment dismissing cross-complaint, as Code Civ. Proc. § 963, subd. 1, does not authorize an independent judgment on the amended cross-complaint, and record did not disclose that any judgment in main action had been entered.

Appeal from Superior Court, Alameda County; John J. Allen, Judge.

Complaint by Sadie E. Pritchard against Hazel Hubbard King and others. Hazel Hubbard King filed a cross-complaint, and, from judgment dismissing cross-complaint, defendant King appeals.

Appeal dismissed.

George Clark Sargent, of San Francisco, for appellant.

Aaron M. Sargent, of San Francisco, amicus curiae.

C. Franklin Baxter, of Los Angeles, and Hamilton A. Bauer, of San Francisco, for respondent.

STURTEVANT, J.

The plaintiff filed a complaint in which she alleged that F. G. King, deceased, at the time of his death, had in his possession certain properties purchased with partnership funds, and the plaintiff asked for a judgment ascertaining and defining her rights as surviving partner. The defendant filed an answer, and at the same time she filed a cross-complaint. To that cross-complaint the plaintiff demurred. The demurrer was sustained, and the defendant filed an amended cross-complaint. Later, the plaintiff served a motion to strike out the amended cross-complaint. After serving that notice, the plaintiff died, and Jennie M. Baxter was appointed administratrix, and she was substituted as plaintiff. Thereafter she presented the motion to strike. It was granted, and a purported "judgment upon cross-complaint" was entered. From that judgment the defendant has attempted to appeal, and has brought up a bill of exceptions. The record does not disclose that any judgment in the main action has been entered. We think we are not at liberty to pass on the appeal. The statute did not authorize an independent judgment on the amended cross-complaint. The purported judgment on the cross-complaint, as separate from the judgment in the main case, is not appealable.

Code Civ. Proc. § 963, subd. 1; Stockton, etc., Works v. Ins. Co., 98 Cal. 557, 577, 33 P. 633; Howe v. Key System Transit Co., 198 Cal. 525, 528, 246 P. 39. It follows that the appeal should be dismissed.

It is so ordered.

We concur: NOURSE, Acting P. J.; BULLOUGH, Justice pro tem.

104 Cal. App. 460

BROWN v. BROWN et al.
Civ. 4029.

District Court of Appeal, Third District, California.

March 13, 1930.

Rehearing Denied April 12, 1930.

Hearing Denied by Supreme Court May 12, 1930.

1. Money received ⇨6(6)—Plaintiff advancing money to investment company purchasing property could recover for money had and received on sale under trust deed in violation of agreement to one of company's sole owners.

Where plaintiff advanced money to investment company to enable school district to purchase land for school, and deed was executed by owner to company and trust deed executed by company to owner for balance of purchase price, and investment company agreed to protect title to property and advanced funds necessary to protect property from sale under trust deed, and district refused to purchase property which was sold under trust deed to one of sole owners of investment company, transaction in effect transferred title to investment company and its sole owner free from terms of trust deed, and, where company and owners denied any obligation to plaintiff on account of moneys advanced by her entering into real purchase price of premises, they immediately in law became charged with so much money in their hands, and action for money had and received would immediately lie.

2. Jury ⇨28(17)—Jury trial may be permitted after waiver thereof.

A trial court has discretion to permit a jury trial even after such trial has been waived.

3. Money received ⇨16—Plaintiff, advancing money to company to purchase property for school district, had only action against company breaching agreement, and was not required to join district.

Where plaintiff advanced money to investment company to purchase realty to be sold to school district and investment company, in violation of agreement, permitted property to be sold under trust deed securing balance of purchase price and to be transferred to one of its sole owners, only action plaintiff had to recover money advanced was for money had and received, and hence failure to bring school district and other parties into action was not error.

4. Appeal and error ⇨757(3)—Appellate court will not search record to determine if testimony supports verdict, where insufficiency is not pointed out and testimony is not printed (Code Civ. Proc. § 953c).

Where appellants failed to comply with Code Civ. Proc. § 953c, relating to appeals by alternative method and requiring printing in briefs of portions of record desired to be called to attention of court, and less than 20 pages of testimony was printed in record, though reporter's transcript covered over 300 pages, appellate court will not search record and ascertain if testimony is sufficient to support verdict, especially when its insufficiency is not pointed out.

5. Appeal and error ⇨758(2)—Appellate court need not look for reasons why court rulings were incorrect, where none are assigned.

Where no reasons were assigned or set forth in brief why rulings of court were not correct, it is not incumbent on appellate court to look for reasons.

6. Appeal and error ⇨757(3)—Appellate court will not search record to determine if there is sufficient testimony to send cause to jury.

Where appellants did not print testimony in their brief or as appendix thereto, appellate court will not search record to ascertain if there is sufficient testimony to send cause to jury.

7. Money received ⇨18(3)—Plaintiff advancing money to defendants to purchase land for school district was not required to show defendants actually received money, but merely that defendants had benefit thereof to recover for money had and received.

In action for money had and received, based on advancements made by plaintiff to defendants to purchase land for school district, it was not necessary for plaintiff to show that defendants actually received money advanced by her, but proof that defendants had use and benefit thereof and were enjoying fruits of same, raised obligation to pay for value received.

Appeal from Superior Court, Stanislaus County; J. T. B. Warne, Judge.

Action by Florence Brown against Lora De Yoe Brown and another, as executors of the last will and testament of N. E. De Yoe, deceased, and others. Judgment for plaintiff, and defendant T. H. Kewin and others appeal.

Affirmed.

Dennett & Zion, of Modesto, for appellants.
Gumpert & Mazzera and C. H. Hogan, all of Stockton, for respondent.

PLUMMER, J.

The plaintiff had judgment against the defendants T. H. Kewin, C. D. Swan, and Modesto Investment Company, a corporation, in an action for money had and received. From this judgment said defendants appeal.

The transcript shows that on or about the month of September, 1925, the members of the school board of the Modesto city school dis-

trict decided to purchase a certain school site known as and called the "Dry Creek Site." The site in question was then owned by one De Yoe. At the time mentioned, the school board did not have the necessary funds with which to make the first payment on the property, and the board requested the plaintiff, with others, to advance to the board of education a sum sufficient to make such payment. In accordance with this request, the plaintiff advanced the sum of \$5,000. The sum of \$2,000 was advanced by one Walter Beard, and the sum of \$3,000 by the appellants. These sums, aggregating \$10,000, were used in making the first payment on the property on the 27th day of October, 1925. On that date De Yoe delivered to the Modesto Investment Company a grant, bargain, and sale deed conveying said property to the company, and on the same date the company executed and delivered to De Yoe a trust deed covering the property for the purpose of securing the payment of the remainder of the purchase price in the sum of \$12,800. Thereupon the Modesto school district entered into an agreement with the Modesto Investment Company, under and by virtue of the terms of which the Modesto Investment Company agreed to sell to said school board and the school board agreed to buy the property. At the same time the Modesto Investment Company placed in escrow a deed conveying the property to the school district. On the 28th day of October, 1925, according to the testimony of the plaintiff, plaintiff signed a certain purported agreement between plaintiff and the Modesto Investment Company. This agreement is hereafter set forth. After the execution of all of the papers to which we have referred, a recall election was had, and three members of the board of the Modesto city school district were recalled. The members of the school board elected in place of the three recalled persons refused to complete the purchase of the property in question, and some time later it was sold by the trustees named in the deed of trust and the property purchased by the defendant T. H. Kewin. The record likewise shows that the appellant C. D. Swan objected to signing some of the papers, or rather objected to the money being turned over until the following paper was signed, which appears to have been executed some days after the plaintiff had advanced her \$5,000. This agreement is in the words and figures following:

"Whereas, W. F. Beard has advanced the sum of Two Thousand Dollars, and Florence Brown has advanced the sum of Five Thousand Dollars, to the Modesto City School Board to be used in purchasing The Northwest quarter of the Southeast quarter of Section 28, Township 3 South and Range 9 East, Mount Diablo Base and Meridian,

"And Whereas, said property is being conveyed to the Modesto Investment Company, a

corporation, and said corporation is advancing the sum of Three Thousand Dollars, which together with the \$7,000.00 above mentioned is being paid to N. E. De Yoe, as a part of the purchase price of the property above described, and said corporation is executing a Deed of Trust for the balance of said purchase price, amounting to Twelve Thousand Eight Hundred Dollars,

"And Whereas, the Modesto School District has agreed to purchase said property for the sum of Twenty Two Thousand Eight Hundred Dollars, and pay the purchase price in the manner provided for in an agreement between said Modesto Investment Company, and said Modesto School District, dated the ——— day of October, 1925,

"And Whereas, said Modesto Investment Company is taking over said property for the purpose of accommodating said school district only, it is the understanding of said Modesto Investment Company that it is to be repaid in full for all moneys expended in connection with the purchase and sale of said property, together with interest thereon at the rate of Seven per cent per annum.

"Now therefore, it is agreed that said W. F. Beard and Florence Brown are to receive the money which they have advanced, above mentioned, only when paid to them by the Modesto School District, and in case said School District for any reason should not take said property, and they should not receive their pay from funds of the said School District, then in that event, they agree that said Modesto Investment Company shall sell the above described land, and that from said sale, said Modesto Investment Company shall receive all of the money which it has been out in said transaction, together with interest thereon at the rate of seven per cent per annum, and said W. F. Beard and Florence Brown shall be entitled to any money remaining of the sale or disposition of said land, and they will not look to said Modesto Investment Company for said money or any portion thereof except as above provided.

"Witness our hands this 21st day of October, 1925.

"Modesto Investment Company

"By T. H. Kewin, Pres. [Seal.]

"By C. D. Swan, Sect. [Seal.]

"By W. F. Beard, [Seal.]

"By Florence Brown [Seal.]"

There is some dispute in the testimony as to the date when this instrument was signed; the plaintiff testifying that it had been signed by all the other parties whose names are attached thereto, preceding her own signature, and that she signed the paper on the 28th day of October, 1925.

The record shows that the Modesto Investment Company had on the 15th day of October, 1925, passed a resolution authorizing the purchase of the De Yoe property, or rather

to take the title to the property for the purpose of transferring the same to the Modesto school district according to the terms of the various instruments executed by the parties in relation thereto. At the time of the transactions being considered, it appears that the following instrument was also executed, being based in part upon the advancement of money by the plaintiff herein in the sum of \$5,000. This agreement is in the words and figures following:

"Whereas, the Modesto Investment Company has acquired or is about to acquire the title to the real property hereinafter described, subject to a deed of trust for the sum of \$12,800.00, executed or to be executed by said Modesto Investment Company to N. E. De Yoe, from whom said real property has been or is about to be acquired; and

"Whereas, the Modesto City School District is desirous of acquiring said real property for purpose of a school site, and has by majority vote of the Modesto City Board of Education, its governing body, authorized the purchase of said real property and authorized J. W. Guyler and Walter M. Johnson to negotiate said purchase; and

"Whereas, the said Modesto City School District has no funds available with which to pay for said property; and

"Whereas, the following persons have agreed to advance the money necessary for the first payment in the following amounts, to-wit:

"W. F. Beard, \$2,000.00

"T. H. Kewin and C. D. Swan, \$3,000.00

"Florence Brown, \$5,000.00

"Now therefore, it is agreed that if the said persons shall advance and pay to the said Modesto Investment Company the sums hereinbefore mentioned, aggregating \$10,000.00, the Modesto Investment Company agrees to make, execute and deliver to said Modesto City School District, or to such of its component school districts as the Modesto City Board of Education may designate, a grant, bargain and sale deed in usual form conveying said real property to said School District, subject to said Deed of Trust for \$12,800.00, in favor of said N. E. De Yoe, and subject to taxes now a lien thereon, and subject to the easements and rights of way mentioned in Preliminary Report No. 1889 of the Sunny Valley Land & Title Company, to which reference is hereby made, but free from all claims of Sue Chung Gow, and free from all other claims, liens, easements, and encumbrances, restrictions, reservations, and rights of way.

"And the said Modesto Investment Company further agrees that until such time as the said Modesto City School District can raise the necessary funds by taxation, bond issue, or otherwise, with which to make, and can actually take the payments hereinafter

provided for, such period, however, not to exceed one year from this date, said Modesto Investment Company will pay all interest and other charges accruing under or payable by the terms of the Deed of Trust hereinbefore mentioned and save and protect said property from sale under said deed of trust, and otherwise save and protect said property so that upon making the said payments hereinafter provided for, the said Modesto City School District shall receive said property, after payment by it of said deed of trust, free and clear of all liens, charges, encumbrances, restrictions and reservations excepting only taxes and the reservations for rights of way mentioned in said Preliminary Report No. 1889.

"And upon the funds therefor becoming available, the undersigned members of the Modesto City Board of Education agree that they will take whatever action may be necessary to ratify or confirm this agreement or make the same a valid and binding obligation upon said district to purchase said real property, and will repay said W. F. Beard, T. H. Kewin, C. D. Swan and Florence Brown, the sums advanced by them as hereinbefore stated, including such legal and customary charges as are unavoidable, until maturity of above agreement.

"Dated this 28 day of October, 1925.

"Modesto Investment Company,
Corporation.

"By T. H. Kewin, Pres.

"C. D. Swan, Secty.

"[Seal.] Modesto City Board of Education

"J. W. Guyler, Prest.

"E. D. Abbott, Secty."

It will be noticed that, while the plaintiff's name is not signed as a party to this instrument, the instrument is executed for the benefit of, and for the purpose of protecting, the interest of all of the parties advancing money to aid in the purchase of the school site. By this instrument the Modesto Investment Company agrees to protect the title to the property, to advance the funds necessary, pay the interest, and to protect the property from sale under the trust deed. The instrument does state that it is limited for the period of one year, but time is not made of the essence of this contract.

We may also state here that the record shows that the appellants Kewin and Swan were practically the sole owners of the Modesto Investment Company. Stock standing in the name of others was only sufficient in number of shares to qualify such persons to act as directors. While there is considerable difference in the dates of the respective instruments set out in the transcript, thus, the deed conveying the property from De Yoe to the Modesto Investment Company is dated the 6th day of October, 1925, and the deed of trust from the investment company back to De Yoe bearing date of the same day, and

other instruments are dated on different days during the month of October, 1925, the record sufficiently shows that all of the instruments were really a part of one transaction.

No effort appears to have been made by the Modesto Investment Company or by the appellants Kewin and Swan to sell the property, and, contrary to the terms of the last instrument we have set forth, the appellants permitted the property to be sold by the trustees named in the trust deed, and to be purchased by, or at least in the name of, the appellant T. H. Kewin. The purchase price, including costs, accumulated interest, etc., amounted to the sum of about \$13,000. Since the purchase of the property, as herein stated, it does not appear that the appellants have made any effort to dispose of the same.

[1] On the part of the appellants, it is insisted that, as the property was sold for a less sum than sufficient to pay the plaintiff, the appellants are relieved from any further obligation. This contention, however, is untenable. The property was not sold pursuant to the agreement first herein set forth, nor was the title to the property protected for the benefit of the parties interested therein, pursuant to the second agreement hereinbefore set forth. All that the transaction legally amounted to was the transmitting of the title to the appellants in the name of T. H. Kewin, freed from the terms of the trust deed, and, as the appellants have denied any obligations to the plaintiff for and on account of the moneys advanced by her, entering into the real purchase price of the premises, they immediately, in law, became charged with so much money in their hands, and an action for money had and received would immediately lie. *Fontaine v. Lacassie*, 36 Cal. App. 175, 171 P. 812; *Firpo v. Pacific Mutual Life Insurance Co.*, 80 Cal. App. 122, 251 P. 657; *Hillwig v. Boyer*, 81 Cal. App. 763, 254 P. 662; *Irvine v. MacGregor*, 203 Cal. 583, 265 P. 218.

On the part of the respondent, it is urged that, as her money had already been advanced prior to the signing of the first agreement set forth in this opinion, the agreement is without consideration, and therefore void. But whether the instrument is based upon a valid consideration, or whether it is not, the transaction, as it appears in the record, leads to the conclusion which we have stated, that the appellants are chargeable as for so much money had and received, and therefore we need not follow the argument either of the respondent or of the appellants as to the validity of the first agreement.

With this preliminary statement we may next consider the alleged errors upon which the appellants base their claim that the judgment "must be reversed."

[2, 3] It is first claimed that the court erred in permitting the jury trial, and in this behalf it is insisted that the demand for a jury trial

was made too late. This alleged error, however, need not be further considered, because it is well settled that a trial court has discretion to permit a jury trial, even after such a trial has been waived. Nor does there appear any error in the fact that the Modesto school district and other parties named were not brought in and made defendants; that the only action the plaintiff had in this case was one for money had and received against the appellants.

[4] The appellants in this case have not complied with the provisions of section 953c, Code of Civil Procedure, relating to appeals by the alternative method, in which section it is required that, "in filing briefs in said appeal the parties must, however, print in their briefs or in a supplement appended thereto, such portions of the record as they desire to call to the attention of the court." Omitting the answer of the appellants, less than twenty pages of the testimony in this case are printed as required by the section, although the reporter's transcript covers over three hundred pages. Under such circumstances the law is well settled that an appellate court will not search the record and ascertain if the testimony is sufficient to support the verdict, and especially is this true when its insufficiency is not pointed out. 2 Cal. Jür. p. 727, and the cases cited on page 133 of the 1928 supplement.

[5, 6] The appellants, following their objections which we have noted, set forth some thirty-odd exceptions upon which they base their claim for reversal on account of errors committed by the trial court in the admission of testimony, denial of their motion for a nonsuit, and also for a verdict in favor of the appellants, notwithstanding the verdict of the jury. No reasons are assigned in appellants' brief as to why a single ruling of the court in relation to the admission of testimony is erroneous, save as to exception appearing as No. 14. One example stands for all:

"Q. I will ask you, Mr. Guyler, if there has been called any election of the Modesto School District for the purpose of authorizing the Board of Trustees to purchase the school lot or site, prior to the execution of this instrument in duplicate which I have shown you?

"Mr. Zion: Object as incompetent, irrelevant and immaterial; not the issues of this case."

The court overruled the objection—exception 5. No reasons are assigned why the ruling of the court was erroneous, and the same appears down the line until we reach exception No. 14. Here the objection made is to the whole line of testimony based upon the theory of the first cause of action set out in plaintiff's complaint, to wit, an action for money had and received. No reasons being assigned or set forth in the brief why the rulings of the court were not correct, it is not incumbent upon an appellate court to look for reasons. The motion for nonsuit of course is based upon all the testimony in the record. Here again appellants have not printed the testimony in their brief or as an appendix thereto, and under such circumstances an appellate court will not search the record to ascertain if there is sufficient testimony to send the cause to the jury. The same is true as to the motion for a directed verdict. However, we may state that what we have set forth herein shows very clearly that the appellants have had and hold the benefit of the moneys advanced by the plaintiff, and, under the cases which we have cited, are under obligations to return the same.

[7] Finally, it is urged that the court erred in its instructions given to the jury. Here again the instructions to the jury are not printed in the appendix to appellants' brief. However, we have read the instructions, and it appears therefrom that the jury was fully and correctly instructed. It would serve no useful purpose to analyze the various instructions and point out that the alleged errors are not sufficient to warrant reversal. We may further add that it was not necessary for the plaintiff to show that the appellants actually received the \$5,000 advanced by her. All that was necessary was to show that the appellants had had the uses and benefits thereof and were enjoying the fruits of the same. This raises the obligation to pay for the value received. No question appears to be raised in the briefs that the school site was not reasonably worth the sum paid to De Yoe by the parties concerned herein.

No appeal lies from the order denying a new trial, and hence need not be considered.

The judgment is affirmed.

We concur: FINCH, P. J.; R. L. THOMPSON, J.

FALL RIVER JOINT UNION HIGH SCHOOL
DIST. v. SHASTA UNION HIGH SCHOOL
DIST.★

Civ. 3871.

District Court of Appeal, Third District, California.

March 11, 1930.

Rehearing Denied April 10, 1930. Hearing Denied by Supreme Court May 8, 1930.

Schools and school districts ⚡110—**Taxes collected by school district from lands not legally within exterior boundaries were not recoverable by district in which lands actually were (Pol. Code, §§ 1756, 1757).**

Money received by school district from lands apparently but not legally within its exterior boundaries by virtue of taxes levied and collected for its uses and purposes and devoted for such purposes were not recoverable by district within whose territory the lands actually were, where no levy had been made or taxes collected for its uses and purposes, and where both districts involved obtained exactly the amount of money for which their budget called in accordance with Pol. Code, §§ 1756, 1757, and neither district obtained or had the use of moneys intended for the other.

Appeal from Superior Court, Shasta County; James W. Bartlett, Judge.

Action by the Fall River Joint Union High School District against the Shasta Union High School District. Judgment for plaintiff, and defendant appeals.

Reversed, with directions.

W. D. Tillotson, of Redding, for appellant.
Jesse W. Carter, of Redding, and Annette Abbott Adams, of San Francisco, for respondent.

PLUMMER, J.

The plaintiff had judgment against the defendant in the sum of \$8,293.84, together with interest thereon at the rate of 7 per cent. from the date of entry of judgment, in an action for money had and received by the defendant for the uses and purposes of the plaintiff, based upon allegations that the defendant had collected and had the use and benefit of certain moneys raised by taxation which should have been had, obtained, and enjoyed by the plaintiff. From this judgment the defendant appeals.

After alleging the existence of the two high school districts named in the title to this action, the complaint sets forth that on the 4th day of February, 1925, a certain school district, known as the "Bunker Hill School District," formed under the laws of the state, was situate entirely within the exterior boundaries of the Fall River joint union high school district in the county of Shasta; that on the same date that certain school district, known as "Kosh Creek School District," was an elementary school district situate entirely

within the boundaries of the Shasta union high school district in the county of Shasta; that the boundary line between the two elementary school districts constituted the boundary line between the two high school districts; that on the 4th day of February, 1925, the board of supervisors of the county of Shasta made an order purporting to transfer to the Kosh Creek school district certain lands and premises theretofore situate within the Bunker Hill school district. This order, if effective, would have transferred from the Fall River union high school district to the Shasta union high school district the lands and premises described in the plaintiff's complaint.

It is further alleged in the complaint that in making the order of transfer, dated February 4, 1925, the board of supervisors did not comply with the requirements of the Political Code, and that thereafter, and in the month of November, 1928, after an action had been prosecuted in the superior court of Shasta county for that purpose, a judgment was entered declaring the purported transfer of property from the Bunker Hill elementary school district to the Kosh Creek elementary school district null and void. The complaint then sets forth that during the years intervening between the purported transfer of the lands described in the complaint and the entry of judgment adjudging the transfer null and void, Shasta union high school district collected in taxes on the property involved in the transfer the following sums, to wit: For the year 1925, \$3,834.57; for the year 1926, the sum of \$1,151.87; for the year 1927, the sum of \$3,019.50; for the year 1928, the sum of \$207.90; aggregating a total of \$8,293.84. The complaint contains no allegations that the plaintiff did not receive, during said years, all of the money necessary to maintain its union high school district, nor is there any allegation in the complaint that the plaintiff did not receive, during said period of time, all of the moneys that had been collected for the uses and purposes of the Fall River joint union high school district; nor is there any allegation in the complaint that the Shasta union high school district received any moneys that were not necessary for the support of its high school; nor is there any allegation in the complaint that the Shasta union high school district received any money not intended for its uses and purposes; nor that any taxes were levied upon the property involved in the transfer that were not intended for the uses and purposes of the Shasta union high school district.

The appellant demurred to the plaintiff's complaint on several grounds, one of which was that it did not state a cause of action. The demurrer being overruled, the appellant declined to amend, and judgment was en-

tered in favor of the plaintiff for the amount sued for.

The respondent, in support of the judgment in its favor, makes the following contention: "That there is but one question involved in this appeal, and that is whether an action for money had and received will lie to recover from a High School District moneys which it has received from taxes for High School purposes, assessed and collected upon lands wholly outside of its boundaries, and wholly within the boundaries of plaintiff district." This, however, is not a full or complete statement of the issues involved. The question really at issue is whether money received by one district, from lands apparently but not legally within its exterior boundaries, levied and collected for its uses and purposes and devoted to its uses and purposes, can be recovered by a district within whose territory the lands actually lie, where no levy has been made or taxes collected for its uses and purposes, and where both districts involved obtained exactly the amount of moneys for which their budget called, and neither district obtained or had the use of money intended for the other.

During the time involved in this action, sections 1756 and 1757 of the Political Code specified that the school board of every high school district should file with the board of supervisors annually, at the time specified in the section, an estimate of the amount of money required for maintaining the high school district for the current school year. Section 1756, *supra*, sets forth how the items shall be stated on the estimate, and the procedure that shall be taken preceding the actual levy of the taxes, and that, after the estimate has been properly passed upon by the county school superintendent, the board of supervisors shall proceed to levy a tax upon the property in each school district sufficient to raise the amount of the estimate determined as necessary for the maintenance of the school for the current year. Section 1757, *supra*, provides for the levy of a special tax. All of the moneys to be raised by taxation are paid to the county treasurer, and by him allotted to the respective school districts for which the tax has been levied and the moneys collected.

Before beginning a review of the authorities relied upon by the respondent, we may state that the complaint fails to show that the plaintiff suffered any deficit in its school funds, or that the defendant obtained any surplus in its school funds by reason of the levy and collection of taxes upon the properties mentioned in the complaint. The contention in this case appears to be based upon the theory that each high school district has an inherent right to all moneys collected by way of taxation upon lands lying within the exterior boundaries of its district, whether or

not the levy and collection of such moneys was intended for, or had for its uses and purposes, and whether it did or did not receive all the money set forth as necessary in its estimate, and irrespective of whether there was or was not a deficit in its funds, and whether there was or was not a surplus in the funds of the district for which the tax was levied and collected.

This is not a case where taxes were levied and collected for one district, and, by mistake, turned over or paid to another district. So far as the complaint is concerned, each district in this action had and enjoyed all the money necessary for its uses and purposes, and no money was paid by mistake to the appellant, derived from taxes levied and collected for the uses and purposes of the plaintiff, as no such taxes were levied or collected.

With these statements in view, we will now consider the cases cited as supporting the ruling of the trial court. In the case of Independent School District of Town of Kelley v. School Township of Washington, 162 Iowa, 42, 143 N. W. 837, 840, it was held that, where the county treasurer, by mistake, paid school taxes levied upon property in one district for school purposes and for the contingent and teachers' funds, to an adjoining district, the district in which the land was located could recover the sum so paid by an action for money had and received. An examination of this case shows that a tax was levied and the money collected for the uses and purposes of the plaintiff, and, by mistake of the treasurer, credited to the defendant district. In the opinion of that case we find the following: "We think the language used in the case of District Township of Spencer v. District Township of Riverton, 56 Iowa, 88, 8 N. W. 785, is apropos to the discussion here. This was an action by the plaintiff district to recover of the defendant district certain moneys which it was claimed had been paid by the treasurer of the county from moneys belonging to the plaintiff, by reason of which defendant district received or would receive more than it was entitled to. * * * 'We come, then, to inquire whether, as the treasurer made a mistake, the plaintiff has any equitable claim upon the defendants. In our opinion it has. The treasurer was charged by law with the duty of refunding a portion of the tax from the funds belonging to the defendants. By a mistake respecting his duty he refunded the whole from funds belonging to the plaintiff. By reason of that mistake the defendants have received, or will receive, from the treasurer more funds than they were entitled to. A court of equity, it appears to us, has the power to rectify the mistake and properly adjust the burden by compelling a contribution.'" Nothing of that kind appears in this case. The funds belonging to the respondent have not been depleted, and the

funds belonging to the appellant have not been augmented to any degree, or the estimates submitted by the respective districts to the board of supervisors as to the funds necessary to maintain their schools in any wise departed from. An examination of the case of District Township of Spencer v. District Township of Riverton et al., 56 Iowa, 85, 8 N. W. 785, shows that it is based upon an error of the treasurer in paying to one school district funds derived from a tax levy made for the uses and purposes of another district.

In Independent School District No. 5 v. Solon Independent School District No. 8, 162 Iowa, 686, 144 N. W. 592, the question involved was whether sums paid by one district to another, for and on account of the tuition of pupils supposed, at the time of payment, to be residing in the defendant district, but who were afterwards found to be actually residing within the plaintiff district, could be recovered. It was so adjudged. Here, the money was paid under mistake, and the defendant district had the uses and benefits of tuition fees that should have remained in the treasury of the plaintiff. In other words, the funds of one district were improperly augmented at the expense of the other district, and equity, of course, necessarily required a refund.

In the case of Board of Trustees of Graded Free Colored Common School of Mayfield v. Board of Trustees of Graded White Common School of Mayfield, 181 Ky. 303, 204 S. W. 86, the only question involved was one of a division of school moneys between schools maintained for white and colored pupils, based upon statutes relating to the same and not applicable to any issues involved herein.

In the case of School District No. 9, Town of Lake, v. School District No. 5, Town of Lake, 118 Wis. 233, 95 N. W. 148, the questions involved related to a division of tax moneys, where the districts had been divided after the levy of the tax. This statement, of course, shows it is inapplicable to the issues here presented.

In Center School Township et al. v. State ex rel. Board of School Commissioners, 150 Ind. 168, 49 N. E. 961, the questions involved had to do with the distribution of moneys received from a certain dog tax. The facts show that one district received a surplus portion which should have been distributed to a different district. It was really an action to require a division of funds, and not an action to recover funds which had been provided for the support of a defendant district.

In Jefferson School Township of Greene County v. School Town of Worthington, 5 Ind. App. 586, 32 N. E. 807, it is held that a proper remedy for a school town to recover taxes appropriated to it, but paid by the county treasurer to the trustees of a school township, and

converted by such township, is by action against the township, and not by mandamus either against the county treasurer or trustee. With this statement of the law we readily agree, but the facts involved are clearly distinguishable from the case at bar. In the case at bar, as we have heretofore stated, the taxes were levied and the moneys collected for the uses and purposes of the appellant, and were not levied and collected for the uses of the respondent, and improperly apportioned. A few excerpts from the case of the Board of Commissioners of Carter County v. Joint School District No. 34, etc., 134 Okl. 140, 272 P. 468, 469, show that the facts considered therein are readily distinguishable from the circumstances presented in the case at bar. In the opinion of the case just referred to we find the following: "The proper remedy for a school town to recover taxes *apportioned* to it, but paid by the county treasurer to the trustee of a school township, and converted by such township, is by action against the township, and not by mandamus against either the county treasurer or trustee." (Italics are ours.) The word which we have italicized discloses the fact that the moneys collected had been apportioned to one district and erroneously paid to another. This, of course, would leave a deficit in the funds of one district and create a surplus in the other. The opinion further quotes from 37 Cyc. 1592, the familiar rule that "a city or other municipality may maintain an action at law against the county which has collected taxes for it and failed to pay them over." This in no wise supports the respondent's contention. The cases seem to be uniform that, where an officer collects taxes belonging to a district or city, and pays the same to the wrong district or to the wrong municipality, the amounts so wrongly apportioned or paid over may be recovered. Thus, in the instant case, if the taxes had been assessed and collected for the purposes of the respondent district, and erroneously paid over to the officers of the appellant district, an action would lie by the respondent district to recover such funds from the appellant district. The record would show upon its face a surplus in favor of the appellant and a deficiency of funds on the part of the respondent.

Finally, respondent urges upon our attention the cases of School District No. 127 v. School District No. 45 of Reno County, 80 Kan. 641, 103 P. 126, and the case of School District No. 8, Shawnee Township, v. Board of Education of Kansas City, 115 Kan. 806, 224 P. 892. The latter case is based in part upon the decision in the former case and upon a statute bearing upon the correction of errors in the apportionment of school funds to which we will refer. There is also a distinct difference between the opinion in the Reno County Case and in the facts involved in the Shawnee Township Case, which apparently

was overlooked by the court in the latter case.

In the case of School District No. 127 v. School District No. 45, supra, it appears that both districts had levied a tax upon a disputed territory claimed to be within the exterior boundaries of each district. One had levied an assessment at the rate of 13 mills, and the other at the rate of 25 mills on the dollar. District No. 127 collected the sum of \$321.13. The court determined that the strip of land involved lay within the exterior boundaries of district No. 45, and held that district No. 127 should refund the sum of \$321.13 collected by it. The record in that case also shows that all the parties had full knowledge of the circumstances, which, of course, included the fact that district No. 127 had full knowledge that it was levying a tax upon land outside of its district. The record also shows that the county treasurer had knowledge of the circumstances involved, and that he had no right to pay the money over to the wrong district. Here, district No. 45 had made an estimate of the moneys necessary to maintain its educational facilities, had levied a tax upon the property within its territorial boundaries, and was entitled to the amount of revenue to be derived from taxation upon the territory in question, and, unless it received the same, while it does not appear to be mentioned in the opinion, there would necessarily have been a deficit in its funds. District No. 45 was suing for something of which it had been deprived. In the case at bar such fact does not appear.

In the case of School District No. 8, Shawnee Township, v. Board of Education of Kansas City, supra, the facts show that the taxes were levied on property in one district for the purposes of that district, and through mistake paid to the officers of another district. In the decision of this case we find that the court refers to the revised statutes of the state of Kansas, quoting a section which is too lengthy to be inserted here, but which statute provides that the county clerk, previous to a certain date of each year therein mentioned, is empowered to correct errors in the apportionment of taxes and in fixing the situs of both personal and real estate, and also providing for the refunding of money, if errors are discovered and claims made for refund, or a transfer from one district to another, or, rather, to the proper district or municipality, of the funds to which it is entitled.

In addition to setting forth the statute relative to the correction of errors, the court also relies upon the case of School District No. 127 v. School District No. 45, supra, mentioning the fact of the property being detached from one district and attached to another, and fails to point out the difference between the facts of that case and the circumstances involved in the Shawnee Township Case, to

wit, that in the case of District No. 127 v. School District No. 45, supra, the taxes were levied by and for the uses and purposes of the district claiming the same, and that in the Shawnee Township Case taxes levied for one district were collected and improperly paid over to another district. Neither of these cases involve the question of whether money, where taxes have been levied and collected for the uses and purposes of a particular district, after the same have been devoted to the uses and purposes of the district for which they are collected, should be paid over to an adjoining district because the orders of the board of supervisors in making a transfer of territory from one district to the other, was subsequently adjudged void.

Respondent quotes at length from the opinion in the Shawnee Township Case, but, after an examination of the facts involved in the case, and also of the case of School District No. 127 v. School District No. 45 relied upon, it will be found that the quotation is the language and not the law of the case, and, so far as the language is concerned, its reasoning is very clearly answered by the dissenting opinion, which, however, we do not quote as authority, but as illustrating what we have said as to misapprehension of the facts involved in the two cases cited to us as authority.

We will next consider the authorities upon which appellant relies. In 35 Cyc. 1037, the rule of law which appeals to us as being the proper one applicable to this case is thus stated: "One school district may recover from another district taxes which have been levied by the former and unlawfully collected by the latter; but a school district does not become a trustee for one taxpayer of an excessive amount collected from another taxpayer, and one school district cannot recover from another district taxes which, through a mistake as to location, have been levied by, and voluntarily paid to the latter upon lands within the former district, although the tax rate, as extended in the former district, is thereby made greater than it otherwise would have been. But the fact that one school district unlawfully levies and collects taxes on land in another school district, does not prevent the latter from levying and collecting taxes on the same land." The latter statement applies to what was really involved in School District No. 127 v. School District No. 45, supra.

In 27 Ruling Case Law, 591, we find the following: "Where one school district collects by mistake, taxes on land lying in another district, the latter, if it can recover from the former at all, cannot recover more than the amount it would have received had there been no mistake. So, where the rate of taxation in the former district is greater than the rate in the latter, the excess collected cannot be recovered by the latter district,

nor can it recover at all if the full amount of the levy made by it on the lands in question has been received." It is then stated that the taxpayer cannot collect where the taxes have been voluntarily paid.

In the case of *School City of Terre Haute v. Harrison School Township*, 184 Ind. 742, 112 N. E. 514, the Supreme Court of Indiana held that, "where the auditor of a county, in distributing the county's share of the tuition revenue of the state arising from the income on the common school fund, fails to take into consideration certain matters, as required by Burns' Ann. St. 1914, § 6475, so that the trustees of some of the school corporations thereof receive more than their proportion, there is no liability on the part of such corporations, after expenditure of the fund, to the school corporations thereof which received less than their proper proportions." That case is similar to the conditions here prevailing, in that, while not so alleged in the complaint, it is evident that the school funds involved have all been consumed and used by the appellant district for the purposes for which the tax was levied and collected.

In *Arthur et al. v. School District of Polk Borough*, 164 Pa. 410, 30 A. 299, the Supreme Court of Pennsylvania held that no recovery could be had where one school district unlawfully levies and collects taxes on lands lying in another district. We may state, however, in that case it is also held that the second district might have levied and collected taxes. The point really involved, so far as the instant case is concerned, is that moneys derived from taxes levied upon lands, though not within its district, for the uses and purposes of the district levying the tax, may be contested by the landowner or taxpayer, but cannot be recovered by the district wherein the lands are situate, after the same have been collected and used for the purposes of the collecting district.

In the case of *Walser v. Board of Education of School District No. 1*, 160 Ill. 272, 43 N. E. 346, 31 L. R. A. 329, we have a case on all fours with the questions presented upon this appeal. It was there held that, "Where, by the mistake of the county clerk, real estate in fact located in school district No. 2 was entered upon the collector's book, for a certain year, as in school district No. 1, * * * and the property was taxed and the taxes were voluntarily paid to No. 1, and there applied, No. 2 cannot recover the amount thus collected." To the same effect is the decision of the Supreme Court of Ohio in the case of *Board of Education of Lyme Township v. Board of Education of Special School District No. 1*, 44 Ohio, 278, 7 N. E. 12.

In *Mabelvale Special School District v. Halstead Special School District*, 169 Ark. 645, 276 S. W. 584, the Supreme Court of Arkansas held as follows: "Special school

district, in suit to recover taxes on disputed lands, held not entitled to recover taxes which had been regularly though erroneously distributed to other school district and consumed in educational purposes, but to be entitled only to taxes in hands of treasurer at time suit was commenced," etc.

In *Carter Special School District v. Hollis Special School District*, 173 Ark. 781, 293 S. W. 722, it was again held by the Supreme Court of Arkansas, in the opinion rendered in 1927, that a school district rightfully entitled thereto could not recover school funds erroneously distributed to, and consumed in educational purposes by, the district to which the funds had been apportioned.

In the case of *School Directors of District No. 153 v. School Directors of District No. 154*, 232 Ill. 322, 83 N. E. 849, the Supreme Court held, upon facts identical with those here presented, that, "where property has been assessed for school taxes in one district and the taxes collected by that district, an adjoining district cannot recover the taxes from the first district on the ground that, by a mistake * * * in making a map of the school districts of the county, the property was taxed by the wrong district."

Somewhat to the same effect is the case of *State ex rel. School Dist. v. Beale*, 90 Mo. App. 341, where it was held that the judgment could only apply to taxes thereafter levied and collected, and that no refund of moneys already collected and used for school purposes could be had.

If it be a fact, as contended by the respondent, that the taxpayers in the respondent district paid somewhat in excess of the moneys they should have paid, if the true situs of the territory involved had been known and assessed accordingly, the effective answer thereto is that, so far as the record before us shows, all of the taxes were voluntarily paid, and the parties paying the taxes are not before us.

The appellant makes the further point that, as each district has received the funds according to the estimate submitted by it, and that the contested funds have been used for educational purposes, the finances of the district ought not to be disturbed by any judgment ordering a refund, and that to do so would be inequitable, as all the parties herein acted in good faith. From what we have said, however, it is apparent that the judgment of the trial court must be reversed, and therefore we need not consider the question of a disarrangement of the funds of the respective districts. We agree with the appellant that the complaint does not state a cause of action, and, in view of what we have said, it is evident that no cause of action can be stated.

It is therefore ordered that the judgment of the trial court is reversed, with directions

to sustain the defendant's demurrer to the plaintiff's complaint, without leave to amend.

We concur: FINCH, P. J.; R. L. THOMPSON, J.

104 Cal. App. 319

BISHOP v. JORDAN.★

Civ. 205.

District Court of Appeal, Fourth District,
California.

March 4, 1930.

Rehearing Denied March 31, 1930. Hearing Denied by Supreme Court April 28, 1930.

1. Waters and water courses ☞231—Tax sale for unpaid assessment levied to pay irrigation district bonds was illegal, bonds being issued at time when land was owned by federal government.

Plaintiff after filing application to homestead certain land involved in this action to quiet title went into possession in 1888 of land which was then public domain of United States. Organization of irrigation district, which included plaintiff's land, was thereafter effected under Wright Act (St. 1887, p. 29). In 1889, bond issue of district was confirmed by court decree, and five years later plaintiff received his patent from United States. In 1918, assessment was levied on plaintiff's land for purpose of making payments on outstanding bonds, and land was sold at tax sale, under which defendant claimed title. *Held* tax sale was illegal, since land was property of federal government at time bonds were issued, and hence not subject to any local tax or assessment, in view of act admitting California into Union (1 Hittell's Gen. Laws, § 242).

2. Public lands ☞35(5)—Entry under homestead act gives merely right of possession which will ripen into title upon performance of statutory conditions (Homestead Act [43 USCA § 164]).

Under Homestead Act (43 USCA § 164), right of possession which entryman acquires by virtue of entry is merely inchoate, but may be perfected into title by continued occupation and improvement of land.

3. Waters and water courses ☞231—Homesteader on federal land agreeing to pay local assessment assumed no liability, since assessments on such land would be illegal.

Where person occupying federal land, under Homestead Act (43 USCA § 164), signed instrument purporting to obligate him to comply with local irrigation laws and to pay taxes or assessments levied thereunder, he assumed no legal liability to pay tax, nor did he thereby give his consent to inclusion of property within irrigation district for taxation purposes, since land owned by United States government is not subject to state taxation.

4. Waters and water courses ☞231—By agreeing to assume liability imposed by irrigation laws, homesteader on federal land did not waive right to assert that assessments on such land were illegal.

Where homesteader on federal land signed instrument which purported to obligate him to pay assessments for irrigation district, he did not thereby waive his right to object to inclusion of land within district, in view of agreement that he assumed no greater liability thereby than was imposed by irrigation laws, since such laws could not be construed to impose assessments upon land of United States.

5. Waters and water courses ☞231—By agreeing to pay local assessments, homesteader on federal land was not estopped to assert that assessments thereon were unlawful.

Homesteader on federal land agreeing to pay assessments and assume liability imposed by irrigation laws was not thereby estopped to assert that federal lands could not be included within irrigation district for purpose of assessment.

6. Estoppel ☞110—Estoppel must be pleaded.

Defense of estoppel is one that must be pleaded by party relying on it.

7. Equity ☞88—Laches must be pleaded to be available.

Laches is affirmative defense which must be pleaded by party wishing to avail himself of it.

8. Judgment ☞715(3)—Judgment holding irrigation district legally organized and its bonds lawfully issued was not *res judicata* of contention that federal land could not be locally assessed.

Judgment of court confirming organization of irrigation district and approving issue of bonds was not *res judicata* of question whether federal land could lawfully be included within such district for purposes of assessment.

Appeal from Superior Court, Kern County; Erwin W. Owen, Judge.

Action to quiet title by Harrie Wilder Bishop against C. Hughes Jordan. From judgment for defendant, plaintiff appeals.

Reversed.

Ray W. Hays, of Fresno, for appellant.
Brown & Bissell, of Los Angeles, for respondent.

MARKS, J.

Appellant brought this action to quiet his title to land in Kern county. Respondent appeared by answer and cross-complaint and denied appellant's title, and asserted title in himself. Judgment was rendered quieting title to the property in respondent.

About September 7, 1887, appellant filed his application with the United States Land Office at Visalia, Cal., to homestead the land involved under the laws of the United States.

The land was then part of the public domain belonging to the federal government. Appellant commenced to reside on the property in March, 1888, and continued to so reside thereon until after November 17, 1894, when his patent was issued to him.

On September 22, 1888, the Poso Irrigation District was formed under what is commonly known as the "Wright Act" (St. 1887, p. 29) and continued to exist as a legal entity until March 1, 1923, when it was dissolved by a decree of court. The property involved in this action was located within the exterior boundaries of this district. No question is raised as to the legality of the organization and existence of the district up to the date of its disincorporation. Some time prior to September 10, 1889, the district took the necessary steps to issue bonds with which to raise money to carry out the purpose of its organization. On the last-named date, the bonds were confirmed and approved by a decree of court.

On March 20, 1918, the board of supervisors of Kern county levied an assessment on all the real property in the district for the purpose of making payments on the outstanding bonds, and an assessment of \$159.18 was placed upon the property involved herein. The assessment was not paid, and the property was sold to satisfy the same, and a certificate of sale issued to W. J. Williams and J. W. Deyoe, who assigned their interests therein and thereunder to Byron R. Marsh on July 25, 1922. On June 26, 1925, a deed was made to the property by the treasurer of Kern county, to Marsh, who, with his wife, deeded it to respondent on August 4, 1925. It does not appear that respondent, or any of his predecessors in interest subsequent to the tax sale, were ever in possession of any portion of the property. Appellant commenced this action to quiet his title to the property on May 19, 1926. At the trial appellant tendered to respondent all money expended by him in paying the assessment, his expenses, and interest, which tender was refused.

[1] The main question to be decided in this case is whether or not the land involved, being a part of the public domain of the United States of America, at the time of the formation of the Poso Irrigation district, the issuance of its bonds, the proceedings to affirm and confirm the organization of the district and its bonds, was included within the district in so far as its power to tax the property is concerned. We believe that this question must be resolved in favor of appellant.

The act admitting the state of California into the Union (1 Hittell, art. 242) contains the following provision: "That the said State of California is admitted into the Union upon the express condition that the people of said State, through their Legislature, or otherwise, Shall never interfere with the primary

disposal of the lands within its limits, and shall pass no law and do no act whereby the title of the United States shall be impaired or questioned; and they shall never levy any tax or assessment of any description whatever, upon the public domain of the United States."

Our courts have construed the law to permit the taxation of property by the state of California, or its agencies, when a private person had a perfect equity therein, with only the dry legal title remaining in the United States, but not otherwise. *Central Pacific R. Co. v. Howard*, 52 Cal. 227; *Hibernia Savings & Loan Society v. San Francisco*, 139 Cal. 205, 72 P. 920, 5 L. R. A. (N. S.) 608, 96 Am. St. Rep. 100.

The Homestead Act in force at the time appellant filed his entry upon the land (8 Fed. Stats. Ann., 2d Ed., p. 558 [43 USCA § 164]) provided in part as follows: "No certificate [however] shall be given or patent issued therefor until the expiration of three years from the date of such entry; and if at the expiration of such time, or at any time within two years thereafter, the person making such entry, or if he be dead his widow, or in case of her death his heirs or devisee, or in case of a widow making such entry her heirs or devisee, in case of her death, proves by * * * two credible witnesses that he, she, or they have * * * resided upon and cultivated the same for the term of three years succeeding the time of filing the affidavit and makes affidavit that no part of such land has been alienated, except as provided in section 174 of this division of this chapter, and that he, she, or they will bear true allegiance to the Government of the United States, then in such case he, she, or they, if at that time citizens of the United States, shall be entitled to a patent, as in other cases provided by law."

[2] This act has been construed to give the entryman no title by virtue of his entry, but merely the right of possession which might be perfected into a title by his continued occupancy and improvement of the land. *Flint, etc., R. Co. v. Gordon*, 41 Mich. 420, 2 N. W. 648. The right of possession which he acquired by the entry, in so far as the United States is concerned, is inchoate and conditional upon his performing the conditions imposed by law, and is not perfected until he has performed all of such conditions. *Norton v. Evans* (C. C. A.) 82 F. 804; *Shiver v. United States*, 159 U. S. 491, 16 S. Ct. 54, 40 L. Ed. 231.

The same question presented in the case before us was decided in the case of *Nevada National Bank v. Poso Irrigation District*, 140 Cal. 344, 73 P. 1056, 1057. In that case the Supreme Court held: "Appellant, Augustine V. Russell, filed a complaint in intervention, and, after putting in issue the allegation of the complaint as to the validity of the bonds

and the right of plaintiff to recover thereon, further alleged that she was the owner of the southeast quarter of section 6 of township 26 south, range 27 east, M. D. B. & M.; that said land lies within the exterior boundaries of said Poso Irrigation District; that said district was organized September 22, 1888; that her said land was then public land of the United States; that John L. Russell filed his application to homestead said land under the land laws of the United States on February 6, 1892; that a patent therefor was issued to him on January 18, 1894, and that in November, 1896, said Russell conveyed the same to her, and that she is now the owner thereof.

* * * Assuming the regularity and validity of the organization of the district and the issuance of the bonds, except as to the land now owned by the intervener, and hereinbefore described, the question is presented whether her said land is liable, by assessment under the act of the Legislature, or in any manner, for the payment of the bonds held by the plaintiff. I think it is not. The intervener's land was not represented in the organization of the district by any person authorized to vote for or against its organization. If the act of the Legislature under which the district was organized had expressly declared that public lands of the United States situated within the exterior boundaries of an irrigation district should be a part thereof, and assessed for its proportion of the liabilities of the district, no one would hesitate to say that such provision would be void; that neither the state nor any of its agencies could impose a tax assessment, or liability upon the public lands of the United States. It is clear, therefore, that so long as the said land now owned by the intervener remained public land of the United States, no liability created by the state or district attached thereto. The further question then arises: Did the sale and conveyance by the United States to the intervener or her grantor operate to charge it with a pre-existing liability not created or assented to either by the government or its grantee? This question must also be answered in the negative, for, if the grantee of the United States must take the land burdened with the liability of an irrigation district made to include it without the assent of the government or the purchaser, it attaches a condition to the disposal of the property of the government without its sanction or consent, and which must, in such cases, interfere with its disposal."

Respondent tries to distinguish this case from the one at bar for the reason that in May, 1894, appellant, with many property owners in the district, signed an instrument in the nature of a ratification of a declaration of trust in which respondent argues that there appeared a consent of the grantee of the government (appellant) to the burden of the liability resulting from the bonds issued by the district, being placed upon the property. The

last sentence of the instrument is as follows: "It is understood that by this instrument we obligate ourselves to comply with the said irrigation laws, known as the 'Wright Act' by the payment of the taxes or assessments levied thereunder and that we do not hereby assume any greater obligation or liability than such as are imposed by said laws, assuming them to be valid."

[3] If, as said in the case of Nevada National Bank v. Poso Irrigation District, supra, appellant's "land is not a part of the Poso Irrigation District, is not subject to any lien of said judgment in favor of the plaintiff [the bondholder], nor to any assessment for the payment thereof, or of any debt or liability of the said Poso Irrigation District," there existed no obligation or liability imposed by law upon appellant to pay any tax or assessment on the government land described in his entry, at the time of the execution of the foregoing instrument, then he did not give his consent to the inclusion of this property within the district for the purpose of assessment or taxation.

[4-7] Respondent contends that by signing this instrument appellant ratified the inclusion of the lands here involved within the district, and waived his right to object to their being so included. In view of the last sentence quoted above, the document cannot be so construed. Neither can he be estopped by the instrument to assert that the lands were not included within the district for the purpose of assessment and taxation. Attention might be called to the fact that the document only described a portion of the lands here involved and also that estoppel is defense that must be pleaded by one relying upon it. 10 Cal. Jur. 653. Respondent failed to plead this defense. Nor can we agree with respondent that the record before us shows that appellant was guilty of any laches. Laches is also an affirmative defense which respondent failed to plead. *Trail v. Firth*, 186 Cal. 68, 198 P. 1033.

[8] Appellant, by his suit, is not making a collateral attack upon the organization of the Poso irrigation district. He is merely relying upon the rule that government land cannot be considered as included within the district for the purposes of taxation or assessment. Because his land escapes such a burden as a result of this action will furnish no precedent for a like decision in favor of any other owner of property within the district, unless the land of such other owner was also government property. For the same reason the judgment of court holding the district legally organized, and the bonds lawfully issued, does not make the doctrine of "res judicata" apply here.

Judgment reversed.

We concur: SLOANE, P. J.; BARNARD, J.

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PER CURIAM.

In denying the petition for a hearing in this court, after decision by the district court of appeal, we do so with the realization that the judgment herein is contrary to and in effect overrules the case of *People v. Spencer*, 54 Cal. App. 54, 201 P. 130. We are satisfied with the reasoning and conclusions of the district court of appeal in the present case, and pronounce it a correct declaration of the law. We therefore deem it unnecessary to grant the petition herein merely for the purpose of entering a like judgment in this court based on the same reasoning and conclusions.

The petition for a hearing is denied.

JONES et al. v. CITY OF LOS ANGELES
et al. ★

Civ. 6380.

District Court of Appeal, Second District, Division 1, California.

March 10, 1930.

Rehearing Denied March 31, 1930. Hearing Granted by Supreme Court May 8, 1930.

1. Municipal corporations ☞601—Restricting specified institutions or businesses to certain zone is within police power of city.

City has authority in proper exercise of police power to divide its area into districts within which may be confined operation of specified institutions or businesses.

2. Municipal corporations ☞601—Institutions for insane are subject to zoning regulations, as they may become dangerous to health, safety, and comfort of community if not properly managed.

While institution for treatment of insane is not of such noxious character that either health, safety, or comfort of community necessarily would be endangered by reason of its presence, nevertheless by mismanagement it may become so and is subject to zoning ordinance.

3. Municipal corporations ☞626—Ordinance restricting institutions for insane to densely populated district, while excluding them from sparsely populated district, was oppressive, discriminatory, and void.

City ordinance which permitted operation of institution for insane in thickly populated and densely settled district, while excluding them from comparatively sparsely settled districts, was oppressive, discriminatory, and void.

104 Cal. App. 203

PEOPLE v. ODENWALD et al.
Cr. 3339.

Supreme Court of California.
March 20, 1930.

In Bank.

On Hearing.

For opinion of District Court of Appeal,
see 285 P. 406.

Appeal from Superior Court, Los Angeles County; H. V. Alvarado, Judge.

Action by E. B. Jones and another against the City of Los Angeles and others. From judgment for defendants, plaintiffs appeal.

Reversed.

Woodruff, Musick, Pinney & Hartke, of Los Angeles, for appellants.

Jess E. Stephens, City Atty., and Frederick Von Schrader, Deputy City Atty., both of Los Angeles, for respondents.

HOUSER, J.

By the terms of an ordinance duly adopted by the common council of the city of Los Angeles and approved by its mayor, it thereafter became unlawful outside a described district in said city for any person to "operate, maintain or conduct any hospital, asylum, sanitarium, home, retreat or other place for the care or treatment of insane persons, persons of unsound mind or persons affected by or suffering from mental or nervous diseases." Territorially considered, the effect of the ordinance was that within from one-third to one-half of the area of said city the operation or maintenance of a hospital or a sanitarium for the care and treatment of persons who were "suffering from mental or nervous diseases" of whatever kind or severity was permitted; while in the remaining portion of said city the conduct of such an establishment was forbidden. Regarding the character of the several areas thus affected, it appears that in general the permissive district included some of the most densely populated portions of the city and its central downtown retail business district, within which were and are located many hotels, apartment houses, and two public parks. More specifically as to the residential area included in such permissive district, the record herein discloses the fact that one part thereof contained a residential district of 6,390 acres in which were located 32,044 families consisting of 118,563 persons, or an average of about 19 persons to the acre; also, a second like area of 151 acres which contained 3,971 families with a total of 11,913 persons, or about 79 persons to the acre. Concerning the territory within which the operation or maintenance of such hospitals or sanitariums was forbidden, comparatively speaking it appears that much of it was sparsely inhabited. To illustrate: One so-called residential district which contained 3,200 acres, of which more than one-half thereof was given over wholly to farming operations, housed an aggregate of 1,351 families with a total of 5,141 persons, or an average of less than 2 persons to the acre. Another of such forbidden districts comprised 4,910 acres, on which were living 802 persons, or one person to every 6 acres.

At the time the ordinance in question became effective, four different sanitariums devoted respectively to the care and treatment of either "mild mental cases" of adults, or of feeble-minded children, were in operation within the forbidden area of the city of Los Angeles. The maximum penalty prescribed by the terms of such ordinance for its violation was either a fine of \$500, or imprisonment

for a period of six months in the city jail of said city, or both such fine and imprisonment. To obviate the happening of untoward results from the operation of their respective institutions, each of the owners thereof sought the injunctive aid of the lower court to the end that the enforcement of such ordinance be forbidden and restrained. From a judgment denying to them, or any of them, the relief prayed, each of the respective plaintiffs in said actions has appealed to this court. By stipulation of the respective parties and by order of the court, the several appeals from the respective judgments therein were consolidated and as far as is here practicable are to be treated and considered as one appeal.

The principal contention of appellants is that the ordinance to which reference has been had is unreasonable and discriminatory, and consequently unconstitutional and void, in that it prohibits the operation or maintenance of a specified institution or business in any part of certain outlying, sparsely inhabited districts of the city, and at the same time permits the operation or maintenance of the same kind of an institution or business within the closely built-up and densely populated sections of the city.

[1] That in the proper exercise of police power the authority of a city to divide its area into districts within which respectively may be confined the operation of specified institutions or businesses is no longer open to inquiry or legal argument. *Miller v. Board of Public Works*, 195 Cal. 477, 234 P. 381, 38 A. L. R. 1479. In considering a questioned zoning ordinance of a city, frequently the only duty of the court is to determine whether such ordinance is necessary and has any reasonable tendency to subserve the legally recognized ends and purposes of police power, in that it bears a proper and substantial relation to either the public health, safety, morals, comfort, or general welfare. However, in the exercise of its powers the court may also be charged with additional duties, among which may be that of determining whether in the anticipated enforcement of the ordinance its provisions are unreasonable or are arbitrary and discriminatory.

[2] The opinion in the case of *Ex parte Whitwell*, 98 Cal. 73, 32 P. 870, 19 L. R. A. 727, 35 Am. St. Rep. 152, contains clear expressions to the effect that an institution of the nature of that conducted by the appellants herein is not of such a noxious or offensive character that either the health, safety, or comfort of the individuals comprising the surrounding community necessarily would be endangered or affected by reason of the presence and operation of such an institution therein. Nevertheless, it is manifest that by reason of either mismanagement or neglect of an institution of the nature of that conducted by the appellants it might so retrograde that its continued operation would pre-

sent such a situation that either a legal nuisance would be evident, or that some one or more of the general elementary foundational conditions requisite to the exercise of the police power would be so palpably present as to authorize, if not imperatively demand, the passage of a zoning ordinance which would have the effect of suppressing the evil, or possibly prohibiting future operation of the establishment as formerly conducted. But aside from any direct question as to whether either a nuisance, or other asserted reason, should form a proper basis for the exercise of police power as far as the instant case is concerned, if the general right of the city to zone its area and in so doing to confine the operation of institutions of the character of those here involved to a specific district be conceded, there still remains for determination by this court the question of whether in exercising its right to zone its area the city has unjustly and unreasonably discriminated in favor of densely inhabited areas and against the several institutions located within sparsely inhabited sections of the city and which institutions are respectively owned and represented by the appellants whose several appeals are submitted to this court.

Notably in the case of *Miller v. Board of Public Works*, 195 Cal. 477, 234 P. 381, 38 A. L. R. 1479, and in other cases to which reference might be had, so much has been so forcefully written in the announcement of the application of legal principles relating to the authority of a municipality to divide its area into various districts, each to be devoted to some particular use or uses, that it is deemed at least inadvisable for this court to attempt any elaboration in connection therewith. At the outset, in dealing with the general question of police power, especially as affects the authority of a municipality to zone its territory, as was remarked by Mr. Justice Henshaw in the case of *Curtis v. City of Los Angeles*, 172 Cal. 230, 234, 156 P. 462, "one is embarrassed rather with the multiplicity than the paucity of authorities, and it would be a waste of time to undertake a review of them." A brief reference to a few of the authorities in this state which are deemed to have the greater bearing upon the facts of the case and the legal principles applicable thereto will suffice. Although, as far as this court is aware, the specific point here at issue heretofore has not been determined either by this or by any other court, the principle of law upon which must rest a decision herein has been discussed in each of several cases to which attention will be presently directed.

In the case entitled *In re Throop*, 169 Cal. 93, 145 P. 1029, 1031, by ordinance of the city of South Pasadena, its entire area, comprising approximately 2,200 acres, was divided into three parts or zones. The first of such districts contained about 25 acres and embraced the retail business section of the city; the

second, which was "densely surrounded by residences and other buildings on all sides for a distance of many blocks in every direction, and * * * very largely built up," contained approximately 11½ acres, which by the terms of the ordinance was devoted to industrial uses; and the third, or so-called "residential district," had an area of 2,163 acres. As to the last-mentioned district, it appeared that it was "sparsely settled, one area containing 500 acres, being unimproved, undeveloped and practically uninhabited." By the express terms of the ordinance, many different kinds of business establishments, including stone crushers, were specifically excluded from operation in the third or "residential" district, but inferentially were permitted to operate in district number two, which, as stated by one of the witnesses on the trial of the action, was "immediately surrounded by a poorer class of residences." The test of the legality of the ordinance arose from the operation of a stone crusher in a "wash" which was located in a part of the "unimproved, undeveloped and practically uninhabited" portion of the so-called "residential district." After devoting some attention to the importance and necessity of stone crushers and their effect as affecting the public health, comfort, safety, and welfare of a populous community, the court reached the conclusion that: "In the case now under consideration, it is plainly manifest that the attempted regulation of the business conducted by the petitioner has no relation to the ends for which the police power exists, namely to protect the public health, comfort, safety, or welfare. An ordinance which prevents the operation of a stone crusher in a sparsely settled territory of 2,163 acres, 500 of which are undeveloped and practically uninhabited, and allows its operation in a small area of 11.65 acres in the center of a city surrounded by 'poorer classes of residences,' does not subserve the ends for which the police power exists."

Another case in which the facts are somewhat similar to those in the instant case is that of *Curtis v. City of Los Angeles*, 172 Cal. 230, 156 P. 462. The situation there presented and the ruling thereon are concisely stated in the syllabus of the case as follows: "An ordinance of a municipality which absolutely prohibits the maintenance of stables within a small district of the city which was comparatively sparsely settled, while permitting their maintenance in other districts more thickly populated and densely settled and exclusively devoted to residence purposes, is oppressive, discriminatory, and void."

The facts in the case entitled *In re Smith*, 143 Cal. 368, 77 P. 180, 182, were not unlike those herein, in that in the *Smith Case*, by ordinance, the county of Los Angeles singled out a specified "sparsely settled rural district" and prohibited the maintenance of gas works therein—the effect of which, inferen-

tially, was to permit the maintenance of gas works in every other part of the county. In passing upon the reasonableness of the ordinance (and perhaps as properly indicative of a ruling here), in part the court said: " * * * In city ordinances, as distinguished from county ordinances, the interest and requirements for protection of a *thickly settled* and growing community will often be widely different from those of *sparsely settled* and *thinly inhabited rural districts*. An ordinance limiting, regulating, or even prohibiting, in a certain district within the corporate limits of a city, may be perfectly reasonable, where like limitations, restrictions, and prohibitions as to some district within the county, *arbitrarily carved out*, would be oppressive and unreasonable in the extreme. * * * " It was held that the ordinance in question was unreasonable, oppressive, an invasion of constitutional rights, and therefore void.

The prevailing principle of law announced in the case of *Brown v. City of Los Angeles*, 183 Cal. 783, 192 P. 716, is that where by ordinance, in the proper exercise of the police power, the conduct of an undertaking establishment is reasonably limited to a specified area, the fact that in other portions of the city "exactly similar" to that inside the permissive area the maintenance of an identical business is forbidden does not militate against the reasonableness of the ordinance. And so in the *Hadacheck Case*, 165 Cal. 416, 132 P. 584, L. R. A. 1916B, 1248, it was held that in the proper exercise of the police power a municipality had the right to prohibit the operation or conduct of brick yards or places for the manufacture or burning of brick within a specified area of the city, even though the maintenance of such yards was not prohibited in other districts of the city where their existence was *equally* injurious to their neighbors.

In the *Brown Case*, 183 Cal. 783, 192 P. 716, the plaintiff was attempting to conduct his undertaking establishment on a lot located 170 feet outside the limits of a zone in which the maintenance of such a business was permissible and which zone comprised "some 60 blocks, including practically all of the business and some of the semi-business property in the central portion of the city." It will thus be noted that in its foundational facts the *Brown Case* was the exact opposite of the situation presented in the instant case. That the ruling made by the court was not intended to apply to facts such as are here presented is made manifest by the following language occurring in the opinion: " * * * It is also pointed out that there are vast tracts of *uninhabited land* contained in the annexed districts of Los Angeles city, and that the or-

dinance in effect prohibits the establishment of undertaking parlors in these localities. *If appellant was located in this uninhabited and outlying territory he would be in a position to raise that question*, but, having selected a location in the heart of the city, he is not concerned with the validity of the ordinance as affecting such outlying territory. * * * " And that even as against the provisions of the ordinance, had the plaintiff "located his undertaking establishment in some *remote and comparatively uninhabited part of Los Angeles city*, upon property which was only valuable for use as an undertaking establishment, *we would have a case paralleling* In re Throop, supra. In this case, however, the situation is *entirely different*, and comes clearly within the principle enunciated in *Ex parte Hadacheck*, supra. * * * " Such language is indicative of at least two things: First, that in circumstances "*paralleling* In re Throop," the law as there announced should be followed; and, secondly, that where the situation is "*entirely different*" and parallels the *Hadacheck Case*, the law as therein stated should be controlling. In such circumstances, the duty of this court is, if possible, to determine which of such cases in its facts presents the nearest parallel to the facts in the instant case, and in its judgment to be rendered thereon to be governed accordingly. Adverting to the *Throop Case*, it will be remembered that in effect the stone crusher was proposed to be permitted in a "very largely built up" section of the city, and was to be prohibited in a "sparsely settled" community; just as here, sanitariums are proposed to be permitted in a "densely populated" portion of the city and to be prohibited in portions of the city which are "sparsely inhabited." In the *Hadacheck Case*, the difficulty was not that the brick yard was permitted in a "densely populated" community and prohibited in an "uninhabited" area; but in effect was that it was not permitted in a described district which was altogether similar to other districts in which the operation and maintenance of brick yards were permitted. In addition to the *Throop Case*, it is difficult, if possible, to distinguish this case from the legal principles and their application to the respective facts as stated in each of the cases of *Curtis v. City of Los Angeles*, 172 Cal. 230, 156 P. 462, and *In re Smith*, 143 Cal. 368, 77 P. 180.

[3] Basing its judgment upon such authorities, this court is of the opinion that the ordinance here in question is unreasonable and discriminatory, and consequently unconstitutional and void.

The judgment is reversed.

We concur: CONREY, P. J.; YORK, J.

Emil WITTMAN and Elsie Wittman, Plaintiffs and Appellants, v. CITY OF LOS ANGELES (a Public Corporation), James E. Davis as the Chief of Police of the City of Los Angeles, and E. J. Lickley as the City Prosecutor of the City of Los Angeles, Defendants and Respondents.★

Civ. 6450.

District Court of Appeal, Second District, Division 1, California.

March 10, 1930.

Rehearing Denied March 31, 1930. Hearing Granted by Supreme Court May 8, 1930.

Appeal from Superior Court, Los Angeles County; H. V. Alvarado, Judge.

Woodruff, Musick, Pinney & Hartke, of Los Angeles, for appellants.

Jess E. Stephens, City Atty., and Frederick Von Schrader, Deputy City Atty., both of Los Angeles, for respondents.

HOUSER, J.

The facts in this case are practically identical with those set forth in the opinion this day filed in the case of *Jones v. City of Los Angeles* (Cal. App.) 286 P. 161. Relying upon such authority as decisive of the issues involved herein, it is ordered that the judgment be, and it is, reversed.

We concur: CONREY, P. J.; YORK, J.

Jerrold A. STERN, Plaintiff and Appellant, v. CITY OF LOS ANGELES (a Public Corporation), James E. Davis as the Chief of Police of the City of Los Angeles, and E. J. Lickley as the City Prosecutor of the City of Los Angeles, Defendants and Respondents.★★

Civ. 6451.

District Court of Appeal, Second District, Division 1, California.

March 10, 1930.

Rehearing Denied March 31, 1930. Hearing Granted by Supreme Court May 8, 1930.

Appeal from Superior Court, Los Angeles County; H. V. Alvarado, Judge.

Walter W. Rennie, of Venice, for appellant. Jess E. Stephens, City Atty., and Frederick Von Schrader, Deputy City Atty., both of Los Angeles, for respondents.

HOUSER, J.

The facts in this case are practically identical with those set forth in the opinion this day filed in the case of *Jones v. City of Los Angeles* (Cal. App.) 286 P. 161. Relying upon

such authority as decisive of the issues involved herein, it is ordered that the judgment be, and it is, reversed.

We concur: CONREY, P. J.; YORK, J.

Ruth Euna RUTHERFORD, Gertrude R. Glasow, and Gilbert H. Glasow, Plaintiffs and Appellants, v. CITY OF LOS ANGELES (a Municipal Corporation), James E. Davis as Chief of Police of the City of Los Angeles, and E. J. Lickley as City Prosecutor of the City of Los Angeles, Defendants and Respondents.★★

Civ. 6452.

District Court of Appeal, Second District, Division 1, California.

March 10, 1930.

Rehearing Denied March 31, 1930. Hearing Granted by Supreme Court May 8, 1930.

Appeal from Superior Court, Los Angeles County; H. V. Alvarado, Judge.

Roy A. Linn, of Los Angeles, for appellants.

Jess E. Stephens, City Atty., and Frederick Von Schrader, Deputy City Atty., both of Los Angeles, for respondents.

HOUSER, J.

The facts in this case are practically identical with those set forth in the opinion this day filed in the case of *Jones v. City of Los Angeles* (Cal. App.) 286 P. 161. Relying upon such authority as decisive of the issues involved herein, it is ordered that the judgment be, and it is, reversed.

We concur: CONREY, P. J.; YORK, J.

104 Cal. App. 349

MICHAELS et al. v. PACIFIC SOFT WATER LAUNDRY et al.†

Civ. 7255.

District Court of Appeal, First District, Division 2, California.

March 6, 1930.

As Modified on Denial of Rehearing April 5, 1930. Hearing Denied by Supreme Court May 5, 1930.

1. Equity Ⓒ66—**Licenses** Ⓒ39—**Corporation** has no greater rights nor less obligation to do equity in suit to declare sales of treasury stock void, because joined as party defendant by minority of board of directors.

In suit to declare sales of treasury stock of corporation void, which was in effect action to cancel contract for sale of stock on ground that sale violated conditions in permit of commissioner of corporation, corporation as such has no greater right and no less obligation to do equity because joined as party defendant by minority

★Rehearing denied. Hearing granted. 295 P. 22.

†Rehearing denied. 286 P. 1071.

★★Hearing granted. 295 P. 23.

of board of directors than if it had been made real party plaintiff through action of majority.

2. Corporations $\S$ 110—Corporation suing to cancel stock sold from treasury must restore, or offer to restore, everything of value received from purchaser (Civ. Code, $\S\S$ 1689, 1691).

Where corporation sues to cancel stock sold from treasury and for which it received full purchase price, it is in no better position than individual suing for rescission of contract on any grounds mentioned in Civ. Code $\S$ 1689, and it must have restored, or offered to restore, everything of value it received from the other party under section 1691.

3. Licenses $\S$ 39—In suit to cancel contract for sale of stock, purchaser could show purchase was in good faith without knowledge of infirmities.

In suit to cancel contract for sale of corporate stock on ground that sale violated conditions in permit of commissioner of corporations, in which evidence tended to show that corporation ratified sale and accepted and retained benefits, purchaser was entitled to show that purchase was made in good faith without knowledge of any infirmities, since result of such showing would be that corporation was guilty of misrepresentation and estopped to claim invalidity of sale.

4. Equity $\S$ 39(1), 66—One seeking equity must do equity, and court of equity assuming jurisdiction has jurisdiction of all equities in suit.

Where party seeks equity, he must do equity, and when court assumes jurisdiction in equity suit, it has jurisdiction of all equities in case.

5. Licenses $\S$ 39—In suit to cancel contract for sale of stock, findings against defendant on issues of fraud held unsupported.

In suit to cancel contract for sale of corporate stock on ground that sale violated conditions in permit of commissioner of corporations, in which plaintiffs failed to plead facts constituting fraud, conspiracy, or bad faith of defendant and failed to prove anything more than general suspicions, and defendant was denied opportunity of disproving charges, on ground that proof was immaterial, findings against defendant on such issues held wholly unsupported by pleading or proof.

6. Licenses $\S$ 39—Plaintiffs suing to cancel contract for sale of stock should by allegations in complaint have tendered back consideration.

In suit to cancel contract for sale of corporate stock on ground that sale violated conditions in permit of commissioner of corporations, plaintiffs should by appropriate allegations of their complaint have made tender of consideration of sale to defendant on behalf of corporation through judgment; plaintiffs having brought suit as minority of board of directors and joined corporation as party defendant.

7. Licenses $\S$ 39—Failure of plaintiffs suing to cancel stock sale contract to tender back consideration was not fatal.

In suit to cancel contract for sale of corporate stock on ground that sale violated conditions in permit of commissioner of corporations,

plaintiffs' failure to tender back consideration by appropriate allegations in complaint was not fatal to cause of action, since in equity case court may do exact justice between parties and is not limited to offers and demands of pleadings.

8. Evidence $\S$ 441(1)—Evidence in suit to cancel stock sale contract respecting notice to plaintiffs, and directors' authorization that president sell stock, held admissible to show plaintiffs waived written notice and waiver, not being objectionable under parol evidence rule.

In suit to cancel contract for sale of corporate stock on ground that sale violated conditions in permit of commissioner of corporations, evidence of written notice to plaintiffs as required by permit, and that directors voted unanimously to authorize president to sell stock, held not objectionable under parol evidence rule, since minutes of meeting are not written instruments, but was admissible for purpose of disclosing what actually took place, and as tending to prove defense that plaintiffs waived right to written notice and written waiver.

9. Estoppel $\S$ 52—One may waive right given by contract or advantage of law intended for his benefit (Civ. Code, $\S$ 3513).

Any person may waive advantage of law intended solely for his benefit under Civ. Code, $\S$ 3513, and may waive right given to him by contract or otherwise.

10. Licenses $\S$ 39—Defendants in suit to cancel stock sale contract could show plaintiffs did not exercise option to buy (Civ. Code, $\S$ 1756).

In suit to cancel contract for sale of corporate stock on ground that sale violated conditions in permit of commissioner of corporations, in which it appeared commissioner imposed condition giving each stockholder option to buy pro rata share of new stock, defendants could show that plaintiffs did not exercise option nor demand delivery within reasonable time under Civ. Code, $\S$ 1756.

11. Licenses $\S$ 39—Defendants in suit to cancel stock sale contract could show acts of plaintiffs tending to prove they ratified transaction and accepted benefits.

In suit to cancel contract for sale of corporate stock on ground that sale violated conditions in permit of commissioner of corporations, it was competent for defendants to show plaintiffs' acts tending to prove that they ratified transaction and accepted benefits without protest, where plaintiffs planted case firmly on strict wording of permit providing waiver of right to purchase must be in writing, since same result might have been reached by ratification.

12. Corporations $\S$ 386—Acts wholly beyond corporate powers are void and cannot be ratified, but acts irregular for failure to follow statutory regulation or condition are voidable.

Generally speaking, those acts which are wholly beyond corporate powers are void, and cannot be ratified by any subsequent act of corporation; but when act is merely irregular because corporate officers have failed to follow some statutory regulation or condition, it would be more proper to say that act is voidable rather than void.

13. Corporations ⇨72—Corporation may sell stock (Const. art. 12, § 11).

A corporation has power to sell its stock for a valuable consideration under Const. art. 12, § 11.

14. Corporations ⇨72—It is competent for Legislature to declare that conditions for benefit of individual in sale of stock may be waived by individual.

Limitations and conditions upon manner of sale of stock by corporation can be imposed by Legislature, but conditions which Legislature may exact it may also excuse, and therefore it is wholly competent for Legislature to declare that conditions for benefit of individual may be waived by individual.

15. Corporations ⇨103—Corporate officers' breach of statutory conditions in sale of stock may be ratified by corporation (Const. art. 12, § 11).

In sale of stock by corporation under Const. art. 12, § 11, breach of statutory conditions by corporate officers may be ratified by corporation.

16. Corporations ⇨388(2)—Corporation having received benefits of stock sale induced by officers' fraud cannot claim stock issue is void.

Where corporate stock has been sold through fraud of corporate officers, corporation is estopped, after having received and retained benefits of transaction, from claiming that issue of stock is void.

17. Licenses ⇨39—Defendants in suit to cancel stock sale transaction may show plaintiffs took no steps to restore consideration to purchaser.

In suit to cancel contract for sale of corporate stock on ground that sale violated conditions in permit of commissioner of corporations, it was competent for defendants to show that plaintiffs had taken no steps to restore, or offer to restore to purchaser, consideration which corporation received, notwithstanding plaintiffs' contention that they were not in control of affairs of corporation, and therefore in no position to make such offer.

Appeal from Superior Court, Los Angeles County; Hugh J. Crawford, Judge.

Suit by Aaron Michaels and another against the Pacific Soft Water Laundry and others, to declare sales of treasury stock void. Judgment for plaintiffs, and defendants appeal.

Reversed with directions.

See also 286 P. 172.

Walter J. Little and Wm. B. Gilroy, both of Los Angeles, for appellants Pacific Soft Water Laundry, Bull, Fletcher, and Craft.

Frank P. Doherty, of Los Angeles, for appellant Thompson.

J. M. Stevens, Harry Povey, B. O. Tinglof, and J. E. Haley, all of Los Angeles, for respondents.

NOURSE, Acting P. J.

The two plaintiffs, as stockholders in the defendant laundry corporation, sued to have it declared that the sales of treasury stock of the corporation to defendants Bull and Thompson were void. The cause was tried by the court without a jury and resulted in a judgment for plaintiffs as prayed. The defendants Bull, Fletcher, and Craft joined with the corporation in an appeal from the judgment. The defendant Thompson prosecutes a separate appeal. Both appeals are presented on a joint bill of exceptions.

The two plaintiffs constituted the minority of the board of directors of the laundry company. The defendants Bull, Fletcher, and Craft constituted a majority of the board. The corporation was capitalized for \$200,000, divided into 200,000 shares. Seventy thousand shares had been issued and were outstanding at the time the events mentioned herein arose. Of this number Michaels owned and held 37,000 and was in control of the corporation affairs and business. The three director defendants petitioned the state corporation commissioner for leave to issue 30,000 additional shares from the treasury in order to liquidate outstanding indebtedness of the corporation. The two plaintiffs opposed the petition before the commission, but on December 15, 1925, after hearing thereon, the petition was granted upon the condition that the stock should first be offered to existing stockholders in proportion to the stock then held by them. The permit contained the following stipulation, which is the basis of the controversy: "Sixty days after such offer shall have been made in writing to said stockholders, or upon receipt of the written waiver of such stockholders of the exercise of the right herein given to subscribe to said shares, any shares remaining unsubscribed for may be offered and sold to any other stockholders of said company, or to the public, for the consideration hereinbefore recited."

On January 5, 1926, at a meeting of the board of directors, at which the five directors mentioned were present, the matter of the sale of the additional shares was discussed. The minutes of this meeting received in evidence recite that Michaels moved "that the stock be sold at once. Mr. Pervine seconded the motion. The motion was put before the directors and discussion asked for. Mr. Michaels then stated he did not want the stock sold. The president read the permit and gave Mr. Michaels a copy. Mr. Craft and Mr. Fletcher said the permit was for the purpose of paying the mortgage, and would leave the matter in the hands of the president."

More than 60 days after this meeting the president negotiated the sale of 21,500 shares of said stock to defendant Thompson, and at

the same time 600 shares of said stock were sold to defendant Bull. The funds received from these sales, \$22,100, were paid into the treasury of the corporation and were used by the corporation to pay off a note and mortgage owned by the California Bank. The next meeting of the directors of the corporation was held on March 17, 1926, and at that time the president informed the members of the board that the stock for which a permit to sell had been granted had nearly all been disposed of and that the money was being used to pay off this mortgage which became due in April. No objection to these proceedings was made by any member of the board, and no request or demand was made by the plaintiffs that they be permitted to purchase any portion of the stock offered. At the close of plaintiffs' case it was stipulated that the plaintiff Michaels had tendered \$18,000 to purchase his proportion of the stock from the corporation in accordance with the terms of the permit. Objection was made to this tender on the ground that it was too late because the corporation did not have sufficient shares to sell to the plaintiff.

No tender was made by either of the plaintiffs as individuals or on behalf of the corporation to repurchase the stock sold to either Thompson or Bull, and no offer was made to restore to them the moneys received by the corporation from them and used by the corporation in the liquidation of its indebtedness. Notwithstanding this, the trial court rendered judgment for the corporation, declaring the sale void and ordering the certificates canceled without restoration to the purchasers of any part of the profits of the alleged "void" sale.

[1] At the beginning of the inquiry it is proper to determine the exact nature of the action. It is an action brought by the corporation to recover for some conceived wrong done to the corporation itself, but because the majority of the governing board of directors refuses to prosecute the action in the name of the corporation, it is in reality instituted by two of the stockholders on behalf of the corporation and the latter is joined as a party defendant. There are certain features of the proceeding in which the plaintiffs, particularly Michaels, are personally interested beyond the redress which they seek for the corporation. Thus, he alleges that by reason of the sale, he lost control of the corporation, and the inference is that if the stock is returned to the treasury and he is permitted to purchase his share this control would be retained. But the plaintiffs seek no relief, as individuals, against any of the defendants, as they might have done, and the prayer of the complaint and the judgment which followed it returning to the treasury of the corporation the entire number of 22,100 shares to be resold for the full price of \$1 a share in accordance with the terms of the permit mani-

festly stamps the corporation as the real party plaintiff. In their briefs filed on this appeal, these plaintiffs insist with some spirit that they are not suing on behalf of the corporation, but that they are merely seeking individual redress. However, there has been filed with us an appeal in another action entitled Michaels et al. v. Pacific Soft Water Laundry et al., 286 P. 172, which is an action brought under section 315, Civil Code, to determine the validity of an election of directors of the laundry corporation. With the papers on the appeal in the instant case the parties have filed a stipulation that these two cases may be consolidated for all purposes of appeal and hearing. In the brief filed by these plaintiffs in Michaels v. Pacific Soft Water Laundry, supra, they state that the instant case was brought by them as stockholders "for the benefit and use of the corporation" for the reason that the corporation is dominated by the other defendants. We are satisfied that such is the nature of the action and that the case is like *Turner v. Markham*, 155 Cal. 562, 569, 102 P. 272; *Difani v. Riverside County Oil Co.*, 201 Cal. 210, 215, 256 P. 210; and *Eggers v. National Radio Co.* (Cal. App.) 281 P. 58, an action to preserve the corporate property or corporate interests brought by a stockholder where the governing directors refused to act or are guilty of fraud or bad faith in the protection and preservation of the corporate interests.

[2, 3] This interest of the corporation as such is most important in connection with the appeal of Thompson. All that the respondents sought as individuals was the right to purchase their proportionate share of the stock issued and to pay therefor into the treasury of the corporation the purchase price fixed by the corporation commissioner. But to do this it was necessary that the corporation have returned to its treasury a sufficient number of said shares to enable it to sell to the respondents their quota. Thus in seeking relief for themselves they first must have the relief which they sought on behalf of the corporation—the return of the stock to the treasury. With this in view we are confronted with the question of the rights as they exist as between the corporation and the purchasers of the stock. Thus if the respondents had control of the governing body of the corporation and sued in the name of the corporation for the cancellation of the stock, what would be the rights of the corporation as between it and the stock purchasers? Manifestly, the corporation as such has no greater right and has no less obligation to do equity because it is joined as a party defendant by the minority of the board than if it had been made the real party plaintiff through the action of a majority. Thus, when a corporation sues to cancel shares of stock which it has sold from its treasury and for which it has received the full purchase

price, is in no better position than an individual who sues for the rescission of a contract upon any of the grounds mentioned in section 1689, Civil Code. At the very threshold of such a suit it is necessary that the party seeking relief must have restored or offered to restore to the other party everything of value which he has received from him. Section 1691, Civ. Code. Here the undisputed evidence is that the president of the corporation, acting under what he deemed to be the authorization of the directors of the corporation, negotiated the sale of the stock to Thompson; that he reported the transaction to the full board of directors; that the money was thereafter received and placed in the treasury of the corporation without objection or remonstrance on the part of any member of the board; that it was thereafter used for the liquidation of an outstanding indebtedness of the corporation with the knowledge and consent of the full board of directors; that the money so received was still retained by the corporation at the time of the trial; and that, though one of the respondents made an offer to purchase additional stock from the corporation, no one on behalf of the respondents or on behalf of the corporation at any time made any tender or offer to restore to the appellant Thompson any portion of the benefits received from him. Basing its judgment upon the finding that the three defendant directors were guilty of fraud in making the sale to Thompson, the trial court declared that all the shares of stock held by Thompson should be void, ordered the certificate to be canceled, and thus returned to the treasury of the corporation all these shares without affording Thompson any relief against the corporation. If there were any evidence supporting the finding of the trial court that the purchase made by Thompson was not made in good faith by him, but was made for the purpose of defrauding the respondents, there might be justification for exacting some penalty from him, but the complaint not only failed to sufficiently charge Thompson with fraud in this respect, but when the plaintiffs came to their proof they showed that they had nothing but mere suspicions upon which to base their allegations. When Michaels was asked the direct question as to whether he maintained that Thompson conspired with the other directors in the sale of the stock, he answered that he had no proof, but he entertained a suspicion that Thompson had made arrangements with the others; however, he would not say that this was true. No other testimony of any character connected Thompson in the slightest degree with any conspiracy or fraudulent scheme in connection with the sale, but the remarkable situation was that when this appellant attempted to prove his good faith, that he purchased the stock in the regular course of business, that he was informed by the president of the corporation

prior to his purchase that written notice had been given to all the other stockholders and that written waivers had been received from them, and that he purchased the stock without notice or knowledge that anything irregular had been done, each question and each offer of proof was objected to on the ground that it was "immaterial," and every objection on that ground was sustained. Then, without the slightest evidence to support the findings and with a rigid denial of every attempt to prove the facts, the trial court made elaborate findings adverse to this appellant on every issue of fact involving good faith, knowledge, conspiracy, and fraud. He was thus skinned, drawn, and quartered without the opportunity even to offer a prayer.

To the charge that these findings are wholly unsupported by any evidence the respondents make no reply; the only defense made of the rulings rejecting the evidence which would have required findings favorable to this appellant is that, because the certificates of stock are not negotiable, it is immaterial whether Thompson was an innocent purchaser in good faith. But the negotiability of the instrument is beside the question. The good faith of the purchaser is of singular importance in relation to the rights of the corporation and the purchaser. In *MacDonald v. Reich & Lievre*, 281 P. 106, 108, we said: "When a corporation issues to the public certificates of stock, regular on their face, it amounts substantially to a representation that the certificates are regular and valid. Certificates of stock so issued by a corporation, but which were irregular or void for reasons not participated in by the stockholder, have been held to amount to a misrepresentation and fraud upon the part of the corporation officials for which the corporation is answerable. *Green v. Caribou Oil Mining Co.*, 179 Cal. 787, 178 P. 950; *Sykes v. Pure Food Cider Co.*, 157 Iowa, 601, 138 N. W. 554; *Windram v. French*, 151 Mass. 547, 24 N. E. 914, 8 L. R. A. 750." (Emphasis ours.) The issue involved in that case was the sale of corporate stock without a permit from the corporation commissioner. No question of waiver of a personal right or of ratification was involved. But here, where the evidence tended to show that the corporation ratified the sale and accepted and retained the benefits, the purchaser was entitled to show that the purchase had been made in good faith and without knowledge of any infirmities. If this appellant had been permitted to make this showing, then the result would have been that the corporation was guilty of misrepresentation and fraud as to him, and the corporation would then have been estopped to claim the invalidity of the sale. The rule of the cases cited by respondents would enter here—that the transferee of certificates of stock takes them subject to "all equities of the corporation." 6 Cal. Jur. p. 785, and cases cited. But the rule upon

which respondents so confidently rely forces the inquiry: What equities has a corporation against an innocent purchaser in good faith of treasury stock sold to him through the misrepresentation and fraud of the corporation? That the corporation cannot rely on its own fraud to claim the invalidity of the sale to the injury of an innocent third party when the corporation is the party defendant is the rule of *Smith v. Martin*, 135 Cal. 247, 67 P. 779; *Daily Telegram v. Ocean View Oil Co.*, 65 Cal. App. 608, 224 P. 1006; and *Cortelyou v. Imperial Land Co.*, 156 Cal. 373, 104 P. 695. We cannot perceive how the rule could be less applicable when the corporation is the party plaintiff.

[4] It would be a reproach on the law if a party had no remedy in a case of this kind, and it is no answer to say that he might sue the corporation for the loss he has suffered. The suit which the respondents have here instituted is in equity. To seek equity one must do equity, and, when the court assumes jurisdiction, it has jurisdiction of all the equities in the case. To require the stock issued to appellant Thompson to be canceled and returned to the treasury of the corporation without restoring the purchase price to him is to accomplish through the guise of equity a greater fraud upon him than the fraud of which the respondents complain. The fraud charged in the complaint—the fraud of the majority of the directors—was the fraud of the corporation, yet this judgment determines that the corporation must profit by its own fraud and that these directors who were found guilty of the fraud must also, as stockholders, incidentally profit by their own fraud. But this is not all. The minority directors who are both stockholders in the corporation are also permitted to profit by the fraud which they both so strenuously condemn.

[5] As to the appellant Thompson the case is this: The respondents failed to plead any facts constituting fraud, conspiracy, or bad faith on his part. The respondents wholly failed to prove anything more than their general suspicions of the conduct of this appellant, while the appellant was denied every opportunity of disproving these charges upon the ground that such proof was immaterial. The findings on these issues are therefore wholly unsupported by pleading or proof, and the judgment as to him must be reversed.

[6, 7] In the record in *Michaels v. Pacific Soft Water Laundry*, supra, to which we are permitted to refer by the stipulation above mentioned, it appears that the respondents might have assumed control of the governing board of the corporation some time in the year 1927. The question will therefore arise on a retrial as to this appellant whether the respondents, after they had the ability to do

so, made a sufficient tender or offer to restore to him within a reasonable time. But in this connection we should add that we do not hold that, before they instituted the action, the respondents must have tendered, or offered to restore, the consideration of the sale to Thompson. They should have, by appropriate allegations in their complaint, made such tender on behalf of the corporation through the judgment. However, their failure to do so is not fatal to their cause of action because, this being a case in equity, the court may do exact justice between the parties and is not limited to the offers and demands of the pleadings. *Wills v. Porter*, 132 Cal. 516, 521, 64 P. 896; *Connell v. Crawford*, 92 Cal. App. 715, 719, 268 P. 948. Thus, it is said, in *Kelley v. Owens*, 120 Cal. 502, 511, 47 P. 369, 52 P. 797, that one of the exceptions to the rule as to restoration, is "where, without any fault of plaintiff, there have been peculiar complications which make it impossible for plaintiff to offer full restoration, although the circumstances are such that a court of chancery may by a final decree fully adjust the equities between the parties." *Cal., etc., Co. v. Schiappa-Pietra*, 151 Cal. 732, 739, 91 P. 593; *Rosemead Company v. Shipley Co.* (Cal. Sup.) 278 P. 1038.

The fact that the respondents were in the minority in the board of directors might excuse them from making an offer of restoration to Thompson because, in the final analysis, such restoration must be made by the corporate entity, but, if they have since assumed control of the corporation affairs, and no offer has been made on behalf of the corporation through them, the exception to the rule hereinbefore noted would no longer apply.

The cause as to Thompson, therefore, must be retried upon the issues whether the complaining stockholders have in fact assumed control of the corporate entity, whether, after assuming such control, a sufficient tender and offer to restore was made within a reasonable time, and whether, by accepting the benefits of the sale of the stock to Thompson, the corporation, and these respondents, validated the sale by ratifying the transaction. But here it should be noted that, if on a retrial as to the other appellants, judgment should go to them, such judgment would, of course, inure to the benefit of appellant Thompson.

[8-10] As to the other appellants, the cause must be reversed for the manifest errors occurring throughout the trial which denied to them the right to make any defense to the charges in the complaint. One hundred and eighty-two specifications are assigned as error in this respect. It would serve no purpose to consider these exceptions separately or to state how many of these constitute reversible error. It is sufficient to state generally that,

stripped of all its trimmings, this is an action to cancel a contract for the sale of corporate stock upon the ground that the sale violated the conditions contained in the permit of the commissioner of corporations. To the issue of fraud charged to the three directors, defendants endeavored to prove: First, that they had complied with the spirit and purpose of the permit; second, that the stipulations therein for written notice and written waiver were expressly waived by the respondents; third, that the president of the corporation was authorized by the unanimous vote of the directors, including these respondents, to sell the stock in the manner in which he did; fourth, that the corporation and these two respondents ratified the sale and accepted the benefits thereof; and fifth, that the corporation as the real party plaintiff has failed to take the necessary steps to enable it to cancel the contract of sale.

Upon the first three points noted these appellants sought to prove that they had given to the respondents written notice as required by the permit when they handed them a printed copy of the commissioner's permit, and that, at the meeting held on January 5, the directors voted unanimously to authorize the president to sell the stock in accordance with his own judgment. Such evidence was not objectionable under the parol evidence rule. In *Lawrence v. Premier Indem. Assur. Co.*, 180 Cal. 688, 697, 182 P. 431, 435, the Supreme Court said: "But minutes of a meeting are not a written instrument. Their function is merely to act as a written record of what took place at the meeting. That record may be true or it may not be, and in the absence of the element of estoppel, as where a party has acted in justifiable reliance upon the minutes, it is permitted to the corporation or to anyone else to show what actually did take place at the meeting. *Gilson, etc., Co. v. Gilson et. al.*, 51 Cal. 341; *Boggs v. Lakeport, etc., Ass'n*, 111 Cal. 354, 43 P. 1106; 7 R. C. L. § 126. In the present case there is no element of estoppel, and it was permissible for the defendants to show the full transaction, although but a part of it appeared in the minutes." Here no element of estoppel was present in so far as the respondents were concerned, but the evidence was admissible not only for the purpose of disclosing what actually did take place, but as tending to prove the defense that the respondents waived the right to written notice and written waiver. Any one may waive the advantage of a law intended solely for his benefit. Section 3513, Civ. Code. He may, of course, waive a right given to him by contract or otherwise. The effect of the condition imposed by the corporation commissioner was to give to each stockholder an option to buy a pro rata share of the new stock. Having such an option, it was wholly proper for the appellants to seek to

prove that the respondents did not exercise it and did not demand delivery within a reasonable time as required by section 1756, Civil Code. It is sufficient to say that the evidence designed to establish these defenses was improperly denied admission.

[11-16] Under the fourth point mentioned it was competent for these appellants to show the acts of the respondents tending to prove that they ratified the transaction and accepted the benefits thereof without protest. Respondents planted their case firmly on the strict wording of the permit providing that a waiver of the right to purchase must be in writing. Now, if no express waiver of this right could be made unless in writing, the same result might have been reached by a ratification. Herein arises the important distinction between those corporate acts which are ultra vires and those which are merely irregular. Generally speaking, those acts which are wholly beyond the corporate powers are void and cannot be ratified by any subsequent act of the corporation. But when an act is merely irregular because the corporate officers have failed to follow some statutory regulation or condition, it would be more proper to say that the act is voidable rather than void. A corporation has power to sell its stock for a valuable consideration. Const. art. 12, § 11. Limitations and conditions upon the manner of sale can be imposed by the Legislature. But, the conditions which the Legislature may exact, it may also excuse. It is wholly competent, therefore, for the Legislature to declare, as it has done, that when these conditions are for the benefit of an individual, and not for the public, the individual may waive them. It is equally true that the breach of such conditions by the corporate officers may be ratified by the corporation. Thus, where corporate stock has been sold through the fraud of the corporate officers, the corporation is estopped, after having received and retained the benefits of the transaction, from claiming that the issue of stock is void. *Winters v. Lindsay*, 52 Cal. App. 93, 96, 198 P. 43; *Smith v. Martin*, 135 Cal. 248, 251, 67 P. 779; *James Eva Estate v. Oakland B. & M. Co.*, 40 Cal. App. 515, 520, 181 P. 415; *American Wire-Nail Co. v. Bayless*, 91 Ky. 94, 15 S. W. 10, 11; *Central Transp. Co. v. Pullman's Car Co.*, 139 U. S. 24, 60, 11 S. Ct. 478, 35 L. Ed. 55.

Disregarding the sale to Bull, who had full knowledge of all the transactions, but directing our attention solely to the sale to Thompson, we must conclude that the sale to him was not ultra vires in the strict sense. It would be more proper to say that the sale was voidable rather than wholly void because it could have been "validated" by the waiver by the respondents of their privilege to purchase, or by their ratification after the sale, which meets the same purpose.

[17] Under the fifth point mentioned it was competent for these appellants to show that the respondents had taken no steps to restore or offer to restore to the purchaser of the stock the consideration which the corporation had received. To this the respondents answered that they were not in control of the affairs of the corporation and were, therefore, prior to the commencement of the action, in no position to make such an offer. However, the evidence was admissible for the purpose of showing that the corporation, acting through its entire directorate, had ratified the sale and accepted the benefits, and that no offer had been made by the respondents, either directly or through the judgment prayed for, to restore the consideration. The cause must be reversed as to these appellants, with directions for a new trial on all the issues, but as to the appellant Thompson the retrial is confined to the issues heretofore mentioned.

Judgment reversed.

We concur: STURTEVANT, J.; DOOLING, Justice pro tem.

104 Cal. App. 366

**MICHAELS v. PACIFIC SOFT WATER
LAUNDRY et al.***
Civ. 7256.

District Court of Appeal, First District, Division 2, California.

March 6, 1930.

Rehearing Denied April 5, 1930. Hearing Denied by Supreme Court May 5, 1930.

1. Corporations $\S$ 283(2)—Pledgee of stock may be represented in election of officers where pledgor fails to appear (Civ. Code, $\S$ 313).

Where purchaser and pledgor of corporate stock failed to appear at meeting for election of officers, either in person or by proxy to vote such stock, pledgee had right to be represented under Civ. Code, $\S$ 313.

2. Corporations $\S$ 283(3)—Evidence, in action to test validity of election of corporate officers, justified finding favorable to pledgee voting stock, on issue of good faith.

In action to test validity of election of corporate officers, in which question was whether pledgee of stock was legally entitled to vote it, trial court under evidence before it should have made finding favorable to pledgee on issue whether it accepted stock in regular course of business and in good faith as security for loan made in good faith without knowledge of facts affecting validity of stock.

3. Evidence $\S$ 582—Witness' testimony cannot be wholly disregarded, but unless impeached or contradicted or inherently improbable, it must be accepted as true.

General rule is that testimony of witness cannot be wholly disregarded, but that unless it is impeached or contradicted by other testimony, by some presumption, or by an inference deducible from facts proved, or unless it is inherently improbable, trial court must accept it as true.

4. Evidence $\S$ 73—Statutory presumption held evidence of good faith of pledgee voting corporate stock in election of corporate officers (Code Civ. Proc. $\S$ 1963, subds. 1, 19, 20).

In action to test validity of election of corporate officers, presumption against fraud, presumption that private transactions have been fair and regular, and presumption that ordinary course of business has been followed under Code Civ. Proc. $\S$ 1963, subds. 1, 19, and 20, were all evidence of good faith of pledgee of stock; controlling question in case being whether pledgee was legally entitled to vote such stock.

Appeal from Superior Court, Los Angeles County; Hugh J. Crawford, Judge.

In the matter of the application of Aaron Michaels and others, stockholders of the Pacific Soft Water Laundry, to test the validity of the election of W. C. Bull and others as directors of the corporation, in which the Pacific Soft Water Laundry was made a party respondent. From an adverse judgment, respondents appeal.

Reversed.

Walter J. Little and William B. Gilroy, both of Los Angeles, for appellants Pacific Soft Water Laundry, Bull, Fletcher, and Craft.

Frank P. Doherty, of Los Angeles, for appellant Thompson.

Samuel J. Crawford, of Ocean Park, for appellant Marine Bank of Ocean Park.

B. O. Tinglof and J. E. Haley, both of Los Angeles, for respondents.

NOURSE, Acting P. J.

Petitioners sued under section 315, Civil Code, to test the validity of an election of directors of the respondent Pacific Soft Water Laundry Corporation. Petitioners had judgment from which three separate appeals were taken. The respondents Bull, Fletcher, and Craft joined with the corporation in one appeal, the respondent Thompson appeals in his own behalf, as does the respondent Marine Bank of Ocean Park. All appeals are by stipulation heard upon the same bill of exceptions.

The controversy comes out of the same transactions which were considered in Michaels et al. v. Pacific Soft Water Laundry Corporation, 286 P. 165, this day decided, and

arises over the annual meeting of the stockholders of the laundry corporation held on May 19, 1927. At that meeting the Marine Bank of Ocean Park, represented by its agent and proxy, voted 21,500 shares of the capital stock of the laundry corporation as pledgee of the respondent Thompson; the shares of stock having been pledged to the bank as security for the sum of \$10,000 which the bank loaned to Thompson. At that election the petitioners Michaels and Pervine and the respondent Craft were elected without controversy. If the stock represented by the bank was legally voted, the respondents Bull and Fletcher would have been elected; but if this stock was not legally voted, then the petitioner Wright would have been elected as a director and the respondents Bull and Fletcher would each have received a tie vote for one position. The trial court found that the stock which had been issued to Thompson was void and that the bank could not vote it at the stockholders' meeting. It therefore gave judgment declaring the directors to be Michaels, Pervine, Craft, and Wright, and directed a new election to be held on account of the tie vote between Bull and Fletcher. The sole question on this appeal is, therefore, whether the Marine Bank was legally entitled to vote this stock.

[1-4] It is conceded that the pledgor Thompson failed to appear at the meeting in person or by proxy to vote the stock. The right of the pledgee to be represented under such conditions is fixed by section 313, Civil Code. Here the bank pleaded that it accepted the stock in the regular course of business and in good faith as security for a loan which was made in good faith, and that it had no knowledge of any facts or circumstances affecting the validity of the stock. In support of the allegation the bank offered the positive testimony of its vice president, who was shown to have been the officer who had conducted all the proceedings relating to the loan. The petitioners offered no testimony of any character to the contrary, but the trial court found the allegation to be untrue. It was an essential part of the defense of the bank in this proceeding that it had received the stock in the ordinary course of business and in good faith and that it was not a party to any of the transactions complained of. What we have said in the other case concerning the rights of an innocent purchaser is applicable equally to the bank in this case, and the rule of *Green v. Caribou Oil Min. Co.*, 179 Cal. 787, 178 P. 950, is determinative. Upon the evidence before it the trial court should have made a finding favorable to the bank upon this issue. The general rule is that the testimony of a witness cannot be wholly disregarded, but that unless it is impeached or contradicted by other testimony, by some presumption, or by an inference deducible from

the facts proved, or unless it is inherently improbable, the trial court must accept it as true. 10 Cal. Jur. 1143; *Stewart v. Silva*, 192 Cal. 405, 410, concurring opinion, 221 P. 191; *Sun-Maid Raisin Growers v. Papazian*, 74 Cal. App. 231, 239, 240 P. 47. This rule is particularly applicable to a case such as we have here where the issue is fraud or good faith. The presumption against fraud, which approximates the presumption against crime (*Truett v. Onderdonk*, 120 Cal. 581, 588, 53 P. 26), the presumption that private transactions have been fair and regular, and the presumption that the ordinary course of business has been followed (section 1963, subs. 1, 19 and 20, Code Civ. Proc.), are all evidence of good faith of the bank in this particular, and a contrary finding cannot stand without some evidence rebutting them.

The two other appeals raise the same questions which have been considered in the other case. As to these appellants the hearing on this petition consisted of a transcript of the record of the former case. As the judgment adverse to these appellants in that case has been reversed for further proceedings, it necessarily follows that the judgment here must be reversed to await the outcome of those proceedings.

Judgment reversed.

We concur: STURTEVANT, J.; DOOLING, Justice pro tem.

104 Cal. App. 462

STRAUCH v. SAN MATEO JUNIOR COLLEGE DIST. OF SAN MATEO COUNTY.★
Civ. 6904.

District Court of Appeal, First District, Division 1, California.

March 12, 1930.

Rehearing Denied April 11, 1930. Hearing Denied by Supreme Court May 8, 1930.

1. Work and labor §10—Recovery could not be had on quantum meruit, where seller furnished heaters for school building without contract complying with statute (Pol. Code § 1612, as amended by St. 1917, p. 204).

Where clerk of board of trustees of junior college district placed order with seller for electric heaters to be installed in school building, which heaters were supplied by seller, but no attempt was made to comply with provisions of Pol. Code § 1612, as amended by St. 1917, p. 204, value of equipment could not be recovered in action of quantum meruit.

2. Schools and school districts §82(1)—No contractual obligation existed, where seller furnished heaters for school building without contract complying with statute (Pol. Code § 1612, as amended by St. 1917, p. 204).

Where clerk of board of trustees of junior college district placed order with seller for electrical heaters to be installed in school building,

which heaters were supplied by seller, but no attempt was made to comply with provisions of Pol. Code § 1612, as amended by St. 1917, p. 204, no contractual obligation to pay for equipment existed.

3. Schools and school districts ⇨82(1)—Seller may recover value of property furnished school district, where attempt to comply with statutory provisions was made and district has used property.

Where contract or agreement upon which seller seeks to recover price of goods is within scope of powers of school district to make, and an attempt to comply with provisions of statute has been made, and it appears that district has accepted and used property of seller, recovery of value thereof will not be denied on ground that there was failure to conform strictly with procedure prescribed by statute.

4. Schools and school districts ⇨83—Contract made with school district without attempt to comply with statutory requirements is void, and no implied liability can arise thereunder.

When by statute power of board of trustees of school district to make contract is limited to certain prescribed method to which there has been no attempt to comply, contract attempted to be made is void, and no implied liability can arise for benefits received thereunder.

5. Schools and school districts ⇨89—School district's failure to return heaters on demand of seller held not to create liability in conversion, where contract was not made in compliance with statute (Pol. Code, § 1612, as amended by St. 1917, p. 204).

Where clerk of board of trustees of school district placed order with seller for electrical heaters to be installed in school building, but contract was not made in compliance with provisions of Pol. Code, § 1612, as amended by St. 1917, p. 204, and seller demanded that price of equipment be paid, or, in lieu thereof, that equipment be returned, which demand was refused by school district, judgment for value of property could not be rendered on theory that failure of district to return goods on demand created liability in damages for conversion.

6. Schools and school districts ⇨83—Seller could not recover value received by school district, where no attempt to comply with statute was made (Pol. Code, § 1612, as amended by St. 1917, p. 204).

Where clerk of board of trustees of school district placed order with seller for electrical heaters to be installed in school building, and thereafter seller installed heaters, but no contract was made or attempted to be made in compliance with provisions of Pol. Code, § 1612, as amended by St. 1917, p. 204, seller could not recover for value of heaters on implied liability arising for benefits received.

7. Schools and school districts ⇨82(1)—Seller furnishing school district electrical heaters without compliance with statutory requirements, where heaters could be removed without damage to building, held entitled to recover property (Pol. Code, § 1612, as amended by St. 1917, p. 204).

Where clerk of board of trustees of school district placed order with seller for electrical

heaters to be installed in school building, and thereafter seller installed heaters, but no contract was made in compliance with provisions of Pol. Code, § 1612, as amended by St. 1917, p. 204, but heaters could be removed and returned to seller without injuring building, seller held entitled to recover heaters.

Appeal from Superior Court, San Mateo County; George H. Buck, Judge.

Action by A. Strauch against the San Mateo Junior College District of San Mateo County. Judgment for plaintiff, and defendant appeals.

Reversed, with directions.

Thomas H. Breeze, of San Francisco, for appellant.

William T. Sweigert, of San Francisco, for respondent.

PER CURIAM.

This is an action to recover the value, or in lieu thereof the possession, of certain electrical heating equipment furnished by the plaintiff to the defendant. The cause was submitted to the trial court upon an agreed statement of facts. Findings and conclusions of law were expressly waived, and judgment was entered against the defendant for the value of the equipment.

The facts are as follows: About the month of December, 1927, the clerk of defendant's board of trustees placed an order with plaintiff for several electrical heaters to be installed in defendant's school building, the price being \$1,950. Thereafter the equipment was installed, and defendant has ever since used the same for heating purposes. The order was given without a previous notice or call for bids by the trustees, and no bid was made by plaintiff. At the time the order was placed and the equipment delivered no emergency existed whereby any repairs, alterations, work, or improvement was necessary to permit the continuance of existing school classes, and the order was not placed or accepted pursuant to the unanimous or any vote of the trustees of defendant, or with the approval of the county superintendent of schools of San Mateo county. At the time the order was placed and accepted defendant did not have an average attendance of one thousand or more pupils as shown by the report of the county superintendent of schools for the preceding school year, and the trustees had not previously secured from responsible bidders three or any estimates of the cost of furnishing such or similar equipment to the district. The parties agreed that the reasonable value of the equipment is the sum for which judgment was entered; that the equipment has not been permanently attached to the school building and could be removed and returned to the plaintiff without injuring the build-

ing; that demand that the price of the equipment be paid, or in lieu thereof that the equipment be returned, has been made, which demand the defendant refused; that the refusal is based solely on the ground that the contract for the purchase of the equipment was not entered into in compliance with the provisions of section 1612 of the Political Code, as amended in 1927 (St. 1927, p. 204).

[1, 2] It is admitted that there was no attempt to comply with the provisions of the above section, and that under the general rule in such cases there is no contractual obligation to pay for the equipment, and that the value thereof cannot be recovered in an action of quantum meruit. *Reams v. Cooley*, 171 Cal. 150, 152 P. 293, Ann. Cas. 1917A, 1260. It is urged, however, that the district, having accepted and used the equipment, is estopped from claiming that the statute was not complied with, and also that its refusal to redeliver the property upon demand constituted a conversion. It is therefore contended that the judgment was proper and should be affirmed.

[3-6] It has been held that, where the contract or agreement upon which recovery has been sought is within the scope of the powers of the school district or municipality to make, and an attempt to comply with the provisions of the statute has been made, and it further appears that the district or municipality has accepted and used the property of the plaintiff, recovery of the value thereof will not be denied on the ground that there was a failure to conform strictly with the procedure prescribed by statute. *McCormick Lumber Co. v. Highland School District*, 26 Cal. App. 641, 147 P. 1183; *Warren Bros. Co. v. Boyle*, 42 Cal. App. 246, 183 P. 706; *Miller v. Boyle*, 43 Cal. App. 39, 184 P. 421; *Clark v. Conley School District*, 86 Cal. App. 527, 261 P. 723. The rule is well settled, however, that, when by statute the power of a board or municipality to make a contract is limited to a certain prescribed method to which there has been no attempt to conform, a contract attempted to be made is void, and no implied liability can arise for the benefits received thereunder (*Zottman v. San Francisco*, 20 Cal. 96, 81 Am. Dec. 96; *Reams v. Cooley*, supra; *Clinton Construction Co. v. Clay*, 34 Cal. App. 625, 168 P. 588; *Nash v. City of Los Angeles*,

78 Cal. App. 516, 248 P. 689), nor can the same be the subject of estoppel in pais (*La Societa Italiana, etc., v. San Francisco*, 131 Cal. 169, 63 P. 174, 53 L. R. A. 382; *Wichmann v. City of Placerville*, 147 Cal. 162, 81 P. 537; *Foxen v. Santa Barbara*, 166 Cal. 77, 134 P. 1142). Without holding that the district or municipality may not be held liable for damages for conversion in a proper case (43 Cor. Jur., Mun. Corporations, § 1737, p. 960), to permit the recovery of the value of property delivered pursuant to agreements which are void under the statute, where the district or municipality fails or refuses to redeliver on demand, would accomplish in the majority of cases the exact result which, as held in the above decisions, the law forbids (*Floyd County v. Allen*, 137 Ky. 575, 126 S. W. 124, 27 L. R. A. [N. S.] 1125). And we are of the opinion that the judgment in the present case for the value of the property rendered, on the theory that the failure of the defendant to return the same on demand created a liability in damages for its conversion, cannot under the facts be sustained.

[7] In such cases, however, the plaintiff is not without remedy, as the possession of the property, if it can be removed without injury to other property of the district or municipality, may be recovered (*City of Bardwell v. Southern, etc., Works*, 130 Ky. 222, 113 S. W. 97, 20 L. R. A. [N. S.] 110; *La France, etc., Co. v. Syracuse*, 33 Misc. Rep. 516, 68 N. Y. S. 894; *Mineralized Rubber Co. v. Cleburne*, 22 Tex. Civ. App. 621, 56 S. W. 220; *Gamewell Fire Alarm, etc., Co. v. Los Angeles*, 45 Cal. App. 149, 187 P. 163), and this has been held to be the only remedy available (*Superior, etc., Co. v. School District No. 63*, 28 Okl. 293, 114 P. 328, 37 L. R. A. [N. S.] 1054; *Moe v. Millard, etc., Dist.*, 54 Utah, 144, 179 P. 980; *Clark v. School Directors of Dist. No. 1*, 78 Ill. 474). In the present case, as stated, the parties have stipulated that the equipment has not been permanently attached to the school building and could be returned to the plaintiff without injury thereto, and, further, that the equipment is replaceable.

For the above reasons the judgment is reversed, with directions to the trial court to enter a judgment in favor of the plaintiff for the recovery of the possession of the property described in the complaint.

104 Cal. App. 414

PEOPLE v. CABERERA.

Cr. 1110.

District Court of Appeal, Third District,
California.

March 8, 1930.

1. Assault and battery $\Rightarrow$ 97—Verdict of guilty of assault with deadly weapon held sufficient, though not naming person assaulted or describing weapon.

In prosecution for assault with deadly weapon, verdict reciting that jury finds defendant guilty of assault with deadly weapon held sufficient, though not giving name of person assaulted or describing weapon used.

2. Criminal law $\Rightarrow$ 894—Defendant charged with assault with deadly weapon waived any objection to form of verdict by failure to object thereto when returned.

In prosecution for assault with deadly weapon, defendant by failure to object to form of verdict at time it was rendered held to have waived any objection thereto.

3. Assault and battery $\Rightarrow$ 100—Statute providing for increased punishment for felony while armed with "deadly weapon" and defining latter phrase does not define "deadly weapon" used in statute defining assault with deadly weapon (Pen. Code, §§ 245, 1168).

Pen. Code, § 1168, providing for greater punishment where felony is committed while armed with "deadly weapon" and providing that words "deadly weapon," as used in this section, are defined to include specific named instruments or weapons, held not to define words "deadly weapon" in sense in which those words are used in section 245, defining crime of assault with deadly weapon, but to expressly restrict definition to words used in section 1168.

4. Assault and battery $\Rightarrow$ 97—Defendant's contention in prosecution for assault with deadly weapon that unless verdict described knife, he would suffer heavier punishment held without merit (Pen. Code, § 1168).

In prosecution for assault with deadly weapon, defendant's contention that under Pen. Code, § 1168, unless verdict shows that knife used in assault had blade shorter than five inches, defendant was bound to suffer heavier punishment than if verdict disclosed facts held without merit, since if enumeration of deadly weapons in section 1168 is to be construed as exclusive, then defendant was in no danger of suffering greater punishment where there was no evidence showing weapon was of kind defined therein, and if enumeration be construed as not exclusive, then it is immaterial that weapon was not described as deadly weapon, since defendant will then be subject to greater punishment regardless of kind of deadly weapon with which he was armed.

5. Criminal law $\Rightarrow$ 1172(1)—Failure to define deadly weapon in prosecution for assault with knife, though erroneous, held not prejudicial (Pen. Code, § 245).

In prosecution for assault with deadly weapon, under Pen. Code, § 245, failure to give instruction defining deadly weapon, though error,

held not prejudicial, since it is matter of common knowledge that knife, when used as instrument with which to stab or cut human being, is deadly weapon.

6. Criminal law $\Rightarrow$ 1170½(5)—Questions on cross-examination of witnesses testifying regarding defendant's reputation, whether they heard defendant had committed acts of violence before assault upon prosecuting witness, held not prejudicial (Pen. Code, § 245).

In prosecution for assault with deadly weapon, under Pen. Code, § 245, permitting questions on cross-examination of defendant's witnesses testifying as to his reputation for peace and quiet, whether they heard defendant had been guilty of acts of violence prior to assault upon prosecuting witness, held not prejudicial where questions were apparently asked in good faith.

Appeal from Superior Court, San Joaquin County; C. W. Miller, Judge.

Luz Caberera was convicted of assault with a deadly weapon, and he appeals.

Affirmed.

Sam Duker, of Tracy, and D. P. Eicke, of Stockton, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

FINCH, P. J.

The defendant was charged with the crime of assault with a deadly weapon with intent to murder B. Poledo. The jury returned a verdict reading as follows:

"We, the jury in the above entitled cause, find the defendant, Luz Caberera * * * guilty of an assault with a deadly weapon."

The defendant was sentenced to imprisonment in the state prison at San Quentin. This is an appeal from the judgment.

[1, 2] Appellant contends that the verdict is insufficient because it does not give the name of the person assaulted or describe the weapon used by him. The objection is without merit. *People v. Gayle*, 202 Cal. 159, 163, 259 P. 750; *People v. Jochinsky*, 106 Cal. 638, 642, 39 P. 1077; *People v. Cecil*, 72 Cal. App. 565, 568, 237 P. 568; *People v. Somsby*, 46 Cal. App. 377, 378, 189 P. 456. The defendant waived any objection to the form of the verdict by his failure to object thereto at the time it was returned. *People v. Gayle*, supra; *People v. Chiappelone*, 90 Cal. App. 472, 265 P. 976; *People v. Cornell*, 29 Cal. App. 430, 155 P. 1026.

A witness for the people testified that the weapon which the defendant said he used in making the assault is "a small penknife." The defendant testified that on the day following the assault he "used it to peel onions and potatoes" when he "made breakfast." There is nothing further in the record to show

the character of the weapon except that it penetrated the coat and overcoat of Poledo and inflicted "a stab wound in the right chest" and other wounds, causing him to be "very weak, and bleeding very much from a wound above his nose, and another wound on his chest." The knife was introduced in evidence, and from an examination of it the jury could have had no difficulty in determining whether it was a deadly weapon. The defendant testified that the knife was open in his right coat pocket immediately prior to the assault.

Section 1168 of the Penal Code, provides that the minimum imprisonment for the commission of a felony by "a person not previously convicted of a felony, but armed with a deadly weapon either at the time of his commission of the offense, or a concealed deadly weapon at the time of his arrest" shall be seven years, and that "the words 'deadly weapon' as used in this section are hereby defined to include any instrument or weapon of the kind commonly known as a blackjack, slung shot, billy, sand club, sand bag, metal knuckles, any dirk, dagger, pistol, revolver or any other firearm, any knife having a blade longer than five inches, any razor with an unguarded blade and any metal pipe or bar used or intended to be used as a club."

[3, 4] Appellant contends that, under the aforesaid provisions of section 1168, "unless the verdict shows that it was a knife with a blade shorter than five inches * * * the defendant is bound to suffer a heavier punishment than if the * * * verdict disclosed the facts." It is clear that section 1168 does not purport to define "deadly weapon" in the sense in which those words are used in section 245 of the Penal Code, defining the crime of assault with a deadly weapon, but expressly limits the definition to those words "as used in this section." If the enumeration of deadly weapons in section 1168 is to be construed as exclusive, then the appellant is in no danger of suffering the greater punishment provided for by that section, because there is nothing in the record to show that the weapon with which he was armed is of a kind mentioned therein. If such enumeration be construed as not exclusive, then it is immaterial that the weapon is not described other than as a "deadly weapon," because the defendant will then be subject to the greater punishment, regardless of the kind of deadly weapon with which he was armed.

[5] Appellant complains of the court's failure to give the jury a definition of a deadly weapon. While such a definition should have been given, the defendant suffered no prejudice from the failure to give it, because it is a matter of common knowledge that a knife, when used as an instrument with which to stab or cut a human being, is a deadly weapon.

[6] The defendant produced witnesses who testified that his reputation for peace and quiet was good. On cross-examination these witnesses were asked whether they had heard that the defendant had been guilty of acts of violence, naming them, prior to the assault upon Poledo. Appellant contends that the asking of these questions constituted prejudicial misconduct and that it was error to overrule his objections thereto. If the questions were asked in good faith, and there is nothing in the record to show that they were not so asked, then there was no error or misconduct in connection therewith. *People v. Gayle*, supra; *People v. Sieber*, 201 Cal. 341, 257 P. 64; *People v. Rice*, 90 Cal. App. 590, 266 P. 295; *People v. Heath*, 79 Cal. App. 20, 248 P. 1027; *People v. Simons*, 70 Cal. App. 143, 232 P. 772.

It clearly appears from the evidence that the defendant is guilty of the offense of which he was convicted, and there is no prejudicial error in the record.

The judgment is affirmed.

We concur: R. L. THOMPSON, J.; PLUMMER, J.

104 Cal. App. 499

LANDIS BROS. CO. v. LAWRENCE et al.★
Civ. 4020.

District Court of Appeal, Third District,
California.

March 14, 1930.

Rehearing Denied April 12, 1930. Hearing Denied by Supreme Court May 12, 1930.

1. Corporations $\S$ 617(1)—Deed executed by corporation through officers when corporation was suspended for nonpayment of license tax, recorded for over five years before suit, held sufficient (Civ. Code, $\S$ 400).

Under Civ. Code, $\S$ 400, deed executed by corporation by and through its president and secretary after corporation had been suspended for nonpayment of its license tax, duly recorded in county wherein land was situated for more than five years before commencement of action, had same force and effect as if executed and delivered prior to suspension of corporation.

2. Corporations $\S$ 432(1)—Deed by corporation through officers having same force as though executed when corporation was authorized to transact business is presumed executed by authority of corporation (Civ. Code, $\S$ 400).

Where deed from corporation to another was executed in corporate name by president and secretary, with corporate seal affixed, and had same force and effect as though executed during period when corporation was authorized to transact business as corporation under Civ. Code, $\S$ 400, presumption arose that deed was

executed by authority of corporation, and burden was on adverse party to overcome presumption by showing want of authority in such officer to execute instrument as that of corporation.

3. Landlord and tenant ☞199½—Tenant of corporation purchasing land on sale under trust deed by corporation's grantee held not liable for rent after purchase under doctrine of merger.

Where deed executed in name of corporation by president and secretary, with corporate seal attached, conveyed land to grantee, in absence of evidence overcoming presumption that deed was executed by authority of corporation and grantee executed deed of trust and tenant became purchaser of land on sale of land under deed of trust, tenant under doctrine of merger was not liable to corporation for rent after date of execution of deed to tenant.

4. Trial ☞35—Affidavit, contents of which were by stipulation admitted to be true, held properly rejected.

Where matters contained in affidavit were by stipulation of parties admitted to be true, trial court committed no error in rejecting affidavit.

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action by the Landis Bros. Company against M. Lawrence and others. Judgment for defendants, and plaintiff appeals.

Affirmed.

James F. Peck, of Oakland, Driver, Driver & Tade, of Sacramento, and C. F. Rafferty, of San Francisco, for appellant.

Bradford, Cross & Prior, and R. Platnauer, all of Sacramento, for respondents.

JAMISON, Justice pro tem.

Plaintiff brought this action to recover alleged unpaid rent that accrued under a lease of real property executed by plaintiff to defendants Lawrence and Comstock, copartners, doing business under the name of Lawrence & Comstock, and against Alex. F. Forni, to whom said lease was assigned; said Forni having died after the commencement of this action, the executrix of his estate, Nettie L. Forni, was substituted as a defendant in his place and stead.

The lease was executed on June 22, 1914, and was for a term of nine years, four months, and eight days, with a rental of \$5,000 a year, \$2,500 thereof to be paid on the execution of the lease, \$5,000 on October 1, 1914, and \$2,500 on the 1st days of June and October in each year thereafter up to and including October, 1922.

Lawrence & Comstock assigned the said lease to said Forni on January 3, 1917, and said Forni took possession of the leased premises and paid the rent on the same up to and including June, 1918. No rent was paid thereafter, nor was any demand made for the

payment of the same up to the time of the commencement of this action.

Appellant was organized as a corporation on September 23, 1910, and continued to exist as such until March, 1917, when it was suspended for failure to pay its license tax. Thereafter, on July 2, 1923, upon payment of its license tax and penalties, it was restored to its rights to do business as a corporation, and since then has been, and now is, a duly existing corporation. At the date of the revocation of the right of appellant to do business as a corporation for the nonpayment of the license tax, the three directors were Harry Landis, Charles W. Landis, and Anthony Landis, they being the owners of the entire capital stock of said corporation, each of them owning one-third thereof.

On April 14, 1917, a deed for all of the real estate described in the said lease was executed in the name of said corporation by Harry Landis, its president, and Charles W. Landis, its secretary, to the said Charles W. Landis, with the seal of the corporation affixed thereto. This deed was recorded in Sacramento county records on May 17, 1917, and in the San Joaquin county records on June 13, 1917; these being the two counties in which said land is situated.

On April 30, 1917, the said Charles W. Landis and wife gave their note secured by a deed of trust on said land to H. C. Davey for a loan of \$15,000 made to them by him. A portion of this money was used to pay obligations of appellant. Default having been made in payment of said note, the trustees in said deed of trust proceeded to sell said land, at which sale said Alex. F. Forni became the purchaser thereof for the sum of \$17,300, and a deed for said land was by said trustees executed to said Forni on August 7, 1918. This deed was recorded in the records of the counties of Sacramento and San Joaquin on the 14th day of August, 1918, and the 13th day of August, 1918, respectively.

On September 13, 1916, the German Savings & Loan Society loaned to appellant \$67,500, and on that date appellant executed its note to said German Savings & Loan Society for that sum, and secured the same by a deed of trust on the land described in said lease, the said German Savings & Loan Society having notice at the time of the existence of said lease. On July 19, 1918, the German Savings & Loan Society changed its name to the San Francisco Savings & Loan Society. On August 27, 1923, the last-named corporation assigned the said last-named note and deed of trust to C. L. Culbert.

Appellant ceased paying any interest on said last-named note after June 1, 1918, and thereafter, until the said land was sold in 1923 under said last-named deed of trust, the said interest was paid by the said Forni. The

amount of interest so paid by Forni on said note aggregated the sum of \$23,625. This was done without any direction from appellant or request that the same should be done.

Appellant having defaulted in the payment of said last-named note, the said land was sold under said last-named deed of trust, and the said Forni became the purchaser thereof for the sum of \$68,000, and a deed for said land was executed to him on November 17, 1923, by the trustees named in the deed of trust last mentioned.

It is the contention of the appellant that from and after June 1, 1918, until the expiration of the term of said lease, the said Forni continued to be its tenant, and that the said Forni as such tenant and Lawrence & Comstock, his assignors, are indebted to appellant for the rent which had accrued and remained unpaid at the expiration of said lease. Respondents contend that the said Forni became the owner of the land described in the lease on August 7, 1918, by virtue of the aforesaid trustees' deed executed to him on that date; also that the said Forni acquired title to the said land by prescription. They further contend that, admitting that said Forni continued to be the tenant of appellant until the expiration of the term of said lease, to preserve his rights and interests in said land, the said Forni has been compelled to pay certain interest and taxes that should have been paid by appellant, namely, the interest on the note secured by the deed of trust executed by appellant to the German Savings & Loan Society, amounting to the sum of \$23,625, and the taxes assessed against said land from the year 1918 until the sale thereof under said deed of trust, amounting to the sum of \$5,987.97, and that the amount so paid by said Forni exceeds the full amount of the rent claimed by appellant in this action.

The validity of the trustees' deed which conveyed the said land to said Forni, under the deed of trust executed by Charles W. Landis, depends upon, and is based upon, the validity of the deed to said land executed by appellant by and through its president and secretary to the said Charles W. Landis.

[1] Appellant contends that this deed is invalid because it was executed after the corporation had been suspended for nonpayment of its license tax and that all of the trustees of said corporation did not join in its execution, that is to say, that Anthony Landis, one of the directors at the date of said suspension, and therefore one of the trustees, did not join with the other two trustees in the execution of this deed, and this contention is supported by the authorities. Civ. Code, § 860; Civ. Code, § 2268; *Anthony v. Janssen*, 183 Cal. 329, 191 P. 538; *Newhall v. Western Zinc Min. Co.*, 164 Cal. 380, 128 P. 1040. However, this deed was executed by appellant by and through its presi-

dent and secretary, it was duly recorded in the counties wherein the said land is situated, and prior to the commencement of this action more than five years had elapsed since the dates of said recordation. Therefore, by the provisions of section 400 of the Civil Code, it has the same force and effect as if executed and delivered prior to the said suspension of said corporation.

The said provision of said section 400 of the Civil Code is as follows: "Provided, however, that any deed executed in the name of such corporation by the president or vice-president and secretary or assistant secretary after a dissolution thereof or after a forfeiture of the charter of such corporation or after the suspension of the corporate rights, privileges and powers of such corporation, which deed shall have been duly recorded in the proper book of records of the county in which the land or any portion thereof so conveyed is situated, for a period of five years, shall have the same force and effect as if executed and delivered prior to said dissolution, forfeiture or suspension."

[2, 3] This deed from appellant to the said Charles W. Landis having been executed in its name by its president and secretary, with its corporate seal thereto affixed, and having the same force and effect as though executed during the period when the corporation was authorized to transact business as a corporation, the presumption arises that it was executed by authority of the corporation. 6 Cal. Jur. 686; *Potts Drug Co. v. Benedict*, 156 Cal. 322, 104 P. 432, 25 L. R. A. (N. S.) 609; *Anderson v. Wickliffe*, 178 Cal. 120, 172 P. 381. And the burden is upon the adverse party to overcome that presumption by showing want of authority in such officers to execute the instrument as that of the corporation. 6 Cal. Jur. pp. 686, 687. No evidence tending toward overcoming this presumption was produced by appellant. We are therefore of the opinion that the deed executed by appellant by its president and secretary, with the corporate seal attached, conveyed the said land to the said Charles W. Landis, and that the said Forni acquired the title to it by his purchase under the deed of trust executed by the said Charles W. Landis, and that, under the doctrine of merger, respondents were not liable to appellant for rent on said land after August 7, 1918, the date of the execution of the deed to said Forni as aforesaid.

[4] The trial court committed no error in rejecting the affidavit of B. F. Driver, as the matters contained in said affidavit were by stipulation of parties admitted to be true.

In view of the conclusions we have reached, we deem it unnecessary to consider the other grounds relied upon by respondents.

The judgment is affirmed.

We concur: FINCH, P. J.; THOMPSON, J.

209 Cal. 223

PUTMAN v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al.

L. A. 11823.

Supreme Court of California.

March 28, 1930.

1. Judges ⇨49(2) — Statements of Judge — Disqualification.

Premature statement of trial judge that certain communication established partnership was not decision, finding, or order, and did not disqualify him.

This was a suit for partnership accounting. Defendant had written to plaintiff that defendant was working for their firm. Judge announced his conclusion that foregoing communication established partnership, and that such would be final holding of court, and that it would be practically useless for defendant to offer any evidence to contrary, and that case had reached stage where referee should be appointed.

2. Prohibition ⇨10(2) — Jurisdiction — Reference — Partnership accounting.

Trial court did not so far exceed jurisdiction in ordering reference for partnership accounting as to be subject to prohibition writ.

3. Partnership ⇨332 — Accounting — Power to order reference.

Court had power to order reference, where complaint alleged partnership and prayed accounting (Code Civ. Proc. §§ 638-645).

Plaintiff alleged defendant misappropriated partnership money while defendant denied existence of partnership and claimed reference should not have been made without giving him opportunity to prove nonexistence of partnership.

4. Partnership ⇨329, 332 — Accounting — Taking testimony — Order of reference.

Stage of proceeding in which to take testimony or to order reference for partnership accounting is not matter of jurisdiction but of order of proof.

5. Prohibition ⇨3(3) — Other remedy — Appeal — Reference.

Questions of powers and errors of referee are reviewable by appeal and not by writ of prohibition.

In Bank.

Petition by Clarence L. Putman for writ of prohibition against Superior Court of State of

California, in and for the County of Los Angeles, and others, which was denied ex parte, and petitioner applied for and was granted hearing in Supreme Court.

Petition denied.

Ben S. Hunter and L. E. Dadman, both of Los Angeles, for petitioner.

Randall & Bartlett, of Los Angeles, for respondents.

RICHARDS, J.

The petitioner herein applies for a writ of prohibition having for its purpose that of preventing the respondent judge herein from proceeding further with the hearing and determination of a certain action pending in the court over which he presides, and also prohibiting the other respondents herein from proceeding further to carry out the provisions of a certain order made by said judge in said action in the matter of the appointment of a referee therein during an early stage in the trial of said action before said court. The case in question was entitled Sidney F. Brock v. Clarence L. Putman, and was commenced in said court during the month of July, 1929, by the filing of a complaint therein, wherein it was alleged that a copartnership between said Brock and Putman had theretofore been entered into, having for the purpose of its members the "entering into the business of mining, locating and operating mining claims, buying and selling the same, and other business of a like nature." The complaint proceeds to allege the wrongful application by the defendant of certain of the moneys, receipts, and profits of said partnership to his own use and to the injury of the business thereof, the precise amount of which is unknown to the plaintiff; that after repeated requests on the part of said plaintiff for an accounting and repayment of said partnership of the moneys so misappropriated, the defendant has neglected and refused, and still neglects and refuses, to comply with said request or to make said accounting, and threatens to continue to misappropriate the funds of the copartnership to his own use and to sell the properties of the same and deprive the copartnership and plaintiff in said action of the proceeds of such sale, to the great and irreparable injury of both. The prayer of the complaint is that said copartnership be dissolved, and that an accounting be had of the dealings and transactions thereof; that the property of said copartnership be sold and the partnership debts and liabilities paid and the surplus, if any, divided between the plaintiff and defendant according to their respective interests in said copartnership, and for such other and further relief as may be meet in the premises. The defendant Putman answered, denying generally and specifically

the existence of any such copartnership, and also denying all of the other allegations of the complaint, and praying that the plaintiff take nothing by his said action. The cause came on for trial in said court and before the respondent judge thereof on the 29th day of August, 1929; whereupon the plaintiff introduced in evidence a certain document, purporting to be a letter from the defendant to the plaintiff, dated April 24, 1928, the essential portion of which reads as follows: "I got the Bull Moose tied up and have a mill ready to ship upon the property. Have it financed. I let Boggs in on it so he would help finance it, so you see I am still working for the Brock and Putman firm. Will have everything working by the time you get home." Upon the introduction in evidence of this document and upon an objection made by the defendant's counsel to the introduction of certain further evidence on the plaintiff's behalf a colloquy occurred between the trial judge and counsel for defendant, during which the trial judge proceeded to announce his conclusion that the foregoing communication established a copartnership, and that such would be the present and final holding of the court in the action, and that it would be practically useless for the defendant to offer any evidence to the contrary. The judge of the court further proceeded to state that the action had arrived at a stage wherein, the court having settled the question that a partnership existed between the plaintiff and defendant, a referee should be appointed to take further evidence in the case upon the issues as to a partnership accounting. These pronouncements on the part of the trial judge were punctuated with objections thereto on the part of counsel for the defendant, but, notwithstanding these, the trial judge continued the further trial of the case, and within a few days thereafter made and entered a formal order appointing the respondent Anne O'Keefe a referee in said action for the purpose designated in said order. The court recited therein: "That the trial of one of the issues of fact in the above entitled matter requires the examination of a long account, and it further appearing that a prima facie showing has been made of the existence of a partnership between plaintiff and defendant, it is therefore ordered that the following matters be referred to Anne O'Keefe as sole referee." The order proceeds to recite a number of matters bearing upon the business and accounts of said purported copartnership, and as to these orders: "That the parties produce before the said referee all books, deeds, papers and writings in their custody or under their control relating thereto, and that they be examined upon interrogatories or otherwise as the said referee shall direct. * * * It is further ordered that said referee report her findings upon the matters referred to prior

to the 27th day of September, 1929; and it is further ordered that the trial of the above entitled action be continued until the 27th day of September, 1929, at the hour of 10 A. M., at which time the report of said referee shall be presented to the court, and at which time the parties to the said action may introduce such evidence as they may have regarding the existence of a partnership between plaintiff and defendant and regarding any other issues presented by the pleadings." Upon the making and entry of the foregoing order, the petitioner herein applied to the District Court of Appeal in and for the Second Appellate District, Division 1, for a writ of prohibition, which was denied ex parte by said court, without an opinion, and a petition for rehearing therein having also been denied, without opinion, the petitioner applied for and was granted a hearing in this court, and the aforesaid matter having been heard herein has been submitted for decision.

It is the contention of the petitioner that, since in said action the existence of any copartnership between the plaintiff and the defendant had been denied, the trial court was without jurisdiction at the stage of the trial thereof during which the foregoing colloquy occurred between the trial judge and counsel for the defendant to determine the issue as to whether or not such a partnership as the plaintiff alleged to exist in fact existed, and was also without jurisdiction at that stage of the trial to make and enter its aforesaid order for the appointment of a referee therein without having first accorded to the defendant an opportunity to be heard and to introduce evidence as to the nonexistence of such copartnership. The petitioner further contends that the respondent judge in said action by his aforesaid premature pronouncement of his conclusion that such copartnership had been established, and that such would be his final ruling, had deprived and disqualified himself from exercising any further jurisdiction in relation to the trial of said action. Wherefore he applied for said writ.

[1, 2] It is conceded that the sole question to be determined upon an application for a writ of prohibition is the question of jurisdiction. It would seem to be too plain for further discussion that the attitude, action, and conclusion of the trial court in the aforesaid cause and at the time of the colloquy between himself and defendant's counsel was premature, unwise, and unjudicial. The oral and oracular statement of the trial court upon that occasion did not, however, amount to either a decision, finding, or order, and, as has been well said by this court in the case of *Scholle v. Finnell*, 173 Cal. 372, 376, 159 P. 1179, 1181: "No antecedent expression of the judge, whether casual or cast in the form of an opinion, can in any way restrict his abso-

lute power to declare his final conclusion in the only manner authorized by law." It does not necessarily follow either that the trial judge disqualified himself thereby to further proceed with the trial of the action, or that in further proceeding therein to the extent of making and entering the formal order for the appointment of a referee therein, and for the continuance of the hearing until such time as the referee might take testimony and report her conclusions upon such matters as were committed to her by the terms of such reference, and in further ordering that upon the presentation of the report of the referee the trial of the action should proceed, during the course of which "the parties to said action may introduce such evidence as they may have regarding the existence of a partnership between plaintiff and defendant and regarding any other issues presented by the pleadings," the trial court so far exceeded its jurisdiction as to subject itself to the process of this writ.

[3-5] The action being one involving issues as to the existence of a copartnership between the parties thereto and as to the propriety and extent of an accounting, it was such an action as would come within the provisions of sections 638 to 645, inclusive, of the Code of Civil Procedure, which provide for references and trials by a referee. Section 638 thereof provides for the order of a reference upon the agreement of the parties filed with the clerk and entered in the minutes. Section 639 thereof provides as follows:

"When the parties do not consent, the court may, upon the application of either, or of its own motion, direct a reference in the following cases:

"1. When the trial of an issue of fact requires the examination of a long account on either side; in which case the referees may be directed to hear and decide the whole issue, or report upon any specific question of fact involved therein;

"2. When the taking of an account is necessary for the information of the court before judgment, or for carrying a judgment or order into effect;

"3. When a question of fact, other than upon the pleadings, arises upon motion or otherwise, in any stage of the action;

"4. When it is necessary for the information of the court in a special proceeding."

It will be noted that the section of the Code quoted places no restrictions upon the trial court as to the time during the pendency of said action when it first acquires jurisdiction to appoint a referee therein. The implication of the section is to the contrary, since subdivision 1 thereof provides that: "When the trial of an issue of fact requires the examination of a long account on either

side; in which case the referees may be directed to hear and decide the whole issue, or report upon any specific question of fact involved therein." In the case of *Fredendall v. Shrader*, 45 Cal. App. 719, 188 P. 580, 582, it was held that the phrase in the foregoing section of the Code, "the whole issue," which by its terms the referee may be directed to hear and decide, refers to "the account, and does not include other issues in the case or issues having no direct or immediate connection with the account." But said case also goes on to decide that as to "the point urged by the appellants that the court was without jurisdiction to order a reference because it had not previously to the making of said order found that the interveners were entitled to an accounting and entered an interlocutory decree adjudging that fact, the answer thereto is that the statute provides for no such preliminary formality. Moreover, the procedure adopted in this case with respect to the order of reference appears to be in accord with the customary practice which has in that particular prevailed in California for many years, and which has received the approval of the Supreme Court," citing *Gunter v. Sanchez*, 1 Cal. 45, 48; *Smith v. Rowe*, 4 Cal. 6; *Williams v. Benton*, 24 Cal. 424; *Jones v. Gardner*, 57 Cal. 641. In the case last above cited, the court said that, with special reference to the section of the Code here under consideration: "The language of this first subdivision of § 639 of the Code of Civil Procedure indicates that the power of the Court to refer depends upon the *pleadings* on the one side or the other. The reference is made 'when the trial of an issue of fact' requires the examination of a long account. A reference for such purpose may, under our State Constitution, be made in any equity suit, when either party alleges facts showing an accounting to be necessary." In the case of *Fox v. Hall*, 164 Cal. 287, 291, 128 P. 749, 751, it was stated that: "The accounting might have been ordered through a reference, or the court might, with or without a preliminary interlocutory order, have proceeded to take and state the account itself (*Emery v. Mason*, 75 Cal. 222, 16 P. 894), rendering such final judgment thereon as might appear to be proper." The language of this court in the case last above cited would seem to indicate that the conclusion to be arrived at in our solution of the problem before us is that as to the stage in an equity proceeding before the court when it may proceed of itself and in the course of the trial to take testimony in the process of an accounting, or may order a reference for the purpose of taking such testimony, it is, after all, not a matter of jurisdiction, but rather of the order of proof in the particular case. In the present action had the trial court itself proceeded to take such testimony as the plaintiff had proffered, or had required

the defendant to produce relative to the accounting, it would seem that the only objection which the defendant might have urged to the taking of such testimony would be that the proper foundation therefor had not been laid by the showing that a partnership relation existed between the parties to the action; and that the trial court in ruling upon such objection held, as it seems to have done, that the document above referred to was sufficient prima facie to show the existence of such partnership, the only remedy of the defendant, assuming such ruling to have been erroneous, would have been by way of appeal. The same principle would seem to apply to the proceedings before the referee, wherein, if the defendant were to be required to produce certain books or other documents, or to testify as to their contents before the referee, he might refuse so to do upon the ground that no sufficient foundation had been laid for such an inquiry into his private affairs; and upon the matter being, by virtue thereof, referred back to the court for its decision, the court would have the same question before it as that which, as above shown, would have arisen upon the hearing as to an accounting immediately before the court; and in that instance also the ruling of the trial court, if erroneous, would be remediable by appeal or by some other appropriate proceeding, but would not be the subject of assault upon the ground that the court had no jurisdiction to make the ruling complained of in either case. A reference to an equitable action resembles in some of its aspects the procedure and practice for the taking of a deposition before notaries or commissioners, who possess no judicial powers, and whose action determines finally no question of law or fact in the case. All questions touching the powers and the exercise thereof on the part of these lay ministers of justice are for the determination of the trial court in the course of the proceeding before it, and are matters which, if erroneous, are the subject of correction by appeal or other appropriate method, but are not the subject of attack for want of jurisdiction in the court even to err. We are of the opinion, therefore, that the application of the petitioner herein for a writ of prohibition is, to say the least, premature, and that whatever error the trial court may have been minded to commit or to persist in during the trial before it is a matter which may not be the subject of determination by means of the particular writ herein sought.

It is therefore ordered that the petition herein be, and the same is hereby, denied.

We concur: WASTE, O. J.; PRESTON, J.; SHENK, J.; SEAWELL, J.; CURTIS, J.; LANGDON, J.

HANDLEY v. JOHNSON.
Civ. 6919.

District Court of Appeal, First District, Division 1, California.

March 20, 1930.

1. Evidence $\S$ 157(5) — **Agent's authority — Assignment — Parol evidence.**

Assignment of insurer's right as subrogee, where automobile was damaged, not being one required to be in writing, extent of insurer's agent's authority could be established by parol.

2. Insurance $\S$ 606(1) — **Subrogation — Agent's authority — Extent — Fact question.**

Extent of agent's authority to assign insurer's right as subrogee was question of fact.

3. Principal and agent $\S$ 122(1) — **Agent's authority — Nature and scope — Agent's testimony.**

Agent's testimony is admissible to prove nature and scope of his authority.

4. Appeal and error $\S$ 122(2) — **Additional findings — Power to make.**

Court of Appeals is authorized to make findings in addition to those made by trial court.

5. Insurance $\S$ 606(1) — **Subrogation — Agent's authority — Sufficiency of evidence.**

Evidence held to show automobile insurer's agent had authority to execute assignment of insurer's rights as subrogee to insured, where his automobile was damaged.

Appeal from Superior Court, San Mateo County; George H. Buck, Judge.

Action by J. J. Handley against Gail B. Johnson to recover for injuries to plaintiff's automobile. From a judgment for plaintiff, defendant appeals.

Judgment modified, and, as modified, affirmed.

F. N. Foley, of San Francisco, and Ross & Ross, of Redwood City, for appellant.

Cooley, Crowley & Gallagher, of San Francisco, for respondent.

PER CURIAM.

An action to recover for injuries to plaintiff's automobile caused by defendant's negligence.

A trial by jury having been waived, the cause was tried by the court.

Damages were allowed by the court for the alleged cost of towing the automobile to a repair shop and the cost of repairs, a total of \$512.05.

Defendant has appealed from the judgment which was entered against him for the above amount. He contends that the finding as to the first item is unsupported; further, that the plaintiff was insured against loss, and that the cost of repairing the car was paid by the insurance company; that the latter consequently became subrogated to that extent to plaintiff's right of action, and that the evidence was insufficient to show that this right was assigned to the plaintiff.

The claim for towage consisted of two items, one for \$8 and the other for \$9.60. It was stipulated that the first was correct. As to the second, defendant denied that the amount had been expended as claimed, and no evidence on the issue was adduced.

There was offered and admitted in evidence a writing purporting to assign to plaintiff the insurance company's claim against the defendant, but the authority of the person who signed the same to act for the company was not shown. This court, therefore, referred the question to a referee, before whom testimony was adduced by the respective parties. According to the testimony of the person by whom the document was signed he was then in the employ of the company as superintendent of its department of automobile claims, which position he has held for about eight years. He further testified that it was his duty to adjust losses and settle cases, in the course of which he made assignments of claims on behalf of the company. He also testified that he had authority from the company to do so in this and other cases, but whether such authority had been conferred in writing he could not recall.

[1-3] The assignment was not one for which a writing was required by statute; and where such is not the case the extent of the agent's authority may be established by parol (*Bergtholdt v. Porter Bros. Co.*, 114 Cal. 681, 46 P. 738) and, like the existence of the agent's authority, is a question of fact (*Grosse-Becker v. Becker*, 102 Cal. 226, 36 P. 433; *Farnum v. Phoenix Ins. Co.*, 83 Cal. 246, 23 P. 869, 17 Am. St. Rep. 233). It is also the rule that the testimony of the agent is admissible and competent to prove the nature and scope of his authority. *Kast v. Miller & Lux*, 159 Cal. 723, 115 P. 932.

[4-5] We are authorized to make findings in addition to those made by the trial court (*Kirk v. Culley*, 202 Cal. 501, 261 P. 994), and we accordingly find from the above testimony that the agent was authorized to execute the assignment in question for and on behalf of the insurance company.

For the foregoing reasons the judgment is modified by deducting therefrom the sum of \$9.60, and, as so modified, is affirmed. It is further ordered that each party bear his own costs on appeal.

DAVIS v. CHIPMAN. ★

Civ. 6876.

District Court of Appeal, First District, Division 1, California.

March 14, 1930.

Rehearing Denied April 12, 1930. Hearing Granted by Supreme Court May 12, 1930.

1. Contracts ⇨161—All sentences in agreement must be considered together, and attention cannot be confined solely to last sentence.

In construing agreement containing only three sentences, all three must be considered, and attention cannot be confined solely to last sentence as if it were detached and unconnected with first two.

2. Brokers ⇨40—Real estate broker's past services held sufficient consideration to support promise to pay commission.

Services rendered by real estate broker prior to agreement to pay commission if designated party exercised option to purchase held sufficient consideration to support promise to pay.

3. Brokers ⇨42—Agreement relating to commissions for sale of realty secured through agent's "efforts" held to contemplate "negotiation" of sale of property to recover compensation for which agent was required to have license (St. 1919, pp. 1252, 1259, §§ 2 and 20).

Agreement, stating that option to purchase realty was secured through agent's "efforts" and that agent "interested" optionee, and containing promise to pay commission if sale was effected with party whose name and address had been furnished as one with whom agent had been dealing for sale of property, held to contemplate negotiation of sale of property to recover compensation for which agent was required to have license under St. 1919, pp. 1252, 1259, §§ 2 and 20; word "efforts" meaning the same as word "negotiations."

[Ed. Note.—For other definitions, see Words and Phrases, First, Second, and Third Series, Negotiation; First and Third Series, Effort.]

4. Brokers ⇨75—Commission for securing sale of realty being payable ratably when purchase price was received, agent held only entitled to commission on each installment as collected.

Under agreement providing that commission for procuring sale of realty was to be due and payable ratably and proportionately if, as, and when such purchase price is received by owner, agent held only entitled to commission on each installment as collected.

5. Brokers ⇨42—Real estate broker can recover commissions if he possesses license when commission is earned and payable.

Real estate broker, though not possessing license at time of employment and rendition of services, can recover commission if he possesses such license when his commission is earned and payable.

6. Brokers ⇨86(1)—Facts showing negotiations with prospective purchaser held insufficient to support finding that prospect's name and address with whom agent had been dealing for sale of property was furnished as required.

In action to recover real estate broker's commission, where agreement required agent to

furnish owner name and address of purchaser with whom they had been dealing for sale of property, facts showing agent attempted to interest purchaser in syndicate and disinterest him in obtaining property for himself held insufficient to support finding that prospect's name and address had been furnished as required by agreement.

7. Brokers 53—Agent introducing prospective purchaser at latter's request, whereupon purchaser and owner without agent's assistance negotiated sale, held not procuring cause.

Where, after expiration of option to procure purchaser, agent introduced purchaser at latter's request to owner, and purchaser and owner without aid or assistance of agent negotiated terms of sale, agent's efforts held not procuring cause of sale so as to entitle him to commission.

Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Action by Harry F. Davis against W. F. Chipman, as trustee of the estate of Josephine A. Phelps, deceased. Judgment for plaintiff, and defendant appeals.

Reversed.

For opinion of District Court of Appeal, see 282 P. 992.

W. C. Sharpsteen, Cushing & Cushing, and William H. Gorrill, all of San Francisco, for appellant.

Fred L. Berry and Dozier & Kimball, all of San Francisco, for respondent.

PER CURIAM.

The judgment in the present action and the one in the companion action hereto, entitled Dozier, Jr., v. Chipman, as Trustee, etc., 286 P. 433, were by this court ordered reversed, and thereafter rehearings were granted so as to afford this court an opportunity to consider certain applications filed by the respective parties a few days prior to the date on which said judgments of reversal would have become final. The purpose of appellant's applications was to modify said judgments of reversal by adding a clause thereto directing the trial court to change its conclusions of law so as to conform to the views expressed in the opinions filed by this court and to enter judgments for the defendant in accordance with such conclusions of law; and to that end, if it was deemed necessary, that this court make findings of fact contrary to and in place of those heretofore made by the trial court. Respondents' applications were filed under the authority of rule XXXVIII of the Supreme Court and the District Courts of Appeal and of section 956a of the Code of Civil Procedure, to obtain permission to take additional testimony before this court relating to matters of fact occur-

ring prior to the entry of the judgments in the trial court, which testimony respondents asserted would support said judgments.

After hearing the oral arguments in support of said applications and giving further consideration to the merits of said appeals, we are of the opinion that said applications should be denied, and it is so ordered. And being satisfied with the reasoning and conclusions set forth in the opinions heretofore written by Mr. Justice pro tem. Gray, and filed herein, we adopt the same as the opinions of this court. The one relating to the appeal in the present case reads as follows:

Challenging the sufficiency of the evidence to support certain findings, defendant appeals from a judgment awarding plaintiff one half of the unpaid balance of an agreed compensation (the other half having been assigned to Thomas B. Dozier, Jr., plaintiff in the companion case) for services, which the complaint, in the form of a common count, alleges, and the answer denies, were rendered to defendant, and for which the answer affirmatively alleges plaintiff cannot recover because he was not a licensed real estate broker.

The unquestioned findings picture the transaction between the parties, out of which the present dispute arose, as follows: Simultaneously, defendant executed and delivered to Thomas B. Dozier, Jr., his written option to purchase certain property therein described, within three months, for \$250,000, and to plaintiff, his written agreement containing the following pertinent terms: "Thomas B. Dozier, Jr., has requested me to send you this copy of the above Option to Purchase, as he states that such Option to Purchase was secured through your efforts, and that you interested him in the property from a purchase standpoint. I hereby agree, if Thomas B. Dozier, Jr., * * * exercise the above option to purchase * * * to pay you a commission on the sale of the property of ten per cent. (10%) of the purchase price of the same, such commission to be due and payable ratably and proportionately, if, as and when such purchase price is received by me. * * * It is further understood and agreed that, on or before the expiration of said Option to Purchase, both Mr. Dozier and yourself are to furnish me with the complete names and addresses of all parties with whom you are or have been dealing for the sale of said property under said Option to Purchase and that no commission will be due and payable to you except it is effected within one (1) year of said expiration of said Option to Purchase and with one of the parties whose name and address has been previously furnished by one or both of you, and it is further understood that any party to whom a sale of the property is effected through your efforts must be a party with whom there have been

no negotiations heretofore in connection with said property." Within the time limited, plaintiff and Dozier, jointly, furnished to plaintiff the names and addresses of persons, including the subsequent purchaser. Plaintiff also, after the expiration of the option, personally introduced to defendant this purchaser and the last two "directly and together conferred respecting the purchase of said property, the conditions and terms of sale of said property and negotiated solely and alone therefor * * * without the interposition or acts of plaintiff. * * * " While these negotiations were pending, plaintiff and Dozier wrote defendant "that we are willing to accept a commission of ten per cent. (10%) of each payment on the purchase price * * * such commission to be payable to us out of and from each payment on the purchase price, if, as and when received by yourself, without interest." Defendant has received the total purchase price of \$250,000 in unequal installments over a period of eighteen months. Plaintiff was a licensed real estate broker only during the time when installments totaling \$191,506.50 were received. Defendant paid commissions on the first three installments in accordance with the letter without interest, although plaintiff did not then have a license.

The court further found that plaintiff rendered services to defendant, at his request, for an agreed compensation of \$25,000, which is due, owing, and unpaid; that plaintiff and Dozier furnished to defendant, in writing, the name and address of the purchaser, as required by the agreement; that plaintiff did not negotiate the terms of the sale or do other than introduce the purchaser to defendant, as a result of which the sale was effected; that a cause of action for the services accrued as each installment was paid; and that such services were rendered, not as a real estate broker, but consisted merely of finding and introducing a purchaser who was ready, able, and willing to purchase. By his claim that the evidence is insufficient to support these findings, defendant squarely presents for decision the question: What services were to be rendered under the agreement? He argues that the agreement employed plaintiff, as a real estate broker, to produce a purchaser, and that, as plaintiff's services were not the procuring cause of the sale, and as he did not have a license as a real estate broker at the time of sale, he cannot recover. In reply, plaintiff takes two somewhat inconsistent positions: (1) That the services to be rendered under the agreement consisted merely of furnishing names and addresses according to its terms and were not such as are performed by a real estate broker; and (2) if such services required a license, he can recover on those installments which were paid when he had such license.

[1-3] The nature and extent of the services for which plaintiff was to be compensated are to be determined solely by an examination of the above-mentioned agreement because a comparison of its terms with those in the letter of Dozier and the plaintiff, acceded to by defendant, when he mailed the first check for commission, clearly shows a modification solely as to interest. In construing that agreement all three sentences must be considered and attention cannot be confined solely to the last sentence, as if it were detached and unconnected with the first two sentences. *Cole v. Low*, 81 Cal. App. 633, 254 P. 676. The first sentence states that Dozier's option was secured through plaintiff's efforts and that plaintiff interested Dozier in the purchase of the property. The italicized words aptly and appropriately described services to be performed by a real estate broker. *Sessions v. Pacific Improvement Co.*, 57 Cal. App. 1, 206 P. 653; *Ross v. Major*, 178 Mo. App. 431, 163 S. W. 880. It is apparent that such services were rendered prior to the agreement. However, such past services were a sufficient consideration to support the promise to pay, if Dozier exercised his option, as contained in the second sentence. *Cole v. Low*, supra. In the last sentence, defendant promised to pay the commission, if a sale was effected with a party whose name and address had been furnished as one with whom plaintiff had been dealing for the sale of the property under the option and with whom there had been no previous negotiations. The effect of this sentence was not to create a new and independent obligation, separate and distinct from the obligation created by the second sentence, but was intended "to protect plaintiff for his efforts during the life of the contract resulting in a sale not consummated until after the termination of the contract." *Wright & Kimbrough v. Dewees*, 52 Cal. App. 42, 46, 197 P. 957, 958, *Hobson v. Hunt*, 59 Cal. App. 679, 211 P. 242. The word "efforts," in the clause "it is further understood that any party to whom a sale of the property is effected through your efforts must be a party with whom there have been no negotiations heretofore," means the same as the word "negotiations." *Sessions v. Pacific Improvement Co.*, supra. The services contemplated by the agreement, therefore, were the negotiation of the sale of the property to recover compensation for which plaintiff was required to have a license. *St. 1919*, pp. 1252, 1259, §§ 2 and 20; *Kornman v. Nelson*, 83 Cal. App. 616, 257 P. 150. The case of *Shaffer v. Beinhorn*, 190 Cal. 569, 213 P. 960, cited by plaintiff, is not in point, because the court was there not discussing a question of fact, but merely passing upon the sufficiency of a complaint, which contained an allegation expressly negating the statutory definition of a real estate broker.

[4, 5] Since the agreement provided "such commission to be due and payable ratably and proportionately if, as and when such purchase price is received by me" (the defendant), plaintiff was only entitled to a commission on each installment as collected. *Arnold v. La Belle Oil Co.*, 47 Cal. App. 290, 109 P. 815; *Miller v. Lerdo Land Co.*, 52 Cal. App. 662, 199 P. 1073. A real estate broker, although he possessed no license at time of employment and rendition of services, can recover his commission if he possesses such license when his commission is earned and payable. *Houston v. Williams*, 53 Cal. App. 267, 200 P. 55; *Wise v. Radis*, 74 Cal. App. 765, 242 P. 90. Were it not for the matters to be next discussed, plaintiff would therefore be entitled to a commission on the installments paid while he had such license.

"The duty assumed by the broker is to bring the minds of the buyer and seller to an agreement for a sale, and the price and terms on which it is to be made, and until this is done his right to commissions does not accrue." *Sibbald v. [Bethlehem] Iron Co.*, 83 N. Y. 382 [38 Am. Rep. 441]. * * * If he failed to do that, he is not entitled to the commission, even though he made efforts to sell the property, and first called to it the attention of the party who subsequently made the purchase. * * * *Zeimer v. Antisell*, 75 Cal. 509, 512, 17 P. 642, 643. "It is not enough that he contribute indirectly or incidentally to the sale by imparting information which tends to arouse interest, but it is sufficient if it be established that he set in motion a chain of events which without break in their continuity caused the buyer and seller to come to terms, that his efforts constituted the proximate cause of the meeting of the minds of the principals. * * * *Sessions v. Pacific Improvement Co.*, 57 Cal. App. 1, 206 P. 653; *Sargent v. Ullsperger*, 54 Cal. App. 384, 201 P. 934. It is necessary for the broker to prove therefore that he was the efficient or procuring cause of the sale; in other words, it must appear that his efforts had to do with the meeting of the minds of the seller and buyer. *Webster v. Parra*, 72 Cal. App. 639, 237 P. 804. * * * The expression "procuring and inducing cause," as used in the books, refers to the cause originating from a series of events that without break in their continuity results in the prime object of the employment of the agent." *Roth v. Thomson*, 40 Cal. App. 208, 180 P. 656, quoting approvingly the rule stated in *Smith v. Preiss*, 117 Minn. 392, 136 N. W. 7, Ann. Cas. 1913D, 820. In any event

the question of whether or not the sale is primarily the result of the broker's efforts is one of fact, and the trial court's conclusions thereon will not be disturbed on appeal if there be substantial evidence to sustain them. *Sessions v. Pacific Improvement Co.*, supra." *Bail v. Glantz*, 78 Cal. App. 49, 53, 248 P. 258, 259.

[6, 7] The following facts appear, without conflict, in the transcript of evidence: The purchaser had previously attempted to buy the property from a prior optionee. Dozier and plaintiff, within the life of Dozier's option, attempted to interest the purchaser in a syndicate, which they were then trying to form to acquire the property under the option. The purchaser informed them that he was not interested in joining the syndicate but was interested in acquiring the property for his own account. Learning this attitude, they attempted to disinterest the purchaser in obtaining the property for himself. During the option's term, Dozier and plaintiff furnished the name and address of such purchaser, as that of a party with whom they had been dealing for the sale of the property. Obviously the attempt to interest this purchaser in the syndicate and disinterest him in purchasing the property for himself was not dealing with him for the sale of the property, and hence defendant's objection that the evidence does not support the court's finding that such name and address had been furnished as required by defendant's agreement is well taken. After the expiration of the option, plaintiff introduced the purchaser, at the latter's request, to defendant, and, as the court found in accord with the evidence, the purchaser and defendant, without aid or assistance of plaintiff, negotiated the terms of the sale. Measured by the rule stated in the above-cited cases, these facts clearly show that plaintiff's efforts were not the procuring cause of the sale, especially in view of his efforts to disinterest the purchaser. Necessarily included within the court's finding that plaintiff rendered services to defendant at his request is an implied finding that plaintiff's efforts were the procuring cause of the sale, which finding is unsupported by the evidence. Furthermore, this finding is based in part on the agreement which contemplated the services of a real estate broker. As plaintiff's efforts were not the procuring cause, such services were not rendered, and this finding is unsupported in the evidence.

Judgment reversed.

Thomas B. DOZIER, Jr., Plaintiff and Respondent, v. W. F. CHIPMAN, as Trustee of the Estate of Josephine A. Phelps, Deceased, Defendant and Appellant.★

Civ. 6907.

District Court of Appeal, First District, Division 1, California.

March 14, 1930.

Rehearing Denied April 12, 1930. Hearing Granted by Supreme Court May 12, 1930.

Appeal by defendant from a judgment of the Superior Court, City and County of San Francisco, Frank J. Murasky, Judge, in an action for real estate broker's commission. Reversed.

W. C. Sharpsteen, Cushing & Cushing, and William H. Gorrill, all of San Francisco, for appellant.

Dozier & Kimball and Fred L. Berry, all of San Francisco, for respondent.

PER CURIAM.

In conformity with the views expressed in the opinion this day filed in the companion case hereto, entitled *Davis v. Chipman*, as Trustee, etc., 286 P. 429, it is ordered that appellant's application to modify the judgment of reversal herein, and respondent's application for an order to take further testimony under the authority of rule XXXVIII of the Supreme Court and the District Courts of Appeal and section 956a of the Code of Civil Procedure, be and the same are hereby denied; and, furthermore, that the opinion heretofore written by Mr. Justice pro tem. Gray and filed herein be adopted as the opinion herein. It reads as follows:

"This is a companion case to 'Harry F. Davis, respondent, v. W. F. Chipman, as trustee of the estate of Josephine A. Phelps, deceased, appellant,' this day decided (282 P. 992). Respondent herein, as assignee, recovered judgment for the other half of the commission involved in the other case. For the reasons stated in the opinion in the other case, judgment is reversed."

It is so ordered.

104 Cal. App. 536

MORRISSEY v. CITY AND COUNTY OF SAN FRANCISCO.

Civ. 6896.

District Court of Appeal, First District, Division 1, California.

March 18, 1930.

I. Carriers ⇨328(3) — Boarding moving street car — Contributory negligence.

Attempt to board moving street car does not necessarily constitute contributory negligence, but whether it does depends on circumstances.

2. Carriers ⇨347(5) — Boarding moving street car — Negligence — Question of fact.

Whether person attempting to board moving street car while in possession of physical vigor and free from hindrance is negligent is question of fact.

3. Carriers ⇨347(5) — Moving street car — Slackening speed — Invitation to board — Question of fact.

Whether slackening of speed by moving street car is invitation to board car while in motion is question of fact.

4. Carriers ⇨346(1) — Boarding moving street car — Contributory negligence — Evidence — Sufficiency.

Evidence held to support conclusion that man 58 years old, suing for injuries sustained while attempting to board moving street car, was not contributorily negligent.

Evidence showed plaintiff, a vigorous man in full possession of his faculties, signaled motorman, who thereupon slackened speed and brought car almost to standstill, that plaintiff grasped rearmost stanchion used by passengers in boarding car with his left hand, and reached right to grasp other, and that, when in act of placing right foot on step, car suddenly and violently lurched forward.

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action by Robert A. Morrissey against the City and County of San Francisco. Judgment for plaintiff, and defendant appeals.

Affirmed.

John J. O'Toole, City Atty., and Walter A. Dold, Chief Deputy City Atty., both of San Francisco, for appellant.

Thomas S. Molloy, of San Francisco, for respondent.

PER CURIAM.

The plaintiff, a man about fifty-eight years of age, was injured while attempting to board a moving street car of the Municipal Railway of San Francisco. The accident occurred about noon on April 19, 1926, on Balboa street at a point where the cars usually stop. The plaintiff testified that he signaled the motorman, who thereupon slackened speed so that when the rear step came abreast of plaintiff the car was moving so slowly as to be nearly at a standstill; that he grasped with his left hand the rearmost stanchion used by passengers in boarding the car, and reached his right hand toward the stanchion on the right-hand side of the step, and was in the act of placing his right foot upon the step when the car was suddenly and violently propelled forward, causing him to be thrown to the track in the rear of the car.

There was conflicting evidence as to how the injuries occurred, but the trial court found in accordance with plaintiff's version of the affair.

[1-4] Defendant contends that the way plaintiff attempted to board the car constituted contributory negligence.

An attempt to board a moving street car does not necessarily constitute contributory negligence. Whether it is such depends upon the circumstances (*Hart v. Fresno Traction Co.*, 175 Cal. 489, 167 P. 885; *Finkeldey v. Omnibus Cable Co.*, 114 Cal. 28, 45 P. 996; *Nilson v. Oakland Traction Co.*, 10 Cal. App. 103, 101 P. 413); and, if the person making such attempt is in possession of physical vigor and free from hindrance, the question of negligence is one of fact to be determined by the jury or the trial court (*Finkeldey v. Omnibus Cable Co.*, supra), as is also the question whether the slackening of speed is an invitation to board the car (*Starkey v. Market Street Railway Co.*, 90 Cal. App. 249, 265 P. 839). While the manner in which a passenger boards or alights from a moving car may change what would otherwise be the act of a prudent person into that of a negligent one (3 *Michie on Carriers*, p. 2253), in the present case the evidence shows that plaintiff was a vigorous man in the full possession of his faculties; and, while he testified that he had not boarded a moving car for twenty years, we cannot say that the way he attempted to board the car in question was under the circumstances negligent. The question was properly one for the determination of the trial court, and its conclusion that plaintiff used due care was fairly supported by the evidence.

The judgment is affirmed.

104 Cal. App. 431

PEOPLE v. SAMPSELL et al.*
Cr. 1555.

District Court of Appeal, First District, Division 1, California.

March 11, 1930.

Rehearing Denied March 26, 1930.

Hearing Denied by Supreme Court April 10, 1930.

1. Indictment and Information $\S$ 19—Statutory short form indictment held sufficient to state public offense and charge robbery rather than larceny (Pen. Code, $\S$ 951).

Indictment in short form prescribed by Pen. Code, $\S$ 951, for robbery of a branch bank, held sufficient to state a public offense, and to charge robbery rather than larceny.

2. Robbery $\S$ 24(1)—Evidence held to support conviction of first degree robbery.

In trial for robbery of a branch bank, evidence held sufficient to support conviction of robbery in the first degree.

3. Criminal law $\S$ 372(6)—Prosecution may prove crime charged was committed in furtherance of conspiracy to commit series.

On trial for particular crime, prosecution may show that it was committed in furtherance of conspiracy to commit a series of like or other criminal acts, though such evidence proves that accused committed other and distinct crimes in furtherance of common object.

4. Criminal law $\S$ 374—Conspiracy to commit series of crimes, including crime charged, may be proved by circumstantial evidence.

Circumstantial evidence is admissible to prove a conspiracy to commit a series of criminal acts, of which the particular crime charged is one.

5. Criminal law $\S$ 374—Proof parties met and made agreement, or previously arranged plan to execute conspiracy, is unnecessary to prove conspiracy to commit series of crimes.

To prove conspiracy to commit a series of criminal acts, of which particular crime charged was one, it is not necessary to show that parties met and actually agreed to perform unlawful acts or previously arranged a detailed plan for execution of conspiracy, but it is sufficient if circumstances proved satisfy jury of existence of conspiracy.

6. Criminal law $\S$ 424(1)—Evidence of acts committed after crime charged, in furtherance of common design of conspiracy, is admissible.

Since common design of criminal enterprise may extend beyond actual commission of crime charged, evidence is admissible to prove acts committed after, as well as before, perpetration of such crime, if it reasonably appears that they were committed in furtherance of common design.

7. Criminal law $\S$ 736(1)—When common design of conspiracy was accomplished or abandoned, and whether acts committed after crime charged were ordinary and probable effect of such design, are jury questions.

Questions as to when common design of conspiracy was accomplished or abandoned, and whether acts committed after commission of particular crime charged were ordinary and probable effect of such design, are for jury to determine from facts and circumstances of each case, and nature and purposes of conspiracy.

8. Criminal law $\S$ 1159(5)—Jury's findings, supported by any evidence, as to whether acts committed after crime charged were ordinary and probable effect of common design of conspiracy or foreign to object thereof, are conclusive on appeal.

If there be any evidence supporting jury's findings on questions whether acts committed subsequent to commission of crime charged were ordinary and probable effect of common design of conspiracy or fresh and independent

products of mind foreign to object of original scheme they are conclusive on appeal.

9. Criminal law §372(6)—Evidence of defendants' conspiracy to commit series of bank robberies, and purchase of firearms after commission of robbery charged, held admissible.

In trial for robbery of branch bank, evidence of defendants' conspiracy to commit a series of bank robberies, and purchase of firearms after commission of offense charged, to resist arrest and prevent seizure of loot, *held* admissible.

10. Criminal law §1169(2, 5)—Admission of evidence that defendants purchased firearms after bank robbery held not reversible error, in view of overwhelming evidence of their guilt and court's instruction.

Reversal of conviction for admission of evidence that defendants purchased firearms after committing bank robbery charged *held* not warranted, even if claimed conspiracy to commit series of such robberies ended with commission of that charged, in view of overwhelming evidence of their guilt of such robbery, and instruction to consider evidence of events before and after date thereof, for limited purpose of determining whether conspiracy existed, and offense charged was committed pursuant to common design.

11. Criminal law §1144(15)—Jury must be presumed to have understood and followed court's instructions.

On appeal from judgment on a verdict of conviction, it must be presumed that the jury understood and followed the court's instructions.

12. Criminal law §404(2)—Admission of prosecuting officer's pistol, identified as similar to that used by defendant, and cartridge clip and loader found on defendants' yacht, held not error.

In trial for bank robbery, introduction in evidence of prosecuting officer's pistol, which witness testified was similar to that used by defendant, and magazine or cartridge clip and loader belonging to pistol of such type, which were found on defendants' yacht, *held* not error.

13. Criminal law §351(10)—Evidence that defendant testified falsely before grand jury as to relevant circumstances held admissible.

In trial for bank robbery, evidence that defendant testified falsely before grand jury as to circumstances relevant to case *held* admissible; inference being that false testimony was given with preconceived design of misleading and deceiving those whose official duty was to ascertain truth.

14. Criminal law §351(10)—Accused's false declarations for purpose of misleading or warding off suspicion may be proved to show consciousness of guilt.

False declarations by accused for purpose of misleading or warding off suspicion may be proved to show a consciousness of guilt, though not conclusive of guilt.

15. Criminal law §593, 594(1)—Refusal of continuance to procure counsel and absent witnesses' testimony held not error, where counsel appeared and all witnesses desired were present, except one whose deposition defendants made no application to obtain.

No error in refusing defendants a continuance to complete arrangements with counsel and procure testimony of absent witnesses was shown, where attorney with whom they were negotiating appeared and agreed to proceed with trial after conferring with them, jury was then impaneled and case tried without further attempt to urge application for continuance, and all witnesses, whose presence defendants desired, were in attendance and available to them, except one, whose deposition they made no application to obtain.

16. Criminal law §741(2)—Whether defendant was present and aided and abetted in crime is fact question for jury.

Question whether defendant, if present at time and place of commission of crime, aided and abetted therein, or, if not present, advised and encouraged its commission, is one of fact for jury to determine from all circumstances established.

17. Criminal law §552(2)—Defendant's unexplained presence at time and place of crime is evidence of complicity.

Unexplained presence of defendant at time and place of commission of crime may be deemed a circumstance tending to show his complicity therein.

18. Robbery §24(1)—Defendant's unexplained presence at scene of robbery and possession of fruits thereof held to support jury's conclusion that he was principal (Pen. Code, §31).

Evidence of defendant's unexplained presence at scene of bank robbery shortly before its commission and possession of fruits of crime *held* sufficient to support jury's conclusion that he was a principal within Pen. Code, §31.

Appeal from Superior Court, Alameda County; Homer R. Spence, Judge.

Lloyd E. Sampsell and Ethan A. McNabb were convicted of robbery in the first degree, and they appeal.

Affirmed.

Leslie D. Summers, Lloyd E. Sampsell, and Ethan A. McNabb, in pro. per.

U. S. Webb, Atty. Gen., and Lionel Browne, Deputy Atty. Gen., for the People.

KNIGHT, J.

Appellants were indicted by the grand jury of Alameda county for the robbery of the Dwight way branch of the Bank of America, located on the corner of Dwight way and Shattuck avenue, Berkeley. The indictment charged also that the appellant Sampsell had been previously convicted of robbery and bigamy, and that the appellant McNabb had been previously convicted on two charges of

robbery. They pleaded not guilty to the present charge and admitted the prior convictions, and upon trial the jury found them guilty of robbery in the first degree. Following the denial of motions for a new trial they were sentenced to imprisonment in the state prison for the term prescribed by law, and they now prosecute this appeal, jointly, from the judgments of conviction and the orders denying their motions for a new trial.

[1] Appellants first challenge the legal sufficiency of the indictment, contending that it fails to state a public offense; or if a public offense be charged, it is that of larceny and not robbery, and that, therefore, having been found guilty of robbery, they were convicted of a crime with which they were not charged. We find no merit in either point. The indictment is in the short form prescribed by section 951 of the Penal Code as amended in 1927, and is no different in substance from the one considered and sustained in the case of *People v. Fallai* (Cal. App.) 278 P. 449. Therefore, upon the grounds and for the reasons stated in the decision in that case, we hold that the indictment here conforms to the requirements of the present law.

[2] It is next contended that the evidence is insufficient to sustain the verdict against the appellant McNabb. An examination of the reporter's transcript discloses, however, that this point too is without merit, for it appears therefrom that there is ample evidence, both direct and circumstantial, to support the jury's finding. In substance, it is as follows: About 3 o'clock on the afternoon of June 14, 1929, an unmasked robber armed with a Luger pistol entered said bank, and, after threatening those present, with the pistol forced them to lie down on the floor behind the counters. He then robbed the bank of \$405 in gold coin including two \$2.50 pieces, between seven and eight thousand dollars in currency, a small amount of silver coin, travelers' checks issued by the American Express Company and by the Bank of Italy amounting to \$9,000, and a number of bank checks payable to and indorsed by a laundry company, together with the deposit tags for said checks made out in the name of said company. The gold coin was contained in a small metal "barrel" bank and was kept in a tin "cash" box in the vault. The "barrel" bank and the tin box were also taken. After gathering up the property mentioned the robber rushed out of the front door of the bank, along the sidewalk for about 100 feet, entered a waiting automobile, and escaped. Shortly before the robber entered the bank, a strange man was seen by one of the bank employees, standing outside of the bank peering curiously through the windows into the bank, and because of the man's peculiar and suspicious actions the bank employee carefully scrutinized his features. Four days later, and on June 18th, appellants were arrested in an apartment which they were oc-

cupying jointly in a Leavenworth street apartment house, in San Francisco; and Sampsell was positively identified by several people who witnessed the robbery, both from within and without the bank, as the man who robbed it, and McNabb was positively identified by said bank employee as the man who was peering through the bank windows. The evidence further shows that appellants had been living in said apartment since June 12th under the fictitious names of Summers and Meline, and that their arrest took place under the following circumstances: The police detectives entered the apartment while appellants were absent, and soon afterwards a young woman walked in, representing herself to be Mrs. Summers, and while the detectives were interrogating her McNabb unlocked the door at the entrance of the apartment and came in. He refused to state whether or not his name was Meline, but Mrs. Summers stated in his presence that it was. He was then placed under arrest. When he entered the apartment he was carrying a bundle which the detectives unwrapped, and it was found to contain a Winchester rifle and a Maxim silencer. He was armed also with a Colt automatic pistol, fully loaded, which he carried in the front pocket of his trousers, and he had on his person between twelve and thirteen hundred dollars in currency. Shortly after the arrest of McNabb, Sampsell appeared at the door of the apartment and was placed under arrest. He too was armed with a loaded automatic pistol, which he carried concealed beneath his clothing, and he had on his person \$250 in currency. Upon searching the apartment, in the presence of appellants and the woman, the detectives found all the loot which had been stolen from the bank except a portion of the currency. They found the tin cash box, the small metal "barrel" bank, all of the gold coin including the two \$2.50 pieces, all of the travelers' checks, between three and four thousand dollars in currency which was still bound with the bank's wrappers bearing the initials of the manager of the bank, and all of the laundry checks and deposit tags. They also found a "Defiance" gas rifle, loaded with four gas shells and two extra gas shells; a box of Luger automatic pistol cartridges loaded with "dumdum" bullets, and a box of rifle shells. At the trial appellants asserted an alibi, claiming that they were in San Francisco on the day of the robbery, but it was contradicted and shown to be false in several respects, and it was also shown that the appellant McNabb had made a number of contradictory statements in connection with other material matters. Numerous additional circumstances disclosed by the evidence tending to establish McNabb's guilt might be pointed out, but it would seem that the foregoing is more than sufficient to demonstrate that the verdict against him was not wanting in evidentiary support.

At the outset of the trial, the district attor-

ney stated that he intended to prove that several weeks prior to the perpetration of the crime, for which appellants were then on trial, they entered into a conspiracy to commit a series of bank robberies, and to divide the loot received from such enterprises, and to arm themselves for the purpose of resisting arrest and preventing seizure of the loot they stole; and, in support of such theory, and as a part of its case, the state introduced evidence as to the action and conduct of appellants both before and after the robbery of the Dwight way bank. Summarized, the salient features of such evidence were as follows: Appellants, while serving time in the penitentiary and in prison road camps, were friends and companions, and, after their release from prison, they lived together in Seattle with the woman posing as Sampsell's wife. Early in April, 1929, all three came to San Francisco and rented an apartment from April 8th to April 29th, during which time and on April 17th the College avenue branch of the Oakland Bank, located on College avenue in Berkeley, was robbed, and besides having appellants identified as the perpetrators of that crime, it was shown that the robbery was executed in the same manner and at the same time of the day as the robbery of the Dwight way bank was perpetrated; that on April 25th, under fictitious names, appellants and Mrs. Summers fled to Long Beach, and after remaining there at one of the leading hotels for a few days, they returned separately to San Francisco and registered at one of the principal hotels, and within a few days thereafter departed for Seattle, Sampsell and Mrs. Summers traveling by airplane; that soon after their arrival in Seattle they purchased a sea-going "gas" yacht, obtained limited navigators' licenses and cruised back to San Francisco, arriving at the yacht harbor on June 12th, and two days later robbed the Dwight way bank. On the day following the latter robbery, McNabb purchased from an arms company in San Francisco the "Defiance" gas rifle, the gas shells, Winchester rifle and silencer, and two Colt automatic pistols which were subsequently found in their possession. Appellants contend, however, that the admission of all of such evidence, and the argument made by the district attorney to the jury based thereon, and the instructions given by the court upon the subject of conspiracy constituted prejudicial error.

[3-8] The law is definitely settled that upon the trial of an accused for the commission of a particular crime, the prosecution may show as a part of its case that such crime was committed in furtherance of a conspiracy to commit a series of like or other criminal acts (People v. Schmidt, 33 Cal. App. 426, 165 P. 555; People v. Arnold, 199 Cal. 471, 250 P. 168), and the fact that such evidence may prove that in furtherance of the common object of the conspiracy the accused committed

other and distinct crimes does not render such evidence inadmissible. People v. Zimmerman, 3 Cal. App. 84, 84 P. 446; People v. Anderson, 59 Cal. App. 408, 211 P. 254. Furthermore, such conspiracy may, and of necessity invariably must, be proved by circumstantial evidence for, as the courts have said, it is not often that the direct fact of an unlawful design which is the essence of a conspiracy can be proved otherwise than by the establishment of independent facts, bearing more or less closely or remotely upon the common design (5 Cal. Jur. 521); and it is not necessary to show that the parties met and actually agreed to undertake the performance of the unlawful acts (People v. Schmidt, supra), nor that they had previously arranged a detailed plan among them for the execution of the conspiracy (People v. Sartori, 43 Cal. App. 304, 184 P. 879). But, the question as to the existence of the conspiracy being one of fact, it is sufficient if the circumstances proved satisfy the jury, leaving the weight and sufficiency of the evidence to the triers of the questions of fact. People v. Schmidt, supra. Moreover, it is held that the common design of the criminal enterprise may extend in point of time beyond the actual commission of the act constituting the crime for which the accused is being tried; and that consequently evidence is admissible to prove acts committed after (Hollingshead v. State, 21 Okl. Cr. 306, 207 P. 104), as well as before (People v. Arnold, supra), the perpetration of the crime for which the accused is being tried, provided, of course, that it reasonably appears that such acts were committed in furtherance of the common design of the conspiracy. And the questions as to when the design is accomplished or abandoned, and whether the acts proved are a part of the design of the conspiracy are also for the jury to determine from the facts and circumstances of each case, and the nature and purposes of the conspiracy. In other words, it is for the jury to say from all the evidence before it whether or not the acts committed subsequent to the commission of the crime are the ordinary and probable effect of the common design, or whether they are a fresh and independent product of the mind outside of and foreign to the object of the original scheme; and if there be any evidence to support the jury's findings on any of the foregoing questions its determination is conclusive on appeal. See People v. Lorraine, 90 Cal. App. 317, 265 P. 893 and cases therein cited.

[9-11] In view of the foregoing legal principles, it seems manifest that in the present case the trial court was justified in receiving the evidence relating to the asserted conspiracy, also as to the circumstances attending the arrests; and, that being so, it follows that neither the argument of the district attorney to the jury, based on such evidence, nor the instructions of the court upon the subject of

conspiracy, constituted error. Even assuming, as appellants contend, that the conspiracy, if any there was, ended at the time of the commission of the robbery of the Dwight way bank, and that consequently the evidence as to the purchase of the firearms thereafter was erroneously admitted, a reversal of the judgment upon that ground is not warranted, for, as will be observed, aside from all the rest of the proof in the case, the evidence relating to the robbery for which appellants were indicted and tried is overwhelming in establishing their guilt thereof; and under such circumstances it cannot be reasonably maintained that the verdict finding them guilty of such crime has resulted in a miscarriage of justice, in which event only is a reversal of a judgment justified. Moreover, and in this connection, it should be stated also that the court was careful to instruct the jury that appellants were "on trial solely for the offense charged in the indictment, to-wit: robbery alleged to have been committed on June 14, 1929, as set forth in the indictment"; and were "not on trial for conspiracy nor for any offense other than the offense charged in the indictment"; and that, although evidence was received as to events happening before and after the 14th day of June, such evidence was to be considered by the jury for the limited purpose of determining whether a conspiracy existed between appellants to commit a series of bank robberies, to protect undivided loot secured therefrom, and to arm themselves for the purpose of preventing arrest; and of determining also whether the offense for which they were being tried was committed in pursuance of the common design of such conspiracy. It must be presumed that the jury understood and followed such instructions (*People v. Ruef*, 14 Cal. App. 576, 114 P. 48, 54); and, if it did, its verdict was reached in a fair and legal manner.

Appellants complain also of the giving of several instructions. Some relate to the law of conspiracy and others to the duties of jurors generally. The objections urged are untenable, and in our opinion do not possess sufficient merit to call for a discussion of the instructions separately. In this connection it may be stated that we have examined the entire charge and are convinced that the jury was fully, fairly, and clearly advised upon all legal principles pertaining to the case.

[12] The evidence shows that the robbery of the College avenue bank on April 17th was accomplished with the aid of a Luger automatic pistol; and an employee of the Dwight way bank, named Faust, testified that a pistol was used by Sampsell in robbing the latter bank; but not being familiar with firearms, the witness was unable to specify the type of pistol used. In order, therefore, to establish such fact the prosecution displayed at the trial, and afterwards introduced in evidence, a Luger automatic pistol, which the district

attorney stated belonged to one of the prosecuting officers; and upon exhibiting the pistol to the witness he testified that it was similar to the weapon used by Sampsell on the occasion mentioned. A week after appellants were arrested the police officers found on appellants' yacht a magazine or cartridge clip, and loader, belonging to a Luger automatic pistol, and these articles, too, were introduced in evidence. Appellants contend that the above proceedings and the introduction in evidence of the articles mentioned was error. We are unable to agree to such contention. At the time the pistol was produced it was definitely stated that the same was being used merely for the purpose of illustration. And, as to the articles found on appellants' yacht, it was shown that up to the time of their arrest they occupied the yacht part of each day and night, and therefore the objection that the articles found were left there by some one else went rather to the weight than to the admissibility of the evidence.

[13, 14] Nor are we able to sustain appellants' contention that the court erred in permitting the prosecution to show that the appellant McNabb testified falsely before the grand jury as to circumstances relevant to the case. As held in *People v. Peete*, 54 Cal. App. 333, 202 P. 51, false declarations made by an accused for the purpose of misleading or warding off suspicion, though not conclusive of guilt, may, nevertheless, strengthen the inference arising from the facts; and, therefore, proof of such false and fabricated statements is admissible on the same theory that evidence of flight and concealment is admissible, to show a consciousness of guilt. See, also, *People v. Cole*, 141 Cal. 88, 74 P. 547; *People v. Garcia*, 83 Cal. App. 463, 256 P. 876. Here it may be fairly inferred that the false testimony was given before the grand jury with the preconceived design of misleading and deceiving those whose official duty was to ascertain the truth.

[15] Appellants claim also that the trial court refused to grant them a continuance, and, in so refusing, committed error. It appears that the attorneys retained by appellants in the beginning, and who represented them until after the case was set for trial, withdrew a few days prior to the date of trial, and that thereupon appellants accepted the services of the public defender. On the morning of the trial appellants asked permission to terminate the services of the public defender and to file and present in their own behalf a motion for a continuance upon the ground that they had been unable to complete arrangements with other counsel with whom they had been negotiating, and upon the additional ground of the absence of certain witnesses. After considerable discussion the attorney with whom appellants had been negotiating appeared in court, and after conferring with appellants agreed to proceed with

the trial of the case. Thereupon, and without any further attempt being made by appellants to urge the application for continuance, the court proceeded with the impanelment of the jury and the trial of the case. It further appears that all of the persons, whose presence at the trial appellants desired as witnesses, were in attendance during the trial and were available to appellants, except one who was a barrister and solicitor in Vancouver, and appellants made no application at any time to obtain his testimony by deposition. Under the circumstances stated, no error has been shown.

[16-18] Appellant McNabb makes the further contention that even assuming that he was at the scene of the robbery shortly prior to its commission, peering through the bank windows as testified by the witness Faust, such fact alone does not prove that he aided or abetted in the commission of the crime, and that therefore he cannot be held to be a principal in its commission. Throughout the trial, and in his testimony before the jury, he insisted he was not in Berkeley at all on the day of the robbery; and, having so testified, the prosecution was deprived of any opportunity to cross-examine him as to his purpose in being there and acting in the manner described by said witness. However, assuming that despite the state of the record above set forth he may now urge this defense for the first time on appeal, we are convinced that it is not maintainable for the following reasons; the question as to whether or not a person who is shown to have been present at the time and place of the commission of the crime has aided and abetted therein, or, not being present, has advised and encouraged its commission, is one of fact for the jury to determine from all the circumstances established (People v. Wilson, 93 Cal. App. 632, 269 P. 951; People v. Kauffman, 152 Cal. 331, 92 P. 861; People v. Wilson, 135 Cal. 331, 67 P. 322; People v. Woodward, 45 Cal. 293, 13 Am. Rep. 176); and if he was present and his presence be unexplained, such fact may be deemed a circumstance tending to show complicity in the crime (People v. Woodward, supra). Here the jury, by its verdict, declared that he was at the scene of the crime, which leaves his presence there unexplained; therefore such fact, coupled with the additional evidence showing possession of the fruits of the crime, was amply sufficient to support the conclusion reached by the jury that he was a principal within the meaning of section 31 of the Penal Code. The remaining points raised by the appeal are not of sufficient importance to require special attention, all being without merit.

The judgments and orders appealed from are affirmed.

We concur: TYLER, P. J.; CASHIN, J.

104 Cal. App. 613
In re NELSON'S ESTATE.
Civ. 4036.

District Court of Appeal, Third District, California.

March 20, 1930.

1. Husband and wife ⇨264—Community interest — Evidence — Quantum of proof.

One asserting community interest in property has burden to establish his claim by preponderance of evidence.

2. Husband and wife ⇨264—Community property — Bank deposit — Joint account.

Fact that money was originally deposited in joint names of husband and wife does not conclusively determine bank account was community property.

3. Joint tenancy ⇨6 — Joint bank account — Husband and wife — Rights of survivor.

Title to bank account payable to either husband or wife or survivor vests in survivor at death of either, regardless of which one originally held title.

4. Husband and wife ⇨264 — Community property — Source — Uncertainty.

Uncertainty regarding source of personalty listed in inventory of deceased wife's estate does not require such items to be considered community property.

5. Husband and wife ⇨249—Community property — Separate property — Subsequently acquired.

Property acquired by wife after marriage, except that acquired by gift, bequest, devise, or descent, is deemed community property (Civ. Code, § 162).

6. Husband and wife ⇨49½(7)—Voluntary conveyance — Gift — Presumption — Separate property.

Absent fraud, undue influence, or evidence to contrary, presumption exists that voluntary conveyance from husband to wife is intended as gift which wife takes as separate property (Civ. Code, § 158).

Civ. Code, § 158, provides, in substance, that husband or wife may enter into engagement or transaction with other or with any other person respecting property which either might if unmarried.

7. Husband and wife ⇨262(1) — Community property — Presumptions — Purchase price — Husband's money.

Absent evidence showing intention that property should become community, it will be deemed separate property of wife to whom it was conveyed, notwithstanding purchase price was partly paid by husband and community funds.

8. Husband and wife ⇨249 — Conveyance to wife — Husband's knowledge and consent — Separate property.

Conveyance from third party to wife with husband's knowledge and consent constitutes such realty wife's "separate property" (Civ. Code, § 164).

[Ed. Note.—For other definitions of "Separate Property," see Words and Phrases.]

9. Husband and wife ⇨249 — Conveyance from third party — Intention — How inferred.

Intention that realty conveyed to wife should be separate property must be inferred from surrounding circumstances, declarations, and conduct at time of transfer.

10. Husband and wife ⇨262(1) — Community property — Conveyance to wife — Separate property — Presumption.

Conveyance to wife with husband's knowledge is presumptively gift, absent fraud or undue influence, and therefore separate property.

11. Husband and wife ⇨137(1) — Wife's separate property — Management by husband — Effect.

Fact that husband managed operations on wife's ranch held not to destroy wife's right thereto as her separate property.

Appeal from Superior Court, Humboldt County; Harry W. Falk, Judge.

In the matter of the estate of Annie D. Robertson Nelson, deceased. From a decree directing partial distribution, the heirs of decedent's deceased former husband appeal.

Affirmed.

J. F. Coonan, of Eureka, for appellants.

Puter & Quinn, of Eureka, for respondents.

R. L. THOMPSON, J.

This is an appeal from a decree of partial distribution. The appellants as heirs of a former deceased husband of Annie D. Robertson Nelson, deceased, claim they are entitled to participate in the distribution of said estate under subdivision 8 of section 1336 of the Civil Code.

Jonathan Robertson was employed as a farm hand by Mr. Dale, the father of said deceased, at \$30 per month. Mr. Robertson and Annie Dale were married June 11, 1891. There were no children born as the issue of this marriage. For a period of time they leased upon shares the Dale ranch in Humboldt county. Their income from this farm was small. Robertson had no other source of income or means so far as the record discloses. Shortly before Annie Dale's marriage to Mr. Robertson, she inherited about \$3,000 from the estate of an old gentleman by the

name of Grinnell whom she had nursed during his last illness. After her marriage to Mr. Robertson, she was given \$1,000 by her father. In 1912 she was given by her father \$10,000 additional upon the sale of his 640-acre tract of timber land. At the death of her father in 1916, she inherited the further sum of about \$9,000. In 1897 she purchased the valuable Walker ranch in Humboldt county, taking the title deed in her own name. As a part of the purchase price, she executed a mortgage upon this ranch to her father for \$4,000, which was subsequently released. This ranch was operated for several years by the joint efforts of Mr. and Mrs. Robertson. Sometimes she transacted the business affairs incident to the management of the farm and sometimes he looked after the business. Once he executed a memorandum lease of this farm in his own name without her signature. The farm, however, was always retained in her name alone. She paid all the taxes on this property. This ranch became quite valuable.

The evidence indicates that Mrs. Robertson acquired in the course of a number of years notes, stocks, bonds, and money in bank amounting to a considerable sum. There is no definite evidence that Jonathan Robertson ever acquired any specific property with the exception of some lots of uncertain value. In 1914 he was stricken with paralysis, and and gradually became helpless, until it was necessary to move him about in a wheel chair. March 23, 1914, he executed and delivered to his wife deeds of conveyance to these lots standing of record in his name, which were situated in Brookdale and Hydesville, Humboldt county.

The history of the existence of several different bank accounts standing in the names of the spouses during their married life is revealed by the evidence. At first the record of these bank accounts appeared in the name of "J. F. Robertson or Annie Robertson." In one of these accounts there was deposited \$7,000 in Liberty Loan bonds "for safe-keeping." Before the death of Jonathan Robertson, these bank accounts had been closed, with the exception of two of them, which were changed during Mr. Robertson's lifetime to "Annie Robertson or J. F. Robertson, or the survivor." Mr. Trollnes, the manager of the Home Savings Bank of Eureka, testified regarding the record of this account, "The account is (in the names of) Annie Robertson or J. F. Robertson, payable to either survivor." There remained in this account after the death of Mr. Robertson a balance of \$10,204.51, which was withdrawn upon the check of Mrs. Robertson May 7, 1924. There was another account in the Fortuna bank which was carried in the names of "J. F. Robertson or Mrs. J. F. Robertson." Mr. Newell, an officer of that bank, testified

that this account was also changed to a joint and survivorship account before the death of Mr. Robertson.

The inventory which was filed in this estate shows the possession of notes, stocks, bonds, money in bank, and personal effects of the total appraised value of \$24,780.81. It is contended by the appellants that, with the exception of the first three items which appear consisting of bonds and cash in bank amounting to the sum of \$8,999.57, the respondents failed to account for the source of the funds with which the remaining notes, bonds, and personal property were acquired.

Jonathan Robertson died February 2, 1922. His estate was never probated. Annie Robertson married William Nelson in June, 1926. She died intestate June 30, 1927, leaving surviving her as her only heirs William Nelson, her husband, two sisters and a brother, all of whom joined in the petition for partial distribution. The brothers and sisters of Jonathan Robertson contested this petition and prayed that they be permitted to participate in partial distribution of this estate on the theory that the estate of their deceased brother owned a community interest in the property of Annie D. Robertson Nelson, deceased.

The court found that the contestants were not heirs of Annie Robertson Nelson, deceased, and were therefore not entitled to participate in her estate, and that the estate of Jonathan Robertson had no community interest in said estate.

[1] It would be an arduous task to attempt to follow the intricacies of the numerous business transactions of Mr. and Mrs. Robertson through a period of thirty-one years of married life. It is sufficient to say that the evidence satisfactorily shows that Jonathan Robertson was without means when he was married, and that, beyond the cost of their living, he never succeeded in accumulating any specific property except the lots which he voluntarily deeded to his wife shortly before his death. Upon the contrary, it satisfactorily appears that all of the money with which the spouses secured their accumulation of money, stocks, bonds, notes, and real property, except as hereinbefore stated, came from gifts and legacies to Annie Robertson Nelson and which therefore became her separate property. We are of the opinion that the findings of the court to the effect that the estate of Jonathan Robertson had no community interest in the property of this estate, and that the contestants are therefore not entitled to participate in the distribution of the estate, is amply supported by a preponderance of the evidence. The burden is on one who asserts a community interest in property to establish his claim by a preponderance of the evidence.

[2] The fact that money was originally deposited in a bank in the joint names of Mr. and Mrs. Robertson does not conclusively determine the title thereto, nor necessarily signify that it was community property. In 4 California Jurisprudence, 199, § 89, it is said: "Neither does the separate property of the wife become joint property, with a right of survivorship, merely because of a deposit in a bank in the name of the wife and her husband, in the absence of evidence respecting the purpose of making the deposit or the circumstances under which it was made, for such a form of deposit may be entirely consistent with the desire on the part of the wife to give her husband mere authority to withdraw money from the bank for her from time to time as she might need it." *Denigan v. Hibernia Savings & Loan Society*, 127 Cal. 137, 59 P. 389; *Mutual Benefit Life Ins. Co. v. Clark*, 81 Cal. App. 546, 254 P. 306.

[3] When a joint account of a husband and wife is changed with the knowledge and the consent of the parties so that it becomes payable to either "or the survivor," the title to that portion of the account which remains at the death of one spouse absolutely vests in the survivor, regardless of which one originally held title to the money. 4 Cal. Jur. 195, §§ 87, 88; 3 R. C. L. 527, § 155; *Estate of Gurnsey*, 177 Cal. 211, 170 P. 402; *Conneally v. San Francisco S. & L. Society*, 70 Cal. App. 180, 232 P. 755. In the present case the evidence satisfactorily supports the assumption that it was the intention of the spouses to vest the title to the bank accounts in the survivor. It follows that, regardless of whether Jonathan Robertson may have held a community interest in these accounts during his lifetime, that interest terminated at his death, and Annie Robertson Nelson, as the survivor, became vested with the exclusive title thereto.

[4, 5] Even though it be true that the testimony fails to show the times when many of the items of personal property which are listed in the inventory were acquired, or the source of the revenue from which they were derived, it does not necessarily follow that therefore these items must be deemed to be community property. Our attention is called to no evidence which shows that they were acquired by the spouses during their marriage. The appellants have failed to sustain the burden placed upon them in this regard. Jonathan Robertson died in February, 1922. His wife married Nelson in 1926, and she died June 30, 1927. So far as the record discloses, all of these items may have been acquired from the unchallenged separate funds of Mrs. Annie Robertson Nelson after the death of her first husband. Indeed, it may be true that these items were acquired after her marriage with Nelson, with the exception of two small notes which she secured after her first husband's death in March, 1924, and

December, 1925, respectively. It is true that property acquired by a wife after marriage, except such separate property as comes within the definition of section 162 of the Civil Code, is deemed to be community property. But this does not necessarily include such property as is acquired after the death of her husband, nor after she has remarried. Of course, under such circumstances, the property may still belong to the community interests, but to establish that fact it would require evidence that it was purchased with community funds. No such showing appears in the present case. There is no sufficient evidence upon which to base a finding that any of the personal property which is described in the inventory is community property.

[6] Regardless of the source of the funds from which the lots were purchased which Jonathan Robertson voluntarily deeded to his wife in 1914, those instruments effectively conveyed to her an absolute title to the property. In the absence of fraud, undue influence, or evidence to the contrary, it will be presumed that a voluntary conveyance of real property from a husband to a wife is intended as a gift to which she takes title as her separate property. Section 158, Civ. Code; 5 Cal. Jur. 349, § 30; 13 Cal. Jur. 850, § 49.

[7-11] So also with respect to the purchase of the Walker ranch, the title to which was taken in the name of Annie Robertson. The weight of the evidence indicates that this ranch was purchased with the separate funds of the wife. But appellants contend that some of his money was contributed to the purchase price and that community funds were subsequently applied upon the purchase price of the ranch. Even though this be true, in the absence of evidence that it was the intent of the spouses that it should become community property, it will be deemed to be the separate property of the spouse to whom it is deeded. If a conveyance of real property is made from a third party to the wife with the husband's knowledge and consent, the property is deemed to be her separate property. Section 164, Civ. Code; *Stafford v. Martinoni*, 192 Cal. 724, 221 P. 919; *Donze v. Donze*, 88 Cal. App. 769, 264 P. 294; 13 Cal. Jur. 854, § 50. The intention must be inferred from the surrounding circumstances, declarations, and conduct of the parties at the time of the transfer. *Gilmour v. North Pasadena Land Co.*, 178 Cal. 6, 171 P. 1066; *Fanning v. Green*, 156 Cal. 279, 104 P. 308; *Cohn v. Smith*, 37 Cal. App. 764, 174 P. 682. Where the conveyance is made from a third person to the wife with the knowledge of the husband, regardless of whether it is paid for from the community funds or from his separate funds, in the absence of fraud or undue influence, it will be presumed to have been intended as a gift.

Miller v. Brode, 186 Cal. 409, 199 P. 531; *Estate of McCauley*, 138 Cal. 546, 71 P. 458; *Swain v. Duane*, 48 Cal. 358; 13 Cal. Jur. 855, § 50. Nor does it destroy the separate character of the wife's title to farming land even though the husband may conduct much of the business of operating the ranch, or even though he assumed the authority to rent the place by executing a lease in his own name. This effort on his part was unexplained, unauthorized, and futile. The assistance which he rendered his wife in operating the farm is entirely consistent with her absolute ownership of the property on the theory that in so doing he was acting as her agent. *Swain v. Duane*, 48 Cal. 358.

In view of the foregoing conclusion that the findings of the court to the effect that the estate of Jonathan Robertson had no community interest in the estate of his wife, it becomes unnecessary to construe the application of subdivision 8 of section 1386 of the Civil Code, upon which the appellants rely as authority for distribution to them.

The decree of partial distribution is affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

104 Cal. App. 521

TITLE INSURANCE & TRUST CO. v. McPHERSON et ux.
Civ. 4032.

District Court of Appeal, Third District,
California.

March 17, 1930.

1. Judgment ⇨707 — Parties — Conclusiveness.

Judgment in action to quiet title *held* not binding on deceased's executor or heirs not made parties to action.

2. Judgment ⇨688 — Quieting title — Executor — Individual capacity — Judgment — Conclusiveness.

Judgment in action to quiet title, wherein plaintiff sued in individual capacity and not as executor, *held* not adjudication of interests of estate or heirs.

3. Frauds, statute of ⇨56(9) — Land — Partnership — Parol agreement.

Partnership in lands may be formed by parol agreement.

Appeal from Superior Court, Mono County; Pat R. Parker, Judge.

Action to quiet title by the Title Insurance & Trust Company against Wallis D. McPherson.

son and wife. Judgment for defendants, and plaintiff appeals.

Affirmed.

Frank Bryant, of Los Angeles, for appellant.

Law & Overholt and R. E. Hobbs, all of Los Angeles, for respondents.

FINCH, P. J.

The plaintiff brought this action to quiet its alleged title to real estate in the possession of the defendants, Wallis D. McPherson and Venita Reche McPherson, his wife. The court found that plaintiff "paid no consideration of any kind or character for any of said property"; that such property "belonged to and was owned by the defendants * * * and one O. F. Brant, now deceased, and that said Wallis D. McPherson and said O. F. Brant were copartners and owned all of said real property jointly, and that said property was deeded to said plaintiff as trustee and as trustee only for the use and benefit of said copartnership," and that the plaintiff "holds only the naked legal title thereto in trust for the use and benefit of the defendants * * * and the estate and heirs of said O. F. Brant, deceased." Judgment was entered in accordance with the findings, and the plaintiff has appealed.

[1,2] The uncontradicted evidence supports the findings. The plaintiff made no effort to meet the case proved by the defendants, except by the introduction of deeds conveying the lands in question to it. The partnership agreement referred to in the findings was at first oral, and later it was reduced to writing. The written agreement purports to be an agreement between D. O. Brant, a son of O. F. Brant, and the defendants, and to be signed by D. O. Brant. The testimony shows, however, that O. F. Brant was the real contracting party. It is wholly immaterial in this case whether the agreement was with the father or the son. Neither the son nor the father's executor nor his heirs are parties to this action, and obviously the judgment is not binding upon them. It is sufficient in this action for the defendants to show that they have an interest in the partnership property, and that the plaintiff holds only the naked legal title thereto in trust for the partnership, or for those interested in the property thereof. The respective rights therein of the defendants and D. O. Brant or the heirs of O. F. Brant can only be determined in an appropriate action to which they are parties. The complaint was filed March 5, 1926. O. F. Brant died in March, 1922. It is alleged in the answer and found by the court that the "plaintiff herein was the duly qualified and acting executor of the estate of said O. F. Brant, deceased." One of the officers of the plaintiff testified that it "was executor of the will and estate of O. F. Brant, deceased."

The same officer further testified: "I have been informed it (estate) was closed." This testimony was stricken out. Disregarding the testimony so stricken out, the only reasonable inference from the pleadings, proof, and findings is that the plaintiff had ceased to be executor of the will of O. F. Brant, deceased, at the time the action was commenced. Whether this be true or not, the plaintiff was not named as a party to the action as such executor, but only in its individual capacity, and therefore the judgment herein is not an adjudication of the rights or interests of the estate or of the heirs of O. F. Brant in the property.

[3] Appellant argues the case upon the erroneous theory that the court admitted parol evidence to modify the terms of the written instruments by which title was conveyed to the plaintiff. The parol evidence was admitted to prove a partnership. A partnership in lands may be formed by a parol agreement. *Perelli-Minetti v. Lawson* (Cal. Sup.) 272 P. 573.

The other points made by appellant are manifestly without merit.

The judgment is affirmed.

We concur: PLUMMER, J.; R. L. THOMPSON, J.

104 Cal. App. 657

BARRETT, Building Inspector, v. SUPERIOR COURT OF ALAMEDA COUNTY et al.

Civ. 7335.

District Court of Appeal, First District, Division 2, California.

March 24, 1930.

1. Contempt $\S$ 28(1) — New ordinance — Invalidity of prior ordinance — Contempt proceedings.

Passage of new ordinance after judgments declaring zoning ordinance invalid held immaterial in proceeding for contempt in again denying building permit, where neither new ordinance nor stipulation as to effective date thereof was before court.

2. Judgment $\S$ 650 — Final judgment — Determination of facts and law.

Final judgment determines facts and law of case, regardless of validity of statutes on which based.

3. Constitutional law $\S$ 110 — Final judgment — Power to alter.

Neither court nor city lawmaking power may alter final judgment, except in statutory manner.

Contempt proceeding by F. A. Andrews against R. H. Barrett, as Building Inspector of the City of Piedmont, and such city. To review a judgment of contempt, defendants apply for a writ of certiorari to the Superior Court of the County of Alameda, and James G. Quinn, Judge.

Affirmed.

Girard N. Richardson, City Atty., of Piedmont, and Joseph C. Prior, of Oakland, for petitioners.

Breed, Burpee & Robinson, of Oakland, for respondents.

STURTEVANT, J.

After the remittiturs were filed in *Andrews v. Barrett* (Cal. App.) 281 P. 79, and *Andrews v. City of Piedmont* (Cal. App.) 281 P. 78, two companion cases, the plaintiff again applied for the building permit which was the subject-matter involved in those two actions. His last application was not granted because a new ordinance had been passed. He then commenced a contempt proceeding. The trial court entered a judgment of contempt against R. H. Barrett, as building inspector, and against the city of Piedmont. Thereafter they applied to this court for a writ of review.

The ordinance under consideration in the two cases above cited was No. 268. Those cases were commenced on March 29, 1928. On March 21, 1929, Ordinance No. 315 was passed. The questions before the court in the case at bar turn on the effect, if any, that the provisions of the new ordinance have on the rights of the parties in the two cases cited.

[1-3] As stated above, the city of Piedmont and its officers rely on the provisions of the new ordinance. The property owner, F. A. Andrews, contends that the latter ordinance has no effect whatever, that his application for a permit should have been granted, and that the judgment of contempt was properly entered. That the latter ordinance has no effect whatever is predicated on the contention that whether said ordinance is valid or invalid there is nothing in the record to the effect that it contains any word or words showing that any of its provisions were retroactive. The point must be sustained. Counsel have stipulated to the facts which were before the trial court. Neither Ordinance No. 315 nor any section thereof was before that court. Nor was there before the court any stipulation

as to when said ordinance took effect. It follows that the trial court did not err in holding, in effect, that the passage of Ordinance No. 315 was immaterial as to anything before the court. As will presently appear, the fact that said ordinance was not retroactive is not necessarily determinative of the question of its materiality in the case at bar. If the lot owner did not hold a final judgment, and if this were an initial proceeding to compel the issuance of the permit, it might well be contended that Ordinance No. 315 was the controlling law and therefore the city of Piedmont and its officers had the right to refuse the permit. *Brougher v. Board of Public Works* (Cal. Sup.) 271 P. 487. But that case rested on the doctrine that the applicant had not, by filing an application, obtained a vested right. The applicant cites and relies on *London v. Robinson*, 94 Cal. App. 774, 271 P. 921. But in that case the permit was issued, and there was no attempt to recall or revoke made by the municipal authorities. The real question before us is, therefore, whether this applicant for a permit obtained a vested right. As to when an applicant for a statutory permit has acquired a vested right is not expressly defined by any case cited by counsel. However, our books are full of cases to the effect that, as to the case under consideration, a final judgment, in the absence of supplemental pleadings as to new rights, determines both the facts and the law pertinent as of the date the action was commenced. *Metropolis, etc., v. Barnet*, 165 Cal. 449, 132 P. 833. The determination includes both the facts and the law applicable to that particular case (15 Cal. Jur. 142-146) whether the statutes on which it rests are valid or invalid (15 Cal. Jur. 147). Except in a manner authorized by statute, the court that rendered the judgment may not alter it (14 Cal. Jur. 991), and what the court may not do in this behalf, the lawmaking power may not do. 5 Cal. Jur. 755; 12 C. J. 984; 12 C. J. 956; *People ex rel. Lafferty v. Owen*, 286 Ill. 638, 122 N. E. 132, 3 A. L. R. 447, and extended note. Having before it a set of facts quite similar if not in all respects parallel, the Supreme Court of Louisiana came to the same conclusion. *City of Shreveport v. Dickason*, 160 La. 563, 107 So. 427. We find no error in the record.

The proceedings are affirmed.

We concur: NOURSE, Acting P. J.; DOOLING, Justice pro tem.

104 Cal. App. 538

McKENNA v. PACIFIC ELECTRIC RY. CO.
et al.
Civ. 5655.

District Court of Appeal, Second District, Division 1, California.

March 18, 1930.

1. Explosives ☞12 — Blasting — Property damage — Vibration.

Tunnel contractor *held* liable for damage to lot and building by vibration or concussion caused by blasting, though not negligent.

2. Negligence ☞58 — Injury from lawful act — Duty to prevent.

One voluntarily performing lawful act, which may naturally cause injury, must prevent it, or pay damages, regardless of motive or care.

Appeal from Superior Court, Los Angeles County; J. Walter Hanby, Judge.

Action by Maude L. McKenna against the Pacific Electric Railway Company, a corporation, the Twohy Bros. Company, a corporation, and another. From a judgment against the last-named company, it appeals.

Affirmed.

E. E. Morris, of Los Angeles, for appellant. Meserve, Mumper, Hughes & Robertson, of Los Angeles (W. W. Orme and Timon E. Owens, both of Los Angeles, of counsel), for respondent.

ELIOT CRAIG, Justice pro tem.

This is an appeal by Twohy Bros. Company, a corporation, one of the defendants, from the judgment for damages in the sum of \$1,979 in favor of respondent and against appellant.

The case grew out of the following facts: The Pacific Electric Railway Company owned a certain strip of land in the city of Los Angeles, running in a generally northwesterly direction from its station near Fourth and Hill streets to First street and Glendale boulevard, a distance of nearly one mile. Said company entered into a contract with appellant Twohy Bros. Company for the construction along said strip of a tunnel or subway for electric railway use. Respondent owned a lot with house thereon at Fourth and Boylston streets, about seventeen feet from the west line of this tunnel (projected to the surface). The interior diameter of the completed tunnel is approximately twenty feet, and for a distance of not less than six hundred feet each way from the junction of Fourth and Boylston streets the tunnel is seventy feet or more below the surface of the ground. The appellant in boring the tunnel used dynamite, and from the explosions the respondent's property was damaged by the shaking of the ground and building or by concussion or both.

The action was dismissed by plaintiff as to the defendant Pacific Electric Railway Company at the commencement of the trial. The judgment was that plaintiff take nothing against defendant W. R. Fontaine (superintendent of construction on the tunnel for appellant), and that she recover damages from appellant.

[1] Appellant concedes that the property of respondent was damaged, and raises no question as to the sufficiency of the evidence to sustain the finding as to the amount of damages. However, appellant does earnestly present its points of law upon its contention that there is no liability whatsoever from appellant to respondent.

Appellant, at the commencement of the trial, objected to the introduction of any evidence in the case upon the ground that "the complaint does not state a cause of action in that it fails to allege any negligence upon the part of defendants, or either of them, and that in the absence of that, no evidence is admissible because we are not liable for blasting unless it is negligently done." The objection was overruled. At the close of the case, appellant moved "for judgment for the defendant upon the ground that the complaint does not state a cause of action in that it fails to allege any negligence." This motion was denied by the court.

Appellant states its point on appeal as follows: "The evidence on the part of the respondent follows the allegations of the complaint, as does also the findings of fact. Our appeal is based on the error of the court in overruling the objections to the introduction of any evidence and in denying appellant's motion for judgment made at the close of the case, and in holding the doctrine of *res ipsa loquitur* applicable and placing the burden on appellant to show it was not negligent. The complaint in no way or manner alleges that the blasting was negligently done and respondent offered no evidence of any negligence, and the record is devoid of anything to show negligence in the manner of blasting unless the mere fact of injury proves negligence."

The complaint alleges that the defendants in building the tunnel continually set off blasts sufficiently severe to shake the surrounding country, including the lot on which plaintiff's house and other improvements stood, "as with a severe earthquake"; that Twohy Bros. Company and Fontaine continually set off very heavy blasts along the line of said tunnel during both the daytime and the nighttime; that said blasting continued at all hours of the day and night for several months; that many times plaintiff's building was shaken by said blasting as though with a heavy and violent earthquake, whereby her property was damaged as set forth in the complaint.

The principal California case relied upon by

appellant is *Houghton v. Loma Prieta Lumber Co.*, 152 Cal. 500, 93 P. 82, 14 L. R. A. (N. S.) 913, 14 Ann. Cas. 1159. The blasting complained of in that case was done in an uninhabited region, where the defendant, as an independent contractor, was engaged in constructing a wagon road, and a stump, which stood in the course of the projected road, was exploded by blasting with dynamite, whereby the deceased lost his life by being struck with a stone while passing by. We do not consider that case in point under the facts of the present case.

The principal California cases upon which respondent relies are: *Colton v. Onderdonk*, 69 Cal. 155, 10 P. 395, 397, 58 Am. Rep. 556; *Munro v. Pacific Coast, etc., Co.*, 84 Cal. 515, 24 P. 303, 18 Am. St. Rep. 248; and *Green v. General Petroleum Corporation* (Cal. Sup.) 270 P. 952, 955, 60 A. L. R. 475.

In the case of *Colton v. Onderdonk*, supra, the facts show that the defendant used quantities of guppowder to blast out rocks upon his own lot, contiguous to another person's property situated in a large city, and the court said this "must be taken as an unreasonable, unusual, and unnatural use of his own property, which no care or skill in so doing can excuse him from being responsible to the plaintiff for the damages he actually did to her dwelling-house as the natural and proximate result of his blasting. For an act which in many cases is in itself lawful, becomes unlawful when by it damage has accrued to the property of another. And it would make no material difference whether that damage, resulting proximately and naturally from the act of blasting by the defendant, was caused by rocks thrown against Mrs. Colton's dwelling-house, or a concussion of the air around it, which had either damaged or entirely destroyed it."

Munro v. Pacific Coast, etc., Co., supra, is an action brought to recover damages for death caused by the negligent explosion by defendant of a blast in the city of San Francisco, whereby plaintiff's intestate was killed. The complaint therein set forth a careless and negligent explosion of the blast. However, the Supreme Court did say in that case: "We perceive no error" in the following instruction: "It is no defense or answer to an action of this character that defendant, in exploding the blast in question, used and employed skillful and experienced men, and in everything appertaining to blasting, it used and exercised the highest degree of care; and I charge you that defendant is liable for damages for the death of said Michael Stanton, if you find that his death resulted from the firing of the blast in question, even if it used the highest and utmost care and skill in firing and exploding it." * * * The evidence shows clearly that this blast was exploded in a thickly-settled portion of the city. We are of opinion that no degree of care will

excuse a person, where death was caused by such explosion, from responsibility for it."

Since the filing of the briefs in the case before us the Supreme Court of this state has given its decision in *Green v. General Petroleum Corporation*, supra. In that case plaintiffs owned certain improved real property in a residence district outside the city of Long Beach, which they occupied as a residence; defendant had leased the adjoining land, and was engaged in drilling a well for the discovery and production of oil; while bailing out the water for the purpose of testing the cement job for shut off of water, the well erupted, blowing off the control valves and wrecking the derrick. A stream of oil, gas, mud, and rocks shot into the air and upon plaintiffs' property, which was located about two hundred feet from the well. This mixture continued to pour forth for about twenty-four hours, and caused the damage complained of. The complaint contained two causes of action; one based upon liability without negligence due to trespass on plaintiffs' property, the other based upon negligence on the part of the defendant in performing the drilling operations. The trial court expressly found that the defendant had used and exercised ordinary care in the drilling of the well, and was not guilty of negligence in any particular. The court said that the evidence amply supported this finding. Judgment was in favor of the plaintiffs on the first cause of action, and the appeal presented to the Supreme Court for its determination the question whether or not, under the existing circumstances of injury without negligence, appellant was liable for the damage suffered by respondents. The Supreme Court therein said: "It ought to be, and we are of the view that it is, the rule that, where an injury arises out of, or is caused directly and proximately by the contemplated act or thing in question, without the interposition of any external or independent agency which was not or could not be foreseen, there is an absolute liability for the consequential damage, regardless of any element of negligence either in the doing of the act or in the construction, use, or maintenance of the object or instrumentality that may have caused the injury."

[2] "In general, if a voluntary act, lawful in itself, may naturally result in the injury of another, or the violation of his legal rights, the actor must at his peril see to it that such injury or such violation do not follow, or he must expect to respond in damages therefor; and this is true, regardless of the motive or the degree of care with which the act is performed." *G. B. & L. R. Co. v. Eagles*, 9 Colo. 544, 546, 13 P. 696, 697.

In the recent case of *Feinberg v. Wisconsin Granite Co.*, 224 N. W. 184, decided by the Supreme Court of South Dakota on March 16, 1929, the complaint alleging that defendant stone quarry operator, in loosening rocks with

high-power explosives, caused injuries to plaintiff's building near quarry by concussions through the air and vibrations through the ground, without alleging negligence or want of skill or care in blasting operations, was held to state a cause of action.

We see no reason for differentiating between responsibility for damage done by physical projectiles or missiles and responsibility for damage done by vibration or concussion.

The judgment is affirmed.

We concur: CONREY, P. J.; HOUSER, J.

104 Cal. App. 687

ISLETON CANNING CO. v. SUPERIOR COURT IN AND FOR CITY AND COUNTY OF SAN FRANCISCO et al. ★
Civ. 7352.

District Court of Appeal, First District, Division 2, California.

March 26, 1930.

Rehearing Denied April 25, 1930. Hearing Denied by Supreme Court May 22, 1930.

1. New trial ⇨138—Notice of Intention — Service — Time.

Notice of intention to move for new trial, served by plaintiff over ten days after serving written notice of entry of judgment, *held* too late, though defendant gave plaintiff no such notice (Code Civ. Proc. § 659).

Code Civ. Proc. § 659 (St. 1915, p. 201, as amended by St. 1929, p. 841), requires party intending to move for new trial to serve notice of intention on adverse party within ten days after receiving written notice of entry of judgment.

2. Appeal and error ⇨345(1) — Time for appeal — New trial — Late notice.

Notice of appeal *held* too late, where notice of intention to move for new trial was not served in time (Code Civ. Proc. § 659).

3. Prohibition ⇨4 — Discretion of court.

Granting or denying writ of prohibition is largely discretionary.

4. Prohibition ⇨10(2)—Preventing settlement of bill of exceptions — Delay in serving notice of intention to move for new trial.

Writ of prohibition should issue to prevent settlement of bill of exceptions, where appellant's notice of intention to move for new trial was served too late (Code Civ. Proc. § 659).

Application by the Isleton Canning Company, for a writ of prohibition to the Superior Court of the State of California in and for the

City and County of San Francisco, and George H. Cabaniss, Judge presiding.

Peremptory writ granted.

Hearing denied by Supreme Court; NOURSE, Acting P. J., not voting.

Erwin C. Easton, of San Francisco, for petitioner.

W. H. Metson and E. B. Mering, both of San Francisco, for respondents

STURTEVANT, J.

This is an application for a writ of prohibition to stop the respondent court from settling a bill of exceptions in the case of Hechtman v. Isleton Canning Company. The basic case was tried before the court sitting with a jury. The jury returned a verdict in favor of the plaintiff, and a judgment was entered thereon. Written notice of the entry of the judgment was given by the plaintiff to the defendant August 23, 1929. The defendant did not give the plaintiff a written notice of the entry of the judgment. On September 18, 1929, the plaintiff served a notice of intention to move for a new trial. September 27, 1929, the defendant made a motion to strike said notice from the files. Apparently at the same time the trial court heard the motion for a new trial. Whether it made any order on the motion to strike does not appear, but it does appear that the trial court denied the motion for a new trial. On October 31, 1929, the plaintiff served a notice of appeal. The defendant asserts that the plaintiff's notice of intention to move for a new trial came too late, and that it is a nullity. Continuing, it claims that the notice of appeal also came too late and that it is a nullity, and, therefore, it asserts the trial court is exceeding its jurisdiction by proceeding to settle a bill of exceptions, and that this application should be granted. In reply, the plaintiff calls attention to the wording of section 659, Code of Civil Procedure, and argues that it was the duty of the defendant to have given the plaintiff notice of the entry of the judgment, if the defendant would complain that the acts of the plaintiff are dilatory.

[1,2] The provision of the statute, the meaning of which is in controversy, is as follows: "The party intending to move for a new trial must, either before the entry of judgment or within ten (10) days after receiving written notice of the entry of the judgment, file with the clerk and serve upon the adverse party a notice of his intention to move for a new trial. * * *" Code Civ. Proc. § 659. The requirement that a notice of intention be given was in the statute when the codes were adopted in 1872. As to when that notice should be given, has been the subject matter of many disputes. In 1915 (St. 1915, p. 201) the Legislature enacted that it should be given " * * * within ten days after receiv-

ing notice of the entry of the judgment, or within ten days after verdict. * * *

After the statute was so amended, the disputes continued, but they took the form as to what was or was not notice. In 1929 (St. 1929, p. 841) the word "written" was inserted before the word "notice." Several sections were amended in the same manner. From the foregoing history, it seems to us that it is clear that the Legislature never contemplated that a written notice should be given by each party. Such a contention was not the subject-matter of any of the former decisions. However, that a written notice should be given and a written record of the notice should be preserved, and thus remove the disputes that had theretofore arisen, was manifestly the intention of the Legislature. When a written notice is prepared by one party and signed by him, and is served on the other party and the service is admitted in writing, it is but reasonable to look upon the document as a written notice to both parties. As the law does not require the performance of idle acts, no good reason appears for construing the statute as requiring each party to serve on the other party a formal written notice in order to cut out delays in litigation. Therefore, we are of the opinion that the notice of intention to move for a new trial, which the plaintiff served on September 18, 1929, came too late, and that it should have been stricken out on motion. As no new trial proceeding was legally initiated within the time allowed by law, the notice of appeal came too late and it was ineffective for any purpose. *Whiting-Mead Comm. Co. v. Bayside Land Co.*, 178 Cal. 93, 94, 172 P. 598.

[3, 4] The question of granting or denying this writ is largely one of discretion and, in view of all of the facts, we think that in this instance the writ should issue.

Let a peremptory writ of prohibition issue.

We concur: NOURSE, Acting P. J.; BULLOUGH, Justice pro tem.

104 Cal. App. 690

PEOPLE v. MACBETH.
Cr. No. 1571.

District Court of Appeal, First District, Division 2, California.

March 26, 1930.

I. Criminal law §549 — Negative averments — Proof.

Slight evidence is sufficient to prove negative averments in criminal case.

2. Forgery §44(1/2) — Conviction — Sufficiency of evidence.

Evidence in prosecution for forgery held sufficient to support conviction.

Appeal from Superior Court, Alameda County; Fred V. Wood, Judge.

Joseph M. Macbeth, alias A. W. Woodson, was convicted of forgery, and he appeals.

Affirmed.

Frederick Dubovsky, of Oakland, for appellant.

U. S. Webb, Atty. Gen., and William F. Cleary, Deputy Atty. Gen., for the People.

STURTEVANT, J.

In the information the district attorney pleaded five separate counts alleging five different acts of forgery. He also alleged two prior convictions. On his arraignment the defendant pleaded not guilty to each of the five counts alleging forgery, but admitted the prior convictions. The jury returned verdicts of guilty on counts 1, 3, 4, and 5. The defendant moved for a new trial. The motion was denied, and from the judgment of conviction and the order denying him a new trial the defendant has appealed.

[1, 2] It was the theory of the prosecution that the defendant wrote the instruments pleaded in the information and signed the names, but the names so signed were names of fictitious persons, natural or artificial. The defendant contends that the evidence was wholly insufficient to show that any of the persons, natural or artificial, were fictitious names. The district attorney called Martha E. May. She testified that the instrument set forth in the first count was cashed by her at the request of the defendant and that the instrument set forth in the second count was likewise cashed by her. He called Henrietta Rudawsky, who testified that the instrument set forth in the third count was at the request of the defendant cashed by her. He called Marguerite Pius, who testified that the instrument set forth in the fourth count was at the request of the defendant cashed by her. He also called Arabella Clark, who testified that the instrument set forth in the fifth count was cashed by her. Each of these passings occurred in Berkeley, Alameda county, all within a space of a few blocks of each other and within a period of four days and under almost identical circumstances. Except as to the amount and the date each instrument was as follows:

"May 20, 1929.

"Security Bank & Trust Co. of Long Beach, Calif., Pay to the order of A. W. Woodson, Thirty five and no/100 Dollars. Value received and charge the same to account of
"W. J. Sutherland, Cashier.

"To Southern Bond Corp.,
"No. 3372 Long Beach, Calif."

Each draft, together with indorsements thereon, was offered in evidence. Mr. C. C. Jameson was called as a witness. He testified that he is assistant cashier of the Security First National Bank of Long Beach; that on April 1, 1929, Security Trust & Savings Bank of Long Beach was merged with Los Angeles First National Bank and thereafter it was called Security First National Bank. He further testified that there has never been at Long Beach a bank named Security Bank & Trust Company; that there is not now, and has not been for seven years, a concern called Southern Bond Corporation; and that he had made inquiry and that there is no person at Long Beach by the name of W. J. Sutherland, and that there is no W. J. Sutherland acting as cashier of any bank at Long Beach. The next witness called was R. W. Foraker, an officer of the Berkeley Police Department, who identified a signature "J. M. Macbeth" and that signature was received in evidence as an exemplar. Mr. E. O. Heinrich qualified as a writing expert. That witness was shown the drafts pleaded in counts 1, 3, 4, and 5 and also the exemplar. He testified that the handwriting on each of said drafts was written by the same person who wrote the exemplar. The next step taken by the prosecution was to call Mr. W. J. Wilson, an inspector of the Berkeley Police Department. That witness testified that on the 26th day of December, 1929, he and Officer Woods of his department and Inspector Becker held a conversation with the defendant in the Berkeley City Hall. At that time the witness showed the defendant the drafts pleaded in counts 1, 3, 4, and 5, and the defendant stated that he wrote each one, and further stated that "the drafts were all fake—names and everything." Continuing, the defendant stated that in his room in the Hotel Galt in San Francisco could be found certain red rubber stamps. Thereupon the officers went to the room and obtained certain stamps which the witness offered in evidence. The foregoing evidence shows a complete case against the defendant on the theory that the names were names of fictitious persons. Before the confession was offered in evidence there was some evidence of the corpus delicti. There was also prima facie evidence that the names were the names of fictitious persons. *People v. Carmona*, 80 Cal. App. 159, 165, 251 P. 315. The latter evidence was in the nature of negating the fact that W. J. Sutherland was at Long Beach. It may be granted, as the defendant contends, that no witness had testified that W. J. Sutherland was not in Alameda county. The prosecution was in the act of proving a negative. It will hardly be contended that the prosecution was bound to produce a wit-

ness who had searched every spot on earth. However, it will be conceded that the prosecution was bound to introduce some evidence tending to support the negative. When a party is attempting to prove a negative slight evidence is sufficient. 10 Cal. Jur., pp. 789, 1149, and 1158. We are unable to say that the showing made by the prosecution in the instant case did not meet that rule prior to the introduction of the evidence of the confession, and, when the confession was introduced, the proof was abundantly sufficient to support the verdict rendered by the jury. We find no error in the record.

The judgment and order are affirmed.

We concur: NOURSE, Acting P. J.; BURROUGHS, Justice pro tem.

RELOVICH v. STUART et al. ★
Civ. 6345.

District Court of Appeal, Second District, Division 1, California.

March 18, 1930.

Rehearing Denied April 7, 1930. Hearing Granted by Supreme Court May 15, 1930.

1. Contracts ⇨10(1) — Specific performance
⇨32(1) — Writing binding only one party —
Enforcement — Damages — Breach.

Writing binding only one party cannot be enforced as contract either specifically or by award of damages for breach or nonperformance thereof by other party (Civ. Code, § 3386).

2. Contracts ⇨10(1)—Lack of mutuality — Effect.

Contract creating no definite obligation as to one party lacks mutuality, and is binding on neither party.

3. Contracts ⇨10(1) — Mutuality — Contract to furnish water.

Agreement to furnish water at stated rate held unenforceable for lack of mutuality, in absence of covenant to require, take, or purchase any water.

Appeal from Superior Court, Ventura County; G. R. Freeman, Judge.

Action by Anton Relovich against S. L. Stuart and others. Judgment for defendants, and plaintiff appeals.

Affirmed.

J. L. Murphey, of Los Angeles, for appellant.

Clarke & Bowker, of Los Angeles, and James C. Hollingsworth, of Ventura, for respondent Mary Perkins Raymond.

HOUSER, J.

Defendant Stuart was the owner of about 130 acres of land upon which he had developed water. He sold to plaintiff, Relovich, 20 acres of such land. Contemporaneously with the delivery of the deed thereto Stuart gave to Relovich an instrument in writing, signed by Stuart alone, by which he agreed to furnish to Relovich, for the price of 20 cents for each 1,000 gallons, water to be used by him upon the land described in the deed. The "agreement" contained the further provision that water to be furnished was to be supplied from the water system owned by Stuart, but that Relovich was to pay the expense of "making the connection to and with said system of pipes and conducting said water to said land." During each of several succeeding years Relovich improved portions of the land purchased by him from Stuart, and in so doing used water which was furnished to him in accordance with the terms of the "agreement." Thereafter Stuart sold his remaining interest in the original 130 acres, together with the water rights therein. After such land and such water rights had passed into the ownership of several successive purchasers thereof, the title thereto finally vested in the defendant Raymond, who thereupon broke and disconnected the pipe theretofore installed by Relovich at its connection with the water system theretofore maintained by Stuart and the several succeeding owners thereof, and thereafter refused to furnish Relovich with any water. Thereupon Relovich instituted a suit by which he sought an injunction to compel Raymond to again connect the water system owned by Raymond with the pipe installed by Relovich in connection with said water system, and thereafter to furnish water to Relovich as provided in the agreement to which reference has been had. By his action Relovich also demanded compensation from Raymond for damages caused by her refusal to furnish water in pursuance of the provisions of said agreement. By order of the lower court a demurrer interposed by the defendants to the complaint in the action was sustained without leave to amend. It is from the ensuing judgment that this appeal is taken.

[1, 2] From a consideration of the foregoing statement of facts it becomes apparent that the right, if any, in the plaintiff to the relief demanded by him primarily depended upon whether the "agreement" was capable of either legal or equitable enforcement. Speaking generally, it is well established by numerous authorities that, where by the terms of a writing but one of the parties purportedly interested therein is bound by its terms, the instrument cannot be enforced as a contract, either specifically or by way of compensation to be awarded as damages to one of the parties to the quasi contract on account of its supposed breach or the nonper-

formance of its apparent requirements by the other party thereto. As in substance is stated in 6 California Jurisprudence, 211, if no definite obligation is created as to one of the parties, the contract lacks mutuality, and is binding upon neither of the parties. And in 9 Cyc. L. & P. 618, the same thought, with an illustration thereof, appears in the following language: " * * * One who promises to do a thing only if it pleases him to do it, is not bound to perform it at all. * * * So where a person agrees to furnish lumber in such quantities as he may 'deem fit and advisable,' it has been held that he may cease furnishing the lumber whenever he pleases." In the case of *Doe v. Culverwell*, 35 Cal. 291, it is held that, in order that a writing between two persons may have binding force, it is essential that it contain obligations which are reciprocal as to each of the parties thereto. That equity will not decree the specific performance of an act agreed to be performed by one of the parties to a purported contract, unless by its terms a reciprocal obligation is created as to the other party thereto, is held in *Archer v. Miller*, 73 Cal. App. 678, 239 P. 92. And in volume 23, page 445, of California Jurisprudence, where many authorities are cited in its support, the rule is thus stated: "A contract will not be specifically enforced unless it has such mutuality that it may be so enforced by either party; and this mutuality must exist at the time the action is commenced. It results that when, from personal incapacity, the nature of the contract, or any other cause, a contract is incapable of being enforced against one party, that party is equally incapable of enforcing it specifically against the other." And by section 3386 of the Civil Code, in part and in substance, it is provided that neither party to an obligation can be compelled specifically to perform it, unless the other party is compellable specifically to perform it.

[3] Adverting to the "agreement" here under consideration, it will be remembered that it was signed by Stuart only, and that he agreed to furnish water to Relovich at a stated rate, but that there was no agreement either as to the total quantity of water which would be furnished, nor the time during which any flow (however uncertain as to quantity or volume) of water should continue. For example: As far as the language of the "agreement" is concerned, the 1,000 gallons mentioned therein might be so furnished that it would come as a mere trickle and possibly take many hours to accumulate; or, again, the 1,000 gallons might be supplied in a comparatively large volume and require the space of one minute or less; and the flow of water last suggested might be continuous; or it might be intermittent, and thus the several flows thereof separated by days, weeks, or months. But of greater importance, as far as the binding force of the agreement was con-

cerned, was the fact that the agreement contained no covenant on the part of Relovich that he would ever require, or take, or purchase, from Stuart any water whatsoever. It is therefore clear that the "agreement" was lacking in mutuality, in that, although, apparently, it obligated Stuart to the performance of an act (however uncertain), in no wise did it impose any reciprocal or other duty on Relovich.

In the case of Schimmel v. Martin, 190 Cal. 429, 213 P. 33, 34, it appeared that Martin, who was the owner of "150 inches of water," agreed with one Uzzell to let him "have this water continuously at 1½¢ per inch," to be delivered on certain land. Later, the rights of Uzzell in the contract were assigned to Schimmel and one Anderson, and immediately thereafter Martin refused to furnish any water to either of them. In an action for damages resulting from such refusal, judgment was rendered against the defendant. On appeal to the Supreme Court it was held that the contract was void because it was lacking in mutuality, in that it contained no covenant on the part of the proposed user to buy the water offered for sale by its owner; also that a contract to allow the use of water where no time was specified during which an agreed rate was applied was void for uncertainty. In part the court said:

"The contract is lacking in mutuality. Considered as a contract for the sale of personal property, as the parties to the action treated and considered it, and as the trial court in effect found it to be, there is clearly no mutuality in the absence of an agreement by the plaintiffs to buy the water offered for sale by the contract. * * * But in the instant case we are unable to find in the contract any obligation or promise on the part of the plaintiffs or their predecessors in interest to take or purchase any water at all.

"The lack of mutuality in the contract is the principal point made in support of the appeal. Incidentally, however, it is contended that the contract was void for uncertainty. This point, even though it be indifferently made, is well taken." And the court then took pains to point out in what respect the uncertainty existed, and reversed the judgment.

That case and the instant case are very similar. It is clear that, if no recovery of damages could be had in the cited case, none should be recovered in this case; and since by general authority, to which reference heretofore has been had herein, it is manifest that, before specific performance of a contract of the nature of that here under consideration will be decreed, it must appear that by the covenants therein a mutuality of remedy for its breach exists in favor of each of its parties, it follows that the judgment rendered

herein by the lower court should be affirmed. It is so ordered.

We concur: CONREY, P. J.; ELLIOT CRAIG, Justice pro tem.

104 Cal. App. 523

FIRST BANK OF JAMESTOWN v. GILLIS
et al.
Civ. 4033.

District Court of Appeal, Third District, California.

March 17, 1930.

1. Vendor and purchaser — Prospective purchasers — Possession.

Prospective purchasers who entered premises with knowledge of owner did not have rights of tenants in possession.

2. Vendor and purchaser — Prospective purchasers — Liability — Taking crop.

Prospective purchasers taking possession without authority from owner, and picking and marketing fruit crop, held liable for value of crop when negotiations for purchase fell through.

3. Vendor and purchaser — Prospective purchasers — Liability — Taking crop.

Where value of crop taken by prospective purchasers was not set forth, their liability was determined by reasonable value (Civ. Code, § 1611).

Civil Code, § 1611, provides that when contract does not determine amount of consideration, nor method by which it is to be ascertained, the consideration shall be so much money as the object of the contract is reasonably worth.

4. Vendor and purchaser — Prospective purchasers — Taking crop — Liability.

Right of prospective purchasers of land to market crop would not necessarily relieve them from paying value of crop when negotiations for purchase failed.

Appeal from Superior Court, Tuolumne County; J. J. Trabucco, Judge.

Action by the First Bank of Jamestown against Charles L. Gillis and another. Judgment for plaintiff, and defendants appeal.

Affirmed.

C. K. Bonestell and Finlay Cook, both of San Francisco, for appellants.

Rowan Hardin, of Sonora, for respondent.

PLUMMER, J.

Plaintiff had judgment against the defendants for the sum of \$950, as the value of a certain apple crop taken possession of and sold by the defendants. From this judgment, the defendants appeal.

The cause was tried before the court sitting without a jury, and at the conclusion thereof the court found, among other things, as follows, to wit:

That in the month of February, 1924, J. P. Gibbons, T. E. Hunt and Marion Hunt, his wife, executed and delivered to J. B. Ryan and W. E. Booker, for the benefit of the plaintiff, a certain deed of trust, wherein and whereby they conveyed to Ryan and Booker, as trustees of plaintiff, certain premises described in the deed of trust, including about 300 acres of land; that upon the land so included in the deed of trust was a bearing apple orchard; that the indebtedness secured to be paid to the plaintiff by the deed of trust just mentioned became due and payable in the month of January, 1926; that the guarantors in said deed of trust defaulted in the payment of the amount secured thereby, and in said month of January, 1926, they delivered to the possession of the plaintiff all of the property described in said deed of trust; that thereafter, and on or about the 2d day of June, 1926, proceedings were begun for a foreclosure of said deed of trust, and the same was thereafter foreclosed and a conveyance made of the premises included in said deed of trust to the plaintiff, on or about the 23d day of October, 1926; that prior to said conveyance by said trustees under the sale referred to, to the plaintiff, the guarantors in said deed of trust granted and quitclaimed to the plaintiff the same premises; that at the time of the commencement of this action the plaintiff was the owner of the premises referred to herein, and during all the times mentioned in this complaint was entitled to the possession thereof, and to the rents, issues, and profits thereof, and to all crops raised or grown thereon; that after the plaintiff had taken possession, as aforesaid, under an agreement with the guarantors in said deed of trust, and on or about the month of June, 1926, said defendants offered to purchase said property under a verbal agreement and understanding with the plaintiff that the purchase was to take place and be completed at such time as the plaintiff could give a good and sufficient title thereto, and it was understood and agreed that conveyance would be made only after sale of said property was had under the terms and provisions of said trust deed; that this proceeding was completed and title perfected on or about the 23d day of October, 1926, and the plaintiff offered to convey said property to the defendants. It further appears in the findings that a dispute arose between the parties as to the amount of the purchase price to be paid therefor, and that the defendants refused to pur-

chase the same, and have neglected, failed, and refused to purchase said property, and that said defendants did not at any time become the owners of said property, or entitled to any right, title, or interest therein. That in the month of June, 1926, and pending the time that said property was being sold under the trust deed referred to, and without any agreement or understanding between the plaintiff and the defendants relative to the possession of said property, the defendants entered upon the property and remained in possession thereof until about the 6th day of November, 1926. The court further found that at the time said defendants went into possession of said property in June, 1926, there was an apple orchard upon said property with a crop of apples nearly matured; that the defendants did not have anything to do with the production of said crop of apples, but that beginning in the month of July, 1926, the defendants commenced picking and selling said apple crop, and continued picking the same and shipping and selling said crop of apples until about the 6th day of November, 1926. The court further found that the defendants had not paid for said apple crop or accounted for any of the proceeds thereof; that the reasonable value of the crop was the sum of \$950; that the crop of apples amounted to 185,000 pounds. Judgment followed for the plaintiff for the value of the crop as it existed upon the trees at the time the defendants picked and sold the same.

A reference to the testimony shows that during the oral negotiations or conversations relative to the property, that the value of the apple crop was discussed, and, on the part of the plaintiff, there is testimony to the effect that the value of the apple crop was considered in fixing the price of the premises. On the part of the defendants, while it is admitted that the value and condition of the apple crop was discussed, it is contended that nothing was said as to the value thereof, entering into the purchase price of the premises. It is not claimed by either party that the defendants entered into the premises in pursuance of any agreement, lease, or understanding that they were to pay so much for the use and occupancy of the premises, or that they were acquiring any interest or ownership therein, or to anything standing or growing thereon.

[1-3] Upon this appeal it is contended, however, that the defendants were tenants in possession, and that the law relative to the right of a tenant to crops planted, growing, and harvested prior to surrendering possession of the premises should be applied to this case. However, the facts show, and the findings of the court show, that the defendants did not enter as tenants of the plaintiff; that they did not lease the premises; that they had not acquired any interest or ownership therein. All that appears is that there was an oral agreement to purchase the premises,

the purchase and transfer to take place at a certain date, and that thereafter the defendants entered upon the premises, of which fact the plaintiff had knowledge, and no objection was offered thereto. There is testimony in the record to the effect that the plaintiff considered the value of the apple crop to be of the sum of about \$2,000. The record shows that the apple crop was about matured, and there is nothing in the record indicating that the defendants ever did anything in relation to the care of the trees or of the apples growing thereon, until they began picking the same. That the value of an apple crop about matured, consisting of 185,000 pounds, would enter into the calculations of the parties in negotiating for the sale and purchase of a tract of land upon which stood trees loaded with that quantity of fruit appears to us almost self-evident, and that upon a failure of the parties to come to an understanding and completion of the purchase and sale, as orally agreed upon, would entitle the owner of the premises to the value of the crop gathered and sold by the intending purchaser who had refused to complete the purchase. The facts of this case are clearly distinguishable from instances where a tenant, or even where a trespasser, has entered upon real estate and planted, cared for, and harvested a crop, and likewise distinguishable from instances where a tenant or a trespasser has entered upon a tract of land containing an apple orchard, and has cared for, cultivated, and performed all of the work necessary to protect fruit-bearing trees, so that the fruit grown thereon will be of a marketable quality. This renders it unnecessary to review the cases cited by the appellants having to do with the rights of tenants under such circumstances. This is an instance of intending purchasers taking possession of property, which is rendered more valuable by reason of a crop of fruit thereon, without any understanding or agreement whatever that such possession may be taken and the crop of fruit picked and marketed without any protest. Being a part of the value of the premises as they stood at the time of the negotiations, we think when the negotiations fell through, the defendants were properly held liable for the value of the crop. It is true that the value of the crop as separable from the value of the real estate, was not set forth. Under such circumstances, section 1611 of the Civil Code applies. In this case, the defendants accepted and took possession of a part of the property without any understanding as to the price to be paid for such portion. Under such circumstances the case of *Dickerman v. Ohashi Importing Co.*, 63 Cal. App. 101, 218 P. 458; 22 Cal. Jur., p. 939, also, p. 1093, would apply.

We think the evidence shows that the defendant Hoefer was equally liable with the defendant Gillis for the value of the crop.

[4] If it be conceded that the defendants, under the circumstances, had the right to pick and market the apple crop, it does not follow that when the sale fell through and the defendants refused to purchase the land upon which the trees bearing the apple crop stood, that they should be relieved from compensating the plaintiff for the value of the crop.

The judgment is affirmed.

We concur: FINCH, P. J.; R. L. THOMPSON, J.

104 Cal. App. 723

ÆTNA CASUALTY & SURETY CO. v. EXNICIOS. (Civ. 6433.) ★

District Court of Appeal, First District, Division 1. California.

March 28, 1930.

Rehearing Denied April 26, 1930. Hearing Denied by Supreme Court May 26, 1930.

Receivers §212 — Qualifying bond — Attorney's fees — Receiver's liability.

Under receiver's qualifying bond, surety held entitled to recover attorney's fees from principal in defending action by trustee in bankruptcy against receiver and surety based on void order appointing receiver.

The qualifying bond provided that indemnitor will at all times indemnify surety from any and all damages, losses, costs, charges, and expenses incurred by reason of suretyship, and that counsel and attorney's fees shall be deemed proper charge or expense within meaning of such provision.

Appeal from Superior Court, City and County of San Francisco; John J. Van Nostrand, Judge.

Action by the Ætna Casualty & Surety Company against John Exnicios. Judgment for plaintiff, and defendant appeals.

Affirmed.

Frank L. Guerena, of San Francisco, for appellant.

James M. Wallace and Lovell & Lovell & Wallace, all of San Francisco, for respondent.

PER CURIAM.

Appellant, in an action filed in the superior court in and for the city and county of San Francisco, numbered 94,314 and entitled "Charles H. Goewey, Plaintiff, v. Herbert Goewey and Goewey Investment Co., a Corporation, Defendants," was duly appointed receiver of the property of the corporation. Following the order he filed a qualifying bond which was furnished by the respondent surety company. He entered upon his duties, and

during the period of his active receivership was paid by order of the court certain sums as fees for his services and those of his attorney. Subsequently the investment company was adjudged a bankrupt and its property was surrendered by the receiver to the trustee in bankruptcy. Thereafter the trustee brought suit in the above superior court against appellant and respondent surety company to recover the amount received as fees by appellant and his attorney and for a further sum alleged to have been lost while the business of the investment company was being conducted by the receiver. The action last mentioned was numbered 129,253 and entitled "Charles W. Taylor, Trustee in Bankruptcy for the Goewey Investment Co., a Corporation, a Bankrupt, Plaintiff, v. John Exnicios and Aetna Casualty and Surety Company (a Corporation), Defendants." The complaint alleged that the superior court was without jurisdiction to appoint appellant receiver of the investment company and that the order was consequently void. A demurrer filed by appellant was overruled, and after a trial upon the merits, a judgment, which has become final, was rendered in appellant's favor. Respondent surety company also demurred to the complaint, and its demurrer was sustained. Following this ruling judgment was entered therein in its favor and was affirmed on appeal. *Taylor v. Exnicios*, 197 Cal. 443, 241 P. 397. The trustee in the action last mentioned sought to hold the surety company liable upon the bond for the portions of the estate of the bankrupt alleged to have been unlawfully received and lost by appellant, it being his contention that notwithstanding the allegation that the order of appointment was void, the bond having been given to enable appellant to exercise the functions of the office, the surety was not relieved from liability thereon because of the invalidity of the appointment. The court held, however, that if the order of appointment was void as alleged, a material consideration for the execution of the bond had failed and the same was unenforceable; consequently that the demurrer of the surety company was properly sustained. *Taylor v. Exnicios*, supra.

Appellant in his application for the bond in question, wherein he is designated as the indemnitor, agreed as follows: "That the indemnitor will perform all the conditions of said bond on the part of the indemnitor to be performed, and will at all times indemnify and keep indemnified the surety from any and all damages, loss, costs, charges and expenses of any kind or nature whatsoever, which it may at any time sustain or incur by reason of its suretyship, and will pay over to the surety, its successors or assigns, all sums of money which may be paid by or for the surety, or which it may become liable to pay by reason of such suretyship. Counsel and attorney's fees, whether incurred under retainer, or

salary, or any other expense incurred by the surety at any time in any litigation, investigation, collection of premiums due on this bond, or in seeking its discharge as surety, shall be deemed a proper charge or expense within the meaning of the preceding sentence, and the surety is hereby authorized to prove such costs or expenses in any action or proceeding against the indemnitor, and include the same in any judgment or decree which may be recovered against said indemnitor, and the company may bring as many actions hereupon as there are defaults, the recovery of each judgment not to be a bar to the recovery of any other judgment. That in any accounting which may be had between the indemnitor and the surety the surety shall be entitled to credit for any and all disbursements in and about the matters herein contemplated, made by it."

The condition of the bond was that, "If the said John Exnicios as such receiver shall faithfully perform the duties of his office according to law and the orders of said court, then this obligation to be void; otherwise to remain in full force and effect." The present action is one to recover from appellant sums expended by respondent surety company for attorney's fees in the defense of the action brought against it by Taylor, the trustee, and for like fees a liability for which it has incurred in the prosecution of the present action.

The trial court found for respondent and entered judgment accordingly.

Appellant claims that the attorney's fees expended by respondent in the action brought by the trustee were not an expense sustained or incurred as provided in the application for the bond, and that consequently he is not liable therefor nor for attorney's fees in the present action.

In support of this contention it is urged that the agreement to save the surety company harmless from all damages, loss, costs, charges, or expenses of any kind or nature which it might sustain by reason of its suretyship can only refer to such expenses, etc., sustained or incurred by reason of its guaranty that the receiver would faithfully perform the duties of his office; that the suit by the trustee did not involve the question of the failure of the receiver to faithfully perform the duties of his office; and that consequently the surety was not sued and did not defend by reason of its suretyship.

As stated, the object of the trustee's suit was to recover funds of the bankrupt's estate to which, it was claimed, the receiver, owing to the invalidity of his appointment, had no right; and it was also sought to hold respondent liable therefor upon its bond. While, as the court held, if the order of appointment was void as alleged, no action would lie as against the respondent surety company, never-

theless the trustee sought to hold it responsible "by reason of its suretyship" and upon no other ground. This being true, the surety was clearly entitled under the terms of its contract with appellant to recover the expense incurred in the litigation, notwithstanding the complaint as against it was legally insufficient. The liability of appellant for attorney's fees in the present action, in case the right of respondent to recover in the above particulars is sustained, is undisputed.

We agree with the conclusions of the trial court, and the judgment is accordingly affirmed.

104 Cal. App. 573

NUNZIATO v. PROUT.★

Civ. 3982.

District Court of Appeal, Third District, California.

March 19, 1930.

Rehearing Denied April 18, 1930.

1. Appeal and error ⇨907(2) — Presumption — Findings — Absence of evidence.

In absence of evidence, appellate court must presume trial court's findings are supported by evidence.

2. Appeal and error ⇨907(2) — Presumptions — Findings — Interference with judgment — Absence of evidence.

That court found against plaintiff on special defense to cross-complaint did not justify appellate court in interfering with judgment that neither party take anything, in absence of evidence.

Appeal from Superior Court, Los Angeles County; Douglas L. Edmonds, Judge.

Action by Salvatore Nunziato against W. I. Prout to rescind a contract, in which defendant filed a cross-complaint. From the judgment, defendant appeals.

Affirmed.

Sherman & Sherman, of Los Angeles, for appellant.

John L. Schaefer and Roy C. Kaiser, both of Los Angeles, for respondent.

BURROUGHS, Justice pro tem.

The plaintiff commenced this action to rescind a contract, by the terms of which he agreed to purchase, and the defendant agreed to sell, certain machinery used in the manufacture of macaroni. The defendant denied the allegations of the amended complaint upon which the rescission of the contract was based, and by a cross-complaint set up two

causes of action, one for the recovery of \$4,500 for goods, wares, and merchandise alleged to have been purchased by plaintiff from the defendant, and one to recover the sum of \$1,500 alleged to be due him for labor and materials furnished to plaintiff within two years last past. The plaintiff denied the allegations of the cross-complaint, and as a special defense, set up the same facts alleged in the original complaint for a rescission of the contract. The court made findings of fact and conclusions of law, and entered its judgment that the plaintiff take nothing by his complaint, that the defendant take nothing by his cross-complaint, and that neither party was entitled to his costs. The defendant appeals from that portion of the judgment which provides "that plaintiff and cross-defendant is not indebted to defendant W. I. Prout, that defendant W. I. Prout take nothing by his cross-complaint, and that neither party is entitled to his costs herein." The appeal is upon the judgment roll alone.

The court found the following facts alleged in plaintiff's amended complaint to be true: That, on or about the 9th day of February, 1925, plaintiff and defendant entered into an agreement wherein the plaintiff agreed to purchase, and the defendant agreed to sell, one double cylinder hydraulic macaroni press, one double cylinder horizontal short goods hydraulic macaroni press, and one kneading machine, as per specifications set forth in said agreement, and wherein plaintiff agreed to pay therefor the sum of \$7,500; that at the time of entering into said agreement the defendant represented to the plaintiff that he was a manufacturer of macaroni machinery, and that he could manufacture the machinery described in the contract, and that he would make a first-class job; that plaintiff relied upon said representations, and, believing them to be true, signed the contract and paid \$3,000 on the contract price; that on January 30, 1926, plaintiff notified the defendant that he could not make either the macaroni presses or the kneading machine function according to their capacity provided in the contract, and notified the defendant to come to plaintiff's factory and place all three of said machines on a satisfactory working basis; that defendant agreed to do as requested, provided plaintiff would send defendant transportation costs from Denver, Colo., to Los Angeles, Cal.; that plaintiff did send defendant \$100, which was in excess of the sum required for transportation, as aforesaid; that defendant arrived in Los Angeles, February 26, 1926, and took full charge of all of said machinery for the purpose of putting it on a satisfactory working basis; that the two macaroni presses have never been put on a satisfactory working basis, and are not as represented by the defendant in the contract of purchase; that the kneading machine has been used by the plain-

tiff in its business since its delivery to plaintiff, and was so used after the notice of rescission; that on the 6th day of May, 1926, and as soon as plaintiff had ascertained that the representations were untrue, he tendered to defendant a duly executed notice of rescission of said agreement; and that defendant refused, and still refuses, to rescind said contract. The court further found that the plaintiff was not indebted to the defendant either upon the first or second count contained in his cross-complaint.

[1] The appellant contends that the trial court erred in adjudging that the respondent was not indebted to appellant and that the latter take nothing by his cross-complaint. He claims that the special defense set out in the amended answer to the cross-complaint does not state facts sufficient to constitute a defense; that the fraud alleged in said amended answer does not show any damage, and therefore is not actionable. It becomes unnecessary to examine this question. The court refused respondent any relief, and there is no appeal by him. The appellant alleged in his cross-complaint that plaintiff within two years last past became indebted to the defendant in the sum of \$4,500 for a balance due for goods, wares, and merchandise. In the second count of said cross-complaint it is alleged that plaintiff became indebted to the defendant in the sum of \$1,500 for labor done and materials furnished. These allegations were both denied. The court found that said allegations were untrue. In the absence of the evidence, it must be presumed that these findings of the court are supported by the evidence. In 2 California Jurisprudence, p. 689, § 395, it is said: "Where the evidence is not included in the record, the findings, * * * are conclusive, for there is nothing to enable the appellate court to pass upon the sufficiency of the evidence."

[2] The mere fact that the trial court found against the respondent on the special defense to the cross-complaint is not sufficient to justify this court in interfering with the judgment. It is said in 2 California Jurisprudence, p. 879, § 515, as follows: "Because of the presumption in favor of the verdict and findings and judgment, the appellate court when receiving the evidence in support of a verdict or finding, or, in the absence thereof, in support of the judgment, must take into consideration all the evidence rather than certain disconnected portions thereof. It must accept as true all evidence tending to establish the correctness of the finding or verdict and it must consider it in most favorable aspect toward the prevailing party, and give to him the benefit of every inference that can reasonably be drawn in support of his claim. A mere doubt as to whether a finding is justified by the evidence does not authorize the appellate court to set aside the finding."

No sufficient reason has been shown why the judgment should be disturbed. The judgment is therefore affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

104 Cal. App. 621

AYDLOTT v. KEY SYSTEM TRANSIT CO.★
Civ. 7062.

District Court of Appeal, First District, Division 1, California.

March 21, 1930.

Rehearing Denied April 19, 1930. Hearing Denied by Supreme Court May 19, 1930.

1. Carriers ⇨320(30) — Injuries to intending passenger — Cause of accident — Jury question.

Whether intending passenger was struck by interurban car after falling across track or as she stepped on it *held* for jury.

2. Carriers ⇨287(1)—Intending passengers — Regular stopping places — Care required.

Steam or interurban railroad must use greater care for safety of intending passengers at regular stopping places than elsewhere.

3. Carriers ⇨287(1) — Condition of tracks — Duty to intending passengers.

Interurban railway company owed duty to keep portion of tracks ordinarily traversed by intending passengers in safe condition.

4. Damages ⇨216(1) — Instructions — Plaintiff's condition of life — Financial condition.

Instruction permitting consideration of plaintiff's age, sex, condition of life, health and physical condition before and after accident in fixing damage *held* not improper as authorizing consideration of her financial condition.

5. Trial ⇨121(2) — Argument of counsel — References to facts in evidence.

Counsel's reference in argument to facts in evidence that injuries prevented plaintiff from pursuing occupation and compelled abandonment of home she was assisting husband to provide *held* proper.

6. Trial ⇨125(3, 5) — Argument of counsel — Derogatory references to defendant — Reference to plaintiff's condition.

Counsel's references to defendant as "company of sinking ferryboats and leaky cars" and to likelihood of plaintiff becoming public charge *held* improper.

7. Trial $\hookrightarrow$ 125(1) — Improper argument — Ex-citing jurors' prejudice or passions.

Counsel's remarks tending to excite jurors' prejudice, passions, or resentment, or unjustly enlist their sympathies for or against party, are improper.

8. Appeal and error $\hookrightarrow$ 207—Objections in lower court — Misconduct of counsel.

Counsel's misconduct must generally be called to trial court's attention to be reviewable on appeal.

9. Appeal and error $\hookrightarrow$ 1015(5) — Review — Findings — Motion for new trial — Misconduct of counsel.

Trial judge's conclusion on motion for new trial as to whether verdict was due to counsel's misconduct will not be disturbed on appeal, unless plainly wrong.

10. Appeal and error $\hookrightarrow$ 1058(2) — Harmless error — Exclusion of testimony — Subsequent testimony.

Exclusion of testimony as to subjects on which witnesses subsequently testified fully held not reversible error.

Appeal from Superior Court, Alameda County; Homer R. Spence, Judge.

Action by Myrtle Aydloft against the Key System Transit Company, a corporation. Judgment for plaintiff, and defendant appeals.

Affirmed.

Brobeck, Phleger & Harrison, of San Francisco, Chapman, Trefethen, Richards & Chapman and James M. Koford, all of Oakland, for appellant.

Donahue, Hynes & Hamlin, of Oakland, for respondent.

PER CURIAM.

This is an appeal from a judgment upon a verdict in favor of plaintiff and against the defendant for damages for personal injuries alleged to have been sustained by plaintiff when she was run over by one of defendant's trains on January 10, 1927.

The complaint contains three causes of action. The first in substance alleges that on January 10, 1927 and for some time prior thereto, at the intersection of Shattuck avenue and Blake street, in the city of Berkeley, defendant failed and neglected to pave or fill in the ground between its tracks or to keep the same flush with the surface of the street; that there were depressions and holes alongside the track; that by reason thereof the tracks, street, and station were unsafe and dangerous; that on the date mentioned plaintiff walked toward the track for the purpose

of taking passage on one of defendant's trains and tripped and fell by putting her foot in a depression and hole so that the wheels of the first car passed over both her legs, mangling and crushing them to such a degree that both had to be amputated.

The second cause of action alleges that by virtue of an ordinance of the city of Berkeley defendant was required to plank, pave, or macadamize that portion of the street used by its tracks and between the rails and for two feet on each side thereof, and to keep the same constantly in repair and flush with the official grade of the street, which it failed to do.

The third cause of action alleges that defendant carelessly and negligently operated one of its trains along and upon Shattuck avenue at its intersection with Blake street, causing the injuries complained of. Damages were claimed in the sum of \$200,000.

Defendant by its answer denied the allegations contained in all the causes of action except the allegation concerning the ordinance and except the fact of an accident, and set up as an affirmative defense contributory negligence on the part of plaintiff.

Trial was had, and a verdict in the sum of \$75,000 was rendered in favor of plaintiff. It is here claimed that the evidence is insufficient to justify the verdict and judgment. It is further claimed that error in the instructions, prejudicial misconduct of plaintiff's counsel, and the admission and rejection of certain evidence, justify a reversal of the judgment.

The evidence in substance shows that defendant is a public service corporation and in the operation of its business it maintains interurban tracks in the city of Berkeley at the place mentioned in the complaint, over which it operates its trains. At this place no station facilities are maintained by it of any kind or description. Passengers board the cars from and alight upon the public streets. The cars may be boarded from either side. Plaintiff, a young married woman, lived in Berkeley, but was employed in San Francisco as a stenographer. On the morning of the accident she drove with her husband to the train. She alighted from her machine and proceeded in the direction of defendant's tracks. She looked to see if her train was approaching. She noticed it some two hundred feet away. The train was traveling at a rate of speed variously estimated at between ten and fifteen miles an hour. In stepping over one of the tracks, so plaintiff testified, her foot caught in a hole adjacent thereto and she was unable to extricate it. As the train continued to approach her, she struggled to release her foot, but was unable to do so; she fell on her side and lost consciousness and was run over by the train. She was taken to a hospital, where

both her legs were amputated, one above and the other below the knee.

[1] It was defendant's theory of the case that plaintiff did not catch her foot in a hole between the rails, but was on her feet when she was struck and knocked down by the front end of the train as she negligently stepped upon the tracks without looking. It was the theory of plaintiff, as above indicated, that she caught her foot in a hole in the street and was stretched out on the ground and across the car tracks, prior to her being hit by the car. Upon this question, the evidence is conflicting. Plaintiff is supported in her evidence upon this subject by the testimony of a certain witness, and by physical facts inconsistent with defendant's claim that plaintiff was struck and knocked down by the train. A review of all the evidence upon this subject is not necessary, as it is conceded by appellant company that there was evidence on the part of plaintiff to support her theory which justified the trial court in submitting the case to the jury as to just how the unfortunate accident happened, assuming the negligence of the defendant to have been established. That negligence was established there is no question. It was admitted by the pleadings that defendant was obligated by ordinance to maintain the surface of the street adjacent to and between its rails constantly in repair, flush with the official grade and with good crossings. The evidence shows that defendant neglected this duty. Then again there is evidence to show that the engineer failed to observe plaintiff in her perilous position in time to avoid the accident. Appellant does not seriously contend that the evidence upon the subject of negligence is insufficient, but it does contend that the evidence which could be construed as showing negligence on the part of the defendant is so slight that this court will review the conflicting evidence, as the many errors committed by the trial court constitute prejudicial error, resulting in a miscarriage of justice which requires a reversal of the judgment. In this connection it is first claimed that the trial court erred in the giving of several instructions to the jury. All but one of these instructions have to do with the duty of an interurban railroad relative to the safe maintenance of stations or stopping places on its line.

[2, 3] The court instructed the jury, in substance, upon this subject that a railroad, whether steam or urban, which maintains stations or regular stopping places along its line, thereby invites the public to patronize the line, and, in the exercise of ordinary care, it must afford protection to the public commensurate with the risk involved; that such a company is required to use a greater degree of care at such places for the safety of intending passengers than at other points along its line; that a station in this connection means any point where cars are custom-

arily stopped to take on passengers and that such passengers, while not absolved from the duty of exercising care for their own safety, have a right to presume that the ground and tracks admit of their getting safely on and off the trains, and they are not necessarily, as a matter of law, negligent in failing to observe a hole. The objection urged against these instructions is that they only apply in steam railroad cases where the station ground and platform belong to and are controlled by the company, and have no application where cars are operated on a public street. In *Wilkinson v. United Railroads*, 195 Cal. 185, 232 P. 131, it is expressly held that there is no reason why the operation of trains with relation to stations should not be the same in both steam and interurban trains; nor should there be any distinction as to the relative degree of care of common carriers and passengers at the stations of a steam railroad and of an interurban train; that the word "station" covers any place where trains usually and ordinarily stop. It is admitted that the place where the accident occurred was a usual stopping place of the train, and a higher degree of care was required at such a place in the operation of the train than at other points along the line. It was the duty of defendant to keep the portion of its tracks ordinarily traversed by intending passengers in a safe condition, and its franchise required that it do so. The instructions find full support in the *Wilkinson Case*, supra.

[4] The remaining instruction objected to refers to the elements of damage. The court instructed the jury that in determining the amount of damage it might take into consideration plaintiff's age, sex, condition of life, health and physical condition before as compared with her condition after the accident. It is claimed that by the inclusion of the term "condition of life" the jury was in effect told that they might consider plaintiff's financial condition, for which reason the instruction was improper and prejudicial. This identical instruction was considered in the recent case of *Roher v. Leonard & Holt* (Cal. App.) 276 P. 357, and it was held that it was not necessarily susceptible to the construction here claimed and the giving of the same did not constitute reversible error.

[5-9] Appellant next complains of prejudicial misconduct of plaintiff's counsel during his closing argument to the jury. In addressing the jury, he stated that plaintiff was prevented from pursuing her occupation as a stenographer; that she had been assisting her husband in providing a home for them which the accident had compelled them to abandon and move to a house over a garage. These facts were in evidence, and counsel had a right to refer to them in his argument. Counsel also referred to defendant as the "company of sinking ferryboats and leaky cars," and stated that it was seeking higher rates for

transportation of its passengers. Reference was also made to the likelihood of plaintiff becoming a public charge by reason of the nature of her injuries. There is no question but that these remarks were highly improper, and should not have been made. While great latitude is allowed in appealing to the sympathies of the jury, attorneys should conduct themselves so as to prevent the exhibition of inordinate zeal which often leads to prejudicial error. Remarks addressed to a jury tending to excite their prejudice or passions, or to cause resentment, or unjustly enlist their sympathies in favor of their client or against the cause of his adversary, are always improper and should be avoided. The remarks in question were not assigned as misconduct at the time they were made, nor was the court requested to instruct the jury to disregard any of them. As the effect of misconduct can ordinarily be removed by an instruction to the jury to disregard it, it is generally essential, in order that such act be reviewed on appeal, that it shall first be called to the attention of the trial court at the time, to give the court an opportunity to so act in the premises, if possible, to correct the error and avoid a mistrial. Where the action of the court is not thus invoked, the alleged misconduct will not be considered on appeal, if an admonition to the jury would remove the effect. It is only the most extreme case where an instruction to the jury, if given, would not remove the effect of improper remarks. *Tingley v. Times-Mirror Co.*, 151 Cal. 1, 23, 89 P. 1097; *Olsen v. Standard Oil Co.*, 188 Cal. 20, 26, 204 P. 393; *Scott v. Times-Mirror Co.*, 181 Cal. 345, 368, 184 P. 672, 12 A. L. R. 1007. A party should not be permitted to remain quiet and take the chance of a favorable verdict, and then, if the verdict is unfavorable, raise the objection on appeal. Moreover, appellant presented this matter to the trial court in support of its motion for a new trial. The motion was denied. A trial judge is in a better position than an appellate court to determine whether a verdict is probably due wholly or in part to misconduct of counsel, and its conclusion in the matter will not be disturbed unless, under all the circumstances, it is plainly wrong. *Lafargue v. United Railroads*, 183 Cal. 720, 192 P. 538.

[10] Finally, appellant assigns as error the rejection of certain evidence. Defendant sought by one of its witnesses to prove the manner in which the accident happened. The question was objected to as leading, and the objection to the same was properly sustained. However, the witness subsequently testified fully upon this subject. Complaint is also made of the ruling of the court sustaining an objection to a question directed to the engineer of the train as to whether he did all that he could to stop the train in order to avoid the accident. An objection to the question

was sustained on the ground that it called for a conclusion of the witness. Whether properly sustained or not is of no consequence, as the witness thereafter fully testified upon this subject.

In conclusion, it may be said that after an examination of the entire cause we cannot say that the misconduct of plaintiff's counsel, above referred to, resulted in a miscarriage of justice. The unfortunate injury which plaintiff has suffered is of such a serious character that it demanded a substantial verdict where negligence on the part of defendant existed. The amount, though large, is not claimed by defendant to be excessive, and it does not indicate that it was obtained through the misconduct complained of.

The judgment is affirmed.

104 Cal. App. 596

PEOPLE v. CIANI et al.

Cr. 101.

District Court of Appeal, Fourth District,
California.

March 19, 1930.

1. Criminal law §511(2) — Testimony — Accomplice — Corroboration.

Corroboration of testimony of accomplice, however strong in other respects, is ineffectual, unless it points to connection of defendant with crime charged.

2. Criminal law §511(1) — Corroboration — Accomplice — Sufficiency of evidence.

Evidence held sufficient to corroborate testimony of accomplice implicating one of two defendants convicted of theft (Pen. Code, § 1111).

Pen. Code, § 1111, provides that conviction cannot be based on testimony of accomplice, unless such testimony be corroborated by other evidence tending to connect defendant with commission of offense.

3. Criminal law §351(3) — Flight — Consciousness of guilt.

Flight of defendant is admissible in evidence as fact showing consciousness of guilt.

4. Criminal law §324 — Two crimes — Presumption — Flight.

That defendant, when arrested, was charged with two distinct crimes, diminished force of adverse presumption raised by his subsequent flight.

5. Criminal law ⚖️511(1) — Sufficiency of evidence — Accomplice — Corroboration.

Evidence held insufficient to corroborate testimony of accomplice tending to implicate one of two defendants convicted of theft (Pen. Code, § 1111).

6. Larceny ⚖️23 — Degree — Value — Method of computation.

Value of stolen property should be fixed at time and place taken, or, if there be no market value there, at place similarly located.

7. Larceny ⚖️30(1) — Information — Describing property.

Information charging grand theft in taking "110 sweat boxes of raisins, of a value in excess of \$200," charged theft only of raisins, not of boxes.

It appeared that sweat boxes are used for purpose of curing the raisins, and that, when purchaser buys quantity of raisins in sweat boxes, it is not intended that he shall receive the boxes.

8. Criminal law ⚖️1184 — Grand theft — Reviewing court — Reduction of offense.

Where prosecution failed to prove charge of grand theft, but did prove petty theft, Court of Appeal could obviate retrial by reducing degree of offense to petty theft.

Appeal from Superior Court, Fresno County; C. E. Beaumont, Judge.

Tony Ciani and Tony Porcelli were convicted of grand theft, and they appeal.

Reversed in part, with directions to grant new trial to defendant first named, and modified in part, and remanded, with directions, as to other defendant.

B. W. Gearhart and Lindsay & Gearhart, all of Fresno, for appellant Ciani.

Thomas F. Lopez, of Fresno, for appellant Porcelli.

U. S. Webb, Atty. Gen., and William F. Cleary, Deputy Atty. Gen., for the People.

MARKS, Acting P. J.

By an information filed in the superior court of Fresno county appellants were charged with the crime of grand theft. It is alleged that they "unlawfully took the property of the Bond Investment Company, a corporation, consisting of 110 sweat boxes of raisins, of a value in excess of \$200.00, in lawful money of the United States." They were tried upon their pleas of not guilty, and the jury found both guilty as charged. Their motion for a new trial was denied, and they were sentenced to confinement in the state penitentiary for the term prescribed by law.

One Mike Devincentis was charged in a separate information with the same crime. He entered a plea of guilty, and was granted probation. He testified as a witness for the people against appellants, and furnished the most serious evidence against them.

The record before us shows that Porcelli owned a Dodge truck which was equipped with six wheels, two in front and four in the rear. These wheels carried the following makes of tires: Lee tires on the right front and both right rear wheels; a Goodrich Silvertown heavy duty cord on the left front wheel; a Sampson on the inside left rear wheel and a Goodrich Silvertown cord on the outside left rear wheel. These tires were of the type known as non-skid or all-weather, with ribbing and indentations that left markings in their tracks peculiar to each respective kind of tire.

The Bond Investment Company owned a number of vineyards in the general vicinity of Fresno. One of them, called the Stellianos ranch, was located near Reedly, about twenty-eight miles from Fresno. On January 19, 1929, there were one hundred thirty-four sweat boxes filled with substandard Thompson seedless raisins, stacked near the driveway into the ranch. On January 21, 1929, one hundred ten of the boxes with their contents had been stolen. It had rained during the week ending January 19, and in the wet dirt of the driveway on the Stellianos ranch on the morning of January 21 were tracks of truck tires that exactly corresponded to the tires on Porcelli's truck. These tracks were traced along the public roads for about eight miles from the ranch towards Fresno. The stolen sweat boxes had the name of the Bond Investment Company painted upon them. The company owned several thousand similar boxes which were used in connection with its operations in its various vineyards.

Mike Devincentis was arrested and confessed, implicating Porcelli and Ciani, who were also arrested. According to Devincentis, he and Ciani were together at the pool room in Fresno on the evening of either Saturday, January 19, 1929, or the next day, Sunday. At about 8 o'clock they were approached by Porcelli, who requested them to go with him into the country to get some raisins, he promising to pay Devincentis ten or fifteen dollars for the work. The three left Fresno in Porcelli's truck, and proceeded to the Stellianos ranch, and loaded the truck with fifty-five sweat boxes full of the raisins in question. They returned to Fresno at about midnight, and unloaded the raisins in the yard of the house in which Devincentis lived. A second trip to the ranch was made when fifty-five more of the sweat boxes full of raisins were loaded on the truck and again unloaded at Devincentis' home. Part of the raisins were stacked in Devincentis' garage

and the balance in his yard. The three separated at about 4 in the morning; Porcelli taking his truck with him. Devinentis maintains that up to this point he had no idea the raisins were stolen. Continuing with the story, he testified that a day or two after the raisins were taken, Porcelli told him to be careful about the raisins, and then or later admitted that they were stolen. Devinentis secured some paint, and with Porcelli's help painted out the name of the Bond Investment Company on some of the boxes. The two of them removed the raisins from over fifty of the boxes and put them in other sweat boxes. They took the empty boxes of the Bond Investment Company and dumped them in an irrigation canal in or near Fresno. This completes the important parts of Devinentis' story. He did not charge Ciani with any knowledge that the raisins were stolen. His testimony was flatly denied by both appellants, who maintained that they had no part in the theft.

The three were arrested on or about February 2, 1929. An investigation was started at once to try and corroborate Devinentis' story. Sub-standard Thompson seedless raisins were found in sweat boxes in his garage and yard. Some of the sweat boxes had been newly painted, and upon washing the ends with gasoline the name of the Bond Investment Company appeared. The irrigating canal was followed, and forty-six sweat boxes with the name of the Bond Investment Company upon them were found some distance down it. Porcelli's truck was found with tires having markings that were identical with the markings of the truck tracks at the Stellianos ranch. One empty sweat box with the end painted over was found among other boxes on a trailer in the yard of Ciani's house.

The raisins were weighed and sold to a packing house in Fresno at a price of 1½ cents a pound, or the total sum of \$216.67. The evidence of witnesses for the people was to the effect that this was the reasonable market price of the raisins in Fresno at the time of the theft. The district attorney attempted to introduce evidence of the reasonable value of the sweat boxes, but this was excluded by the trial court on the ground that the information charged the theft of the raisins, but not the boxes.

Two important questions are presented on this appeal, namely: First, was the testimony of Devinentis, an admitted accomplice, sufficiently corroborated to support the conviction of either or both of the appellants? and, second, does the evidence show that the stolen property was of the value of more than \$200? We will take these questions up in the order in which we have stated them.

[1] Section 1111 of the Penal Code provides that the conviction of a defendant cannot be had upon the testimony of an accomplice un-

less such testimony be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense. The rule by which the sufficiency of corroborating evidence is to be measured has been considered in many California cases. It is clearly stated in the case *People v. Woodcock*, 52 Cal. App. 412, 199 P. 565, 568, as follows:

"Where, as in this case, the prosecution relies upon the direct testimony of one witness and corroborating circumstances to prove the perjury, the character of corroboration necessary is like that in the case of an accomplice arising under section 1111, Penal Code. In other words, the corroborating circumstances used to support the testimony of a single witness must be more than evidence tending to prove that the testimony was given, and that it may or may not be false. The rule as to the character of corroborating circumstances necessary to support the testimony of an accomplice is well stated in 12 Cyc. at page 456, quoted with approval by the Supreme Court in *People v. Robbins*, 171 Cal. 466, 470, 154 P. 317, 319, as follows: 'It is necessary that the evidence corroborating an accomplice shall connect or tend to connect the defendant with the commission of the crime. Corroborative evidence is insufficient where it merely casts a grave suspicion upon the accused. It must not only show the commission of the offense and the circumstances thereof, but must also implicate the accused in it. * * * But where the circumstances when proved, taken separately or collectively, are consistent with the innocence of the accused, there is no corroboration, and a verdict of conviction thereon will be set aside.' And in the same case the court said (171 Cal. 471, 154 P. 319): 'The corroborative evidence required to convict the defendant in addition to that of the accomplice is not sufficient if it merely tends to raise a suspicion of the guilt of the accused. * * * Mere suspicion, as has been shown, will not suffice as corroborative evidence; and where the evidence relied upon as corroborative of the accomplice is, as in the present case, only such as to raise a suspicion of the guilt of the defendant, the verdict must be set aside.' Then again (171 Cal. 476, 154 P. 321): 'The proofs of mere suspicious circumstances and of opportunity to commit a crime are never sufficient to justify a conviction upon the testimony of an accomplice. *People v. Thompson*, 50 Cal. 480; *People v. Smith*, 93 Cal. 218, 33 P. 58; *People v. Koenig*, 99 Cal. 574, 576, 34 P. 238; *State v. Willis*, 9 Iowa, 582; *People v. Morton*, 139 Cal. 725, 73 P. 609.'

"In *People v. Morton*, 139 Cal. 719 at page 724, 73 P. 609 at page 611, the Supreme Court quoted with approval from *Welden v. State*, 10 Tex. App. 400, as follows: 'We suggest this mode as a proper test: Eliminate from the case the evidence of the accomplice, and then examine the evidence of the other witness or witnesses with the view to ascertain if there

be inculpatory evidence—evidence tending to connect the defendant with the offense. If there is, the accomplice is corroborated; if there is no inculpatory evidence, there is no corporation, though the accomplice may be corroborated in regard to any number of facts sworn to by him.' And again, on the same page, the court said: 'In New York, under the same code provision (Code Crim. Proc. § 399), it was said: "The corroboration, however strong in all other respects, must point to the connection of the defendant with the commission of the crime to be of any avail." People v. Ryland, 28 Hun. [N. Y.] 568, 570.'"

[2] When we apply this rule to the case against Tony Porcelli we find that there is sufficient evidence corroborating the testimony of Mike Devincentis to support the verdict of the jury against him.

[3-5] The case against Tony Ciani presents greater difficulties. There were two circumstances shown at the trial upon which the corroboration of Devincentis' testimony must stand or fall. More than a week after the raisins were stolen one of the sweat boxes with the name of the Bond Investment Company painted out was found with a number of other boxes on a trailer standing in the yard at Ciani's home. Of course, this is a circumstance that would tend to raise a suspicion of his connection with the theft. The weight of this circumstance is greatly lessened when we recall that over forty of these same boxes had been dumped in an irrigation canal by Porcelli and Devincentis and were washed down into the southwestern part of Fresno, where many of them were recovered after the arrest of the defendants. There is nothing in the record that would preclude the assumption that one of these boxes had been picked up by a person not connected with the case and taken to Ciani's house. The other circumstance relied upon by respondent to corroborate the testimony of the accomplice is the flight of Ciani. After he was released from jail, he left California, and was found some time later in the state of Massachusetts. Flight is a circumstance admitted in evidence as showing a consciousness of guilt on the part of a defendant. The record shows, however, that at the time of the arrest of Ciani he was charged with another crime not connected in any way with the theft of the raisins. With the two charges pending against him the flight might have been occasioned by a consciousness of guilt of either or both of the crimes charged against him. This circumstance reduces the weight of the presumption against Ciani caused by his flight. After a careful reading of the entire record we believe that the testimony of Mike Devincentis is not sufficiently corroborated to support the verdict of guilty against Tony Ciani.

[6] Whether or not the evidence shows the stolen property to have been of a value of

more than \$200 presents two questions that do not seem to have been decided in California. The first is presented by evidence which fixes the value of the raisins at the time of the theft in Fresno and not on the Stellanios ranch, where they were taken. The second question arises under the language of the information as to whether or not theft of the sweat boxes is charged so as to permit proof of their value as well as the value of the raisins.

It seems to be the established and well-recognized rule in a majority of the states whose decisions we have examined that, in cases involving the theft of personal property, the value at issue is the market value of the property at the time and place of the theft. *Robinson v. State*, 107 Neb. 591, 186 N. W. 977; *People v. Cole*, 54 Mich. 238, 19 N. W. 968; *State v. Mall*, 112 Kan. 63, 209 P. 820; *State v. Maggard*, 160 Mo. 469, 61 S. W. 184, 83 Am. St. Rep. 484; *Filson v. Territory*, 11 Okl. 351, 67 P. 473; *Cunningham v. State*, 90 Tex. Cr. R. 500, 236 S. W. 89; *Keipp v. State*, 51 Tex. Cr. R. 417, 103 S. W. 392. In two of the states east of California proof of the market value of the stolen property at any place within the county where the crime was committed has been permitted. This rule loses its particular force here when we remember that Fresno county is almost as large as these states. We believe the better rule to be that in cases of theft the value of the property taken should be fixed at the time and place where the property was stolen, and, if there be no market value at such particular place, at such other place sufficiently near and in such a like situation that the evidence will afford a fair measure of value at the place of the theft. *Hoffman v. State*, 24 Okl. Cr. 236, 218 P. 176.

As we have seen, the evidence of the witnesses fixed the value of the raisins at packing houses in the city of Fresno, about twenty-eight miles from the place of the theft. One of the witnesses for respondent testified that the price would necessarily be less at the Stellanios ranch than in Fresno. Respondent therefore failed to prove that the value of the raisins stolen was over the sum of \$200 at the time and place of the theft.

[7] The Attorney General attempts to meet this failure in the evidence to prove the value of the raisins at more than \$200 at the time and place of the theft in a most ingenious manner. He argues that the language used in the information, "110 sweat boxes of raisins," is not descriptive of quantity or size of the various parcels of the stolen property, but instead is descriptive of the "things stolen, that is, of 110 objects of personal property, each consisting of a box and the raisins therein contained," and that therefore the value of the property stolen was not merely the value of the raisins, but also the value of the boxes. He illustrates his argument by saying that

the terms "diamond ring," "can of tomatoes," "sack of flour," "bottle of vinegar," and "carton of cigarettes" each refer to but one object, namely, the container and its contents. We must agree with him as to these illustrations. On the other hand, if a vendor sells one hundred ten cars of iron, a barge of lumber, or a truck of raisins, no one would contend that the buyer would receive the cars, the barge, or the truck. We are immediately forced to the conclusion that in the illustrations used by the Attorney General he has selected finished products where, in the common and general usage of trade, the container and the contents form but a single article; the container and contents being bought and sold together. Thus by generally accepted definition the containers and their contents are included in the phrase. In the other illustrations used the words "cars," "barge," and "truck" are used as a measure of the quantity of their contents, and by equally common definition are not included with their contents as one article. We therefore believe that, where a finished product is prepared for sale, in and with its container, such as a "bottle of vinegar," the phrase refers to the container and its contents as one article, but, where an article of trade is put in a container as a means of transportation or a measure of quantity, such as a "car of iron," the phrase refers to the contents and does not include the container. It appears in the record and is of common knowledge in the raisin district that raisins are put in sweat boxes for the purpose of curing. It is a matter of general knowledge that, when a purchaser buys a quantity of raisins contained in sweat boxes, he receives the raisins and not the boxes under his contract. The sweat boxes are not sold with the raisins, unless there is a special contract including them. When the phrase "sweat box of raisins" is used, reference is made to the quantity of raisins and not to the container and its contents. We must therefore hold that, when the phrase "110 sweat boxes of raisins" was used in the information, it was used in the general and accepted sense employed in the raisin districts of the state, and referred to the raisins contained in the sweat boxes, and did not include the boxes; they being referred to in a descriptive sense as a measure of quantity only. The trial court properly refused to allow the respondent to introduce evidence as to the value of the sweat boxes.

Appellants complain of rulings of the trial court upon questions of admission and rejection of evidence. We can find no error in these rulings. They were eminently fair to appellants. There was no error committed in refusing to give instructions requested by appellants. The instructions given covered all phases of the case and correctly stated the law.

[8] There is no question that a theft of the raisins occurred and was proven. The conviction of Tony Porcelli of this theft is supported by the evidence. Respondent did not prove his guilt of grand theft, but did prove him guilty of petty theft. Under the authority of *People v. Kelley* (Cal. Sup.) 281 P. 609, we can reduce the degree of the offense to petty theft, and obviate a retrial of the case.

The judgment against Tony Ciani is reversed, with the direction to the trial court to grant his motion for new trial.

The judgment against Tony Porcelli is modified. The case against this defendant is remanded to the trial court, with directions to enter judgment against Tony Porcelli finding him guilty of petty theft, and to thereupon pronounce judgment upon him as prescribed by law.

I concur: BARNARD, J.

PORTER et al. v. HILTON et al. ★
Civ. 244.

District Court of Appeal, Fourth District, California.

March 26, 1930.

Rehearing Granted April 21, 1930.

1. Appeal and error §907(3) — Presumptions — Findings — Evidence — Appeal on judgment roll.

On appeal taken upon judgment roll alone, court must assume that all findings are sufficiently supported by evidence.

2. Brokers §106 — Agent — Unauthorized acts — Ratification.

Finding that owner of lots sold by broker acting without authority was not chargeable with broker's fraud by having received benefits of deal held justified.

In this case the owner's knowledge of fraud or circumstances indicating fraud was not shown, and the owner received only the consideration which he had all along demanded for his four lots.

Appeal from Superior Court, San Diego County; Charles C. Haines, Judge.

Action by Roscoe S. Porter and others against Frank Hilton, C. E. Hamilton, copartners doing business under the firm name of Hilton & Hamilton, and others. From the judgment, plaintiffs appeal.

Affirmed.

Wright & McKee and C. M. Monroe, all of San Diego, for appellants.

H. V. Richardson, of San Diego, for respondents Hilton & Hamilton.

Stickney & Stickney, of San Diego, for respondent Fowlks.

SLOANE, P. J.

This action was brought for the rescission of a contract of purchase of real estate on the ground of fraudulent representations inducing the purchase. On and prior to the 23d day of June, 1926, the defendant R. M. Fowlks was the owner of lots 15 and 16 in block 223 of Pacific Beach, in the city of San Diego, county of San Diego, state of California, and also of two similar adjacent lots, facing upon Garnet avenue in Pacific Beach. Prior to the date last mentioned, said Fowlks had given to one Earl Taylor, a licensed real estate broker of San Diego, California, a written exclusive right to sell all four lots as his agent, at a net price to the owner of \$3,000 for each pair of lots, or \$6,000 for the whole thereof.

On May 27, 1926, said Taylor executed a written agreement, by the terms of which he agreed to sell the four lots in question to the defendant C. E. Hamilton, of the real estate copartnership of Hilton & Hamilton, for \$7,000. This agreement was in the form of an option, and recited that \$100 had been paid for such option. Mr. Taylor did not notify the owner Fowlks at the time he executed the option to Hamilton, but did notify him of its execution some time prior to June 21, 1926. The option was executed by Taylor in form as though he were the owner of the property, but before the sale, which was afterwards made by Hamilton to the plaintiffs, was consummated, Hamilton was informed of the fact that R. M. Fowlks was the owner of the property in question. Prior to being so notified, he believed that Earl Taylor owned the property. While this condition existed, Hamilton approached Roscoe Porter and Johnston O. Miller, plaintiffs herein, soliciting the sale to them of the first described two lots, and as a result of the solicitations of Mr. Hamilton the purchase was consummated. Mr. Hamilton represented to the plaintiffs that the lots had been listed with him as a real estate broker by their owner, and that he was receiving the usual commission for consummating the sale thereof. He represented that the two lots in question were of a value in excess of \$7,000, and that at such price they were the best buy on Garnet avenue, and that the owner could be induced to accept \$7,000 for the two lots, but would not accept a less sum. Also Mr. Hamilton approached the two plaintiffs separately, representing to each plaintiff that the other plaintiff was familiar with the property, was satisfied with its value, and was ready to join in the purchase of the lots. In this manner, the two plaintiffs, each believing that the other had investigated the transaction, entered into the joint pur-

chase of the property. Mr. Hamilton did not advise the plaintiffs of the fact that he had an interest in the transaction other than that of a broker interested in obtaining his commission, nor did he advise them of the manner in which the transaction was actually consummated with Mr. Fowlks.

The fact was that when Mr. Hamilton approached the plaintiffs he knew that the four lots could be purchased from the owner through Taylor, for \$7,000, and he offered to sell to the plaintiffs the two lots first mentioned for \$7,000, representing that he was acting as the agent of Fowlks. When the plaintiffs agreed to purchase the two lots they paid \$500 down, giving Mr. Hamilton their check for that amount. Mr. Hamilton then gave them an unsigned form of receipt, being the ordinary form of receipt which real estate brokers give to purchasers upon consummating a sale. The receipt set forth the terms of the sale, and provided that the seller agreed to pay a regular commission. The receipt contained a blank for the approval of the purchaser, and Miller and Porter signed their approval upon it. Thereafter, Hamilton exhibited to Earl Taylor, the agent of Fowlks, a copy of this receipt, signed by Miller and Porter and setting forth the terms and conditions of the sale. It was upon this occasion that Mr. Taylor notified Hamilton of the identity of the owner of the property. Thereupon Mr. Hamilton stated to Miller and Porter that he was taking a trip to Redlands, the home of Mr. Fowlks, for the purpose of securing the consent of the latter to the transaction, and for the purpose of closing up the deal. As a matter of fact, Mr. Hamilton did not go to Redlands at all.

Up to this time the plaintiffs knew nothing of the connection of Mr. Taylor with the transaction, and knew nothing of the other two lots involved in the transaction, but supposed that at all times they were buying the two lots in question from Mr. Fowlks, through Hilton & Hamilton, as agents. The court finds that the representations of Mr. Hamilton concerning his trip to Redlands were also made with intent to deceive the plaintiffs. Thereafter Mr. Taylor went to Redlands to take up the matter of the sale with Mr. Fowlks, informing Mr. Fowlks that he had made an agreement to sell the four lots to Hamilton for \$7,000, upon certain terms, and that Mr. Hamilton was selling two lots to Mr. Porter and Mr. Miller for the same total consideration of \$7,000, and upon somewhat different terms of payment. The proposition which Taylor put up to Fowlks was that Fowlks accept the \$500 which had been paid by the plaintiffs, and which had been delivered over to him by Hamilton; that he execute his deed for the two lots to Porter and Miller and accept their three trust deed notes for the aggregate of \$6,500, and that as a part of the same transaction Mr. Fowlks, without further or other consideration, deed

the other two lots direct to Hilton & Hamilton as their part of the transaction. Mr. Fowlks was unwilling to consummate the deal in this manner, as he wished his security for the \$6,500 to be spread over the four lots, instead of having it against two lots only. He therefore proposed the alternative proposition that he execute his deed direct to Porter and Miller for two lots, accepting their payment of \$500, and their three trust deed notes aggregating \$6,500, secured by trust deed upon the two lots, and that he deed the other two lots direct to Hilton & Hamilton, they to execute to him a trust deed note for \$2,750, secured by deed of trust upon the two lots deeded to them, and that he thereupon assign and deliver to them one of the notes for \$2,750 executed by the plaintiffs. In this manner the same result would be obtained, viz.: Hilton & Hamilton would get two lots out of the deal without paying any consideration therefor, the entire consideration for the four lots being paid by Miller and Porter. If Miller and Porter paid up all of their notes, the note given by Hilton & Hamilton would be automatically extinguished. In the meantime, however, Mr. Fowlks would have security upon four lots instead of merely upon two.

In accordance with this suggestion, the transaction was carried out. The \$500 paid by the plaintiffs was paid to Fowlks. He executed his deed to Miller and Porter for lots 15 and 16, and Mr. and Mrs. Miller and Mr. and Mrs. Porter executed their three notes aggregating \$6,500, and their trust deed, to secure the same. They, of course, during all of this time, knew nothing of the other end of the transaction, whereby Hilton & Hamilton were getting the equivalent of two of the lots for nothing.

Mr. Taylor turned over to Mr. Hamilton the deed of Mr. Fowlks, which was by him in turn delivered to the plaintiffs upon the execution by them of the trust deed and the trust deed notes. The transaction having been completed and the three notes having been delivered to Fowlks, one of them was indorsed by him to Hilton & Hamilton and delivered to them, together with deed to Hilton & Hamilton for the second pair of lots. Whereupon they executed and delivered to Fowlks their trust deed note and trust deed for \$2,750, and the court specifically found that the plaintiffs did not know of the conveyance of the other two lots to Hilton & Hamilton, nor of the receipt by them of one of said notes for \$2,750, but believed that they were at all times purchasing direct from the original owner for a consideration of \$7,000 for the two lots, and believed that Hilton & Hamilton were acting only as agents and receiving only the customary real estate agent's commission upon said deal.

The Union Trust Company acted as trustee in the transaction, the property in question being conveyed to it by trust deed. This com-

pany had no other nor further interest in the transaction, and of course had no part in the fraud which was found to have been perpetrated.

The plaintiffs brought action to rescind the transaction upon the ground that the sale to them was induced by the fraudulent representations of Hamilton. It was alleged by plaintiffs that Hamilton acted as agent for Fowlks in the transaction, and that Fowlks approved, ratified, and accepted the transaction made upon his behalf by the defendants Hilton & Hamilton. The defendants filed a joint answer, and the various defendants by way of answer denied the perpetration of any of the acts of fraud stated in the complaint, and denied that Hilton & Hamilton were acting as agents for Fowlks, claiming that the transaction was, in fact, a sale by Fowlks to Hamilton and a resale by him to the plaintiffs. The defendants also raised the defense of laches. The court found that on November 20, 1926, the plaintiffs paid the interest upon all three of the promissory notes.

Prior to that time plaintiffs had discovered that the property purchased by them was not worth \$7,000, but had not discovered the conveyance of said other lots or the fact that Hilton & Hamilton held one of the trust deed notes. Shortly after making such payment of interest, the plaintiffs discovered that Hilton & Hamilton held such trust deed note for \$2,750. Thereafter they discovered the facts of the transaction, but did not fully discover all of the facts until the 7th day of March, 1927. Three days later this action was filed.

It was claimed by plaintiffs that the lots purchased by them were not worth more than \$3,500. Upon conflicting evidence, the court found the value of the lots to have been \$5,000. It was admitted by the pleadings and found by the court that, prior to the commencement of the action, the plaintiffs took the necessary steps prerequisite to the commencement of an action for rescission.

It appears from the findings that a good deal of evidence was taken in the trial of the case to show the experience of the plaintiffs Porter and Miller in real estate conditions in Pacific Beach and that vicinity. That the plaintiff Porter was a licensed real estate agent of many years' experience, and that the plaintiff Miller was a banker of many years' experience, doing business in and about Pacific Beach and that portion of the city of San Diego. It was found by the court that Roscoe S. Porter had been engaged for a number of years in the real estate business in San Diego, and that Johnston O. Miller had been engaged for a number of years in the banking business in the same place, and both of them were generally familiar with the locality of Pacific Beach, but that neither of the plaintiffs had made specific investigation as to the precise values of property in that section, and neither was informed as to such values, but

throughout the whole transaction they both relied upon the statements and representations of the defendant Hamilton. As to the question of laches and estoppel, the court specifically found that the plaintiffs were not guilty of laches, and were not estopped to bring the action.

Upon this state of facts, the court found that the sale to the plaintiffs had been induced by fraud, and that the plaintiffs were entitled to relief. It was found, however, that the defendant Fowls did not know of the false and fraudulent representations made by Hamilton, and that Hamilton was not and never had been acting for him as his agent in the transaction. The court therefore denied to plaintiffs the complete relief of rescission, but in lieu thereof gave plaintiffs a judgment for \$2,000 against Hilton & Hamilton, the amount being the difference between the agreed consideration paid by plaintiffs for the property and the actual value thereof as found by the court, and granted such relief in lieu of the rescission.

Upon settlement of findings and rendition of judgment, plaintiffs filed their motion for another and different judgment on the findings, in accordance with the provisions of section 663 and 663a of the Code of Civil Procedure. This motion was predicated upon the express ground that the facts as found by the court affirmatively established that the defendant R. M. Fowls ratified and adopted the transaction negotiated by C. E. Hamilton, and thereby adopted the fraudulent acts perpetrated by Hamilton in such negotiations and was bound thereby, and that therefore plaintiffs were entitled to a rescission of the contract. This motion, together with the motion for new trial, which was predicated among other things upon the proposition that the decision was against law, was overruled. The plaintiffs thereupon filed this appeal.

[1, 2] This appeal was taken upon the judgment roll alone, none of the testimony appearing in the record. It must be assumed, therefore, that all of the findings are sufficiently supported by the evidence, the only question in controversy being as to whether or not, in the absence of any participation or knowledge on the part of the defendant Fowls of fraudulent representations by Hamilton, or any knowledge of the fact that Hamilton was holding himself out as Fowls' agent, he, as a matter of law, is responsible for any fraud committed in the transaction by virtue of the fact that he received the benefits of the deal.

Counsel for plaintiffs argue at some length and with much research of authorities that the acceptance of the benefits of a transaction is a sufficient ratification thereof to make Fowls, the owner of the property, responsible for the fraudulent action of his purported but unauthorized agent, relying upon the statement of the rule, among others, as laid

down in *Union Trust Co. v. Phillips*, 7 S. D. 225, 63 N. W. 903:

"A corporation or an individual cannot adopt and claim the benefit of a contract made in its or his behalf by one assuming to act as agent, and at the same time repudiate the means or representations by which such contract was so procured.

"This rule controls, even though such agent, to the knowledge of him with whom he deals, has an interest in the making of the contract distinct and separate from that of his principal, unless there is collusion or fraudulent connivance between the agent and such other contracting party."

Appellants also rely upon the decision of the Supreme Court in the case of *Wilder v. Beede*, 119 Cal. 646, 51 P. 1083, 1184, where the mother of the defendant, one Lucia S. Beede, owned a piano, and a party by the name of Hutchings negotiated a sale of the piano to the plaintiff, receiving from the plaintiff a promissory note made payable to the defendant, and causing the defendant to execute to the plaintiff a bill of sale for the piano. It was established that Hutchings, the self-constituted agent, obtained the note by false and fraudulent representations. The defendant was held liable for the fraud. In that case, as in the case at bar, counsel claim the defendant claimed that the property in question was sold to the self-constituted agent, and the transaction was a resale. In disposing of this contention, counsel quote from the decision as follows:

"But the particulars in proof did not sustain that view. The note showed on its face that it was a contract between plaintiff, as payor, and defendant, as payee. It was discounted, and the proceeds were divided between Hutchings and defendant, before the piano was taken from the latter's house. The bill of sale made on defendant's procurement ran to plaintiff, not Hutchings. Clearly, defendant acted on the assumption that through Hutchings the piano had been sold to plaintiff, and that she had agreed to pay him (defendant) the sum of \$400 for the same. In that form the transaction had his approval."

Counsel further argue that "again, in the same case, it was claimed by the defendant, just as it was claimed in the case at bar, that the acceptance and retention of the benefits of the transaction involved no adoption of the fraud of the self-constituted agent because the vendee had no knowledge of the fraud." The Supreme Court similarly disposed of this contention in the following language:

"It is urged, however, that such a ratification of the supposed sale involved no adoption of the fraud of Hutchings, because defendant had not been informed thereof. But the defendant accepted the note from a self-constituted agent, knowing that it had been executed in advance of the delivery of the piano

to plaintiff, and for a sum largely in excess of the value of the instrument. The circumstances made it his duty to inquire into the acts and representations by which such agent had procured the paper; he made no inquiry, and the jury might well find that he meant to take upon himself, without further information, the risk of any misconduct of Hutchings, and to adopt all his acts."

It may be said in this connection that it does not appear from the findings that Fowlks had any knowledge, not only of any fraud in this transaction or of any circumstance to put him upon inquiry as to its regularity and fairness. That he only received in the transaction the consideration he had always demanded for his four lots in Pacific Beach, and we do not feel authorized in finding that the trial court was not in error in entirely absolving the defendant Fowlks from any liability to the plaintiffs, and in rejecting the conclusion of the court that plaintiffs have been amply compensated by a return to them of the difference between the sales price of \$7,000 for the property and its actual value of \$5,000. It is difficult in any event to understand how seasoned experienced business men as the plaintiffs were found to be, familiar with the property in this immediate neighborhood, could have been seriously misled as to the value by a salestalk of even the most plausible real estate brokers.

The judgment is affirmed.

We concur: BARNARD, J.; MARKS, J.

104 Cal. App. 396

PEOPLE v. PANTAGES.
Cr. 1922.

District Court of Appeal, Second District, Division 1, California.

March 8, 1930.

1. Bail §47—District Court of Appeal had jurisdiction of motion for admission to bail pending appeal.

Motion for admission to bail pending appeal, where motion was based on allegations that prisoner's confinement in county jail had caused recurrence of form of heart disease, with imminent danger to his life, could be entertained by District Court of Appeal.

2. Bail §44—Application for bail pending appeal because confinement is injurious to health will not be granted unless dangerous consequences are so imminent as to require release.

Where application for admission to bail pending appeal is based on claims of serious impairment of defendant's health due to confinement in jail, court's discretion in liberating defendant on bail will not be exercised unless it

appears there is such imminence of dangerous results to life or health as obviously to require his release.

3. Bail §49—In application for bail, testimony of seventeen physicians held not to show imminent danger to prisoner's life because of confinement in jail.

On application for bail pending appeal from felony conviction, evidence of seventeen physicians, not agreed on question whether continued detention of prisoner in county jail would be fatal, held to show he might be retained in custody without imminent danger to his health or life.

4. Criminal law §1148—Decision on applications for bail pending appeal because confinement is detrimental to health will not be interfered with in absence of manifest abuse.

Where applications for bail pending appeal are based on ground that continued detention in jail would be imminently dangerous to health or life of defendant, determination of trial court will not be disturbed or ignored except in an instance of manifest abuse.

Alexander Pantages was convicted of a felony and, pending an appeal, he applies for admission to bail.

Denied.

U. S. Webb, Atty. Gen., Frank Richards, Deputy Atty. Gen., and Buron Flitts, Dist. Atty., and R. P. Stewart, Deputy Dist. Atty., both of Los Angeles, for the People.

Le Compte Davis, Jerry Giesler, W. I. Gilbert, and Earle M. Daniels, all of Los Angeles, for appellant.

CONREY, P. J.

In the superior court of Los Angeles county, appellant was convicted of a felony and sentenced to imprisonment in the state prison. His appeal from the judgment is now pending in this court.

Appellant has now filed an application for admission to bail herein. He states, among other things, that since the date of his conviction circumstances of an extraordinary character have occurred, in that his confinement and detention in the county jail has caused recurrence in an active form of a heart disease with which he had been theretofore afflicted; and that, at the time of filing his application (February 3, 1930), and for several weeks, there has been such imminence of fatal results to the life and health of appellant as to require his removal from the county jail; that in the latter part of December, 1929, and again in the latter part of January, 1930, appellant applied to the superior court for admission to bail, and that both of said applications were denied; that the denial of said applications in the superior court, under the circumstances fully set out in the affidavits, testimony, and proceedings before that court, was an abuse of the dis-

cretion lodged in said court; that appellant is in imminent danger of losing his life as a result of such confinement, and that a situation exists authorizing this court in the exercise of its original appellate jurisdiction to order the release of appellant upon bail pending appeal. The motion is based upon a certified copy of the proceedings before the superior court upon said two applications made to that court. The motion has been presented after notice duly given, and the record of the proceedings on said motions before the superior court constitutes the evidence presented here.

[1] The Attorney General and the district attorney of Los Angeles county appear for the people and resist the motion. They first object to the jurisdiction of this court to entertain such motion; although it is admitted that the same subject could be presented and determined in this court by writ of habeas corpus. We are inclined to the view that this objection is not well taken. *People v. Cornell*, 28 Cal. App. 654, 153 P. 720.

[2] Coming to the merits of the application, we find that the rule concerning admission to bail after conviction, and particularly where the application is based upon considerations of health of the defendant, has been announced several times by the Supreme Court and the Courts of Appeal in this state. Before it can be said that the discretion of the court should be exercised in favor of the liberation of the defendant, pending appeal, and where the application is based upon claims of serious impairment of health of the defendant, by reason of his confinement in jail, it must be made to appear that there is such imminence of dangerous results to the life or health of the defendant as to obviously require his release from the custody of the sheriff. *Ex parte Turner*, 112 Cal. 627, 45 P. 571; *People v. Cornell*, 28 Cal. App. 654, 153 P. 720; *In re Albori* (Cal. App.) 272 P. 321, 328; *People v. Keyes* (Cal. App.) 279 P. 833.

[3] The record before us contains the evidence of seventeen physicians who have observed the defendant and expressed opinions concerning his physical condition and the particular diseases with which it is said the defendant is afflicted. According to the testimony of some of these witnesses the defendant is suffering from certain forms of heart disease, hardening of the arteries, and other physical ailments of such serious nature that there is great danger to the defendant by reason of his detention in jail; for example, one of them states that it is his opinion that the patient cannot be properly treated for his heart condition in the coun-

ty jail and that if this confinement continues a fatal result may ensue. On the other hand, some of these witnesses do not attach any such serious probable consequences to the continued confinement of the defendant in jail. For example, one of them says: "I believe the mental state is the governing thing there and if this man could be reassured as to the danger of impending death during these heart disturbances I cannot see why the confinement would then be so serious a matter. The worry over his misfortunes would exist in or out of confinement and could not be removed by anyone." He believes that rest and a better diet than is possible under jail conditions would be of advantage to the defendant. Another physician states: "Considered from a physical standpoint alone no disability was found to exist which would imminently be likely to cause death or serious impairment of health leading to death because of confinement." Another witness stated that he did not believe that further incarceration would impair the defendant's health in any way. Another witness states: "Upon my examination and the information given me by others I believe that further incarceration is not necessarily of immediate and permanent injury to Mr. Pantages. I personally feel that the care of these conditions given in one place is very much the same as good and perfect care given in another place. The condition has not been acute in coming on, and no one can say it will be acute in its termination. One might guess, but that is only a guess."

After much consideration of the facts presented concerning the physical condition of the defendant, and the several opinions of the physicians, as shown by their testimony, we have reached the conclusion that the defendant may be retained in custody without imminent danger to his health or life by reason of such confinement.

[4] Referring to the contention of appellant that the denial by the superior court of his applications for bail was an abuse of the discretion lodged in the trial court, it has been held many times that the determination of the trial court, in relation to applications of this character, should not be disturbed or ignored except in an instance of manifest abuse. *People v. Cornell*, 28 Cal. App. 654, 656, 153 P. 720. We have, however, based our conclusions upon the entire record, without regard to the fact that the applications made by defendant to the trial court were denied.

The motion of appellant for admission to bail, pending appeal, is denied.

We concur: HOUSER, J.; YORK, J.

104 Cal. App. 788

In the Matter of the Application of Alexander PANTAGES for Writ of Habeas Corpus.
Cr. 1938.

District Court of Appeal, Second District, Division 1, California.
March 8, 1930.

Alexander Pantages was convicted of a felony, and he applies for writ of habeas corpus directed to the superior court to secure his release on bail pending appeal.

Application denied, and petitioner remanded.

U. S. Webb, Atty. Gen., Frank Richards, Deputy Atty. Gen., and Buron Fitts, Dist. Atty., and R. P. Stewart, Deputy Dist. Atty., both of Los Angeles, for the People.

Le Compte Davis, Jerry Giesler, W. I. Gilbert, and Earle M. Daniels, all of Los Angeles, for appellant.

PER CURIAM.

In accordance with stipulation filed herein, this matter has been submitted upon the same papers constituting the evidence and upon the same argument made on the motion for admission to bail in *People v. Pantages*, 286 P. 467, wherein the decision of this court has been this day filed. Upon the authority of that decision, the application for admission to bail is denied, and the petitioner remanded to custody.

BERG v. TRAEGER, Sheriff.*
Civ. 5659.

District Court of Appeal, Second District, Division 1, California.
March 8, 1930.

Hearing Granted by Supreme Court April 7, 1930.

Appeal and error ⇄2 — Jurisdiction — District Court of Appeal — Law changed — Pending appeals affected.

Change in law as to jurisdiction of District Court of Appeal affected pending appeals, there being no reservation as to pending cases (*Deering's Gen. Laws, Consol. Supp. 1925-27, Act 5238, § 29, as amended by St. 1929, p. 838, § 2; Const. art. 6, § 4b*).

The change in law referred to was effected by *Deering's Gen. Laws, Consol. Supp. 1925-27, Act 5238, § 29, as amended by St. 1929, p. 838, § 2*, which enlarged the jurisdiction of the municipal courts and thereby changed the appellate juris-

diction of the District Court of Appeal, which, under Const. art. 6, § 4b, has jurisdiction of cases in which the superior court has original jurisdiction.

Appeal from Superior Court, Los Angeles County; Hartley Shaw, Judge.

On petition for rehearing.

Petition denied.

For former opinion, see 285 P. 332.

Nathan M. Dicker and Abè Richman, both of Los Angeles, for appellant.

A. E. McManus, of Los Angeles, for respondent.

PER CURIAM.

We adhere to the position taken in the decision in above case filed February 6, 1930 (Cal. App.) 285 P. 332, to the effect that this court is without jurisdiction of the appeal. Appellant asks that we follow the recent case of *Harris v. Moore* (Cal. App.) 283 P. 76. In said *Harris v. Moore* reference is made to *Cassard v. Tracy*, 52 La. Ann. 835, 27 So. 368, 49 L. R. A. 272, but even in said *Cassard v. Tracy* the court said (52 La. Ann. 835, 27 So. 368, 375, 49 L. R. A. at pages 279, 280): "A reconsideration of these cases has led to a conclusion at variance with that announced in the former opinion of the court," and said court then proceeded to determine that legislative enlargement of a remedy on appeal inured to the benefit of cases pending on appeal at the time the remedial amendment took effect. The court said further (52 La. Ann. 835, 27 So. 368, 377, 49 L. R. A. at page 280): "The rule that the terms of a statute or constitution are not to be interpreted as having a retrospective or retroactive operation, unless the language used plainly conveys that intention and is susceptible of no other interpretation, finds no application to remedial statutes or to the remedial provisions of organic laws. Remedial laws are an exception to the general rule, and may have retroactive or retrospective force." (Many citations stated.)

In the case of *Federal Land Bank of Omaha v. United States National Bank*, 13 F.(2d) 36 (C. C. A., Eighth Circuit), under date of May 25, 1926, there is a résumé of a line of cases decided by the Supreme Court of the United States holding that a change or repeal of law as to jurisdiction of the court, in the absence of a saving clause, affects pending appeals, and that, if a law conferring jurisdiction is repealed without any reservation, as to pending cases, all such cases fall with the law. *Assessors v. Osborne*, 9 Wall. 567, 19 L. Ed. 748; *Baltimore & P. R. Co. v. Grant*, 98 U. S. 398, 401, 25 L. Ed. 231; *Hallowell v. Commons*, 239 U. S. 506, 36 S. Ct. 202, 60 L. Ed. 409; *Western Union Teleg. Co. v. Louisville & Nashville*

★Hearing granted by Supreme Court.

R. Co., 258 U. S. 13, 42 S. Ct. 258, 66 L. Ed. 437.

The case of *Baltimore & P. R. Co. v. Grant*, supra, decided by the Supreme Court of the United States in 1879, is still a leading authority, many times approved. In that case a judgment had been rendered by Supreme court of the District of Columbia for \$2,250, and appeal perfected to the Supreme Court of the United States. The minimum amount in controversy for jurisdiction of the Supreme Court of the United States at the time the appeal was perfected was \$1,000. While the appeal was pending, Congress raised the said jurisdictional minimum to \$2,500. The Supreme Court of the United States dismissed the appeal for lack of jurisdiction by reason of the amendment. That court said: "The act of 1879 is undoubtedly prospective in its operation. It does not vacate or annul what has been done under the old law. It destroys no vested rights. It does not set aside any judgment already rendered by this court under the jurisdiction conferred by the Revised Statutes when in force. But a party to a suit has no vested right to an appeal or a writ of error from one court to another. Such a privilege once granted may be taken away, and if taken away, pending proceedings in the appellate court stop just where the rescinding act finds them, unless special provision is made to the contrary. * * * The repeal of that law does not vacate or annul an appeal or a writ already taken or sued out, but it takes away our right to hear and determine the cause, if the matter in dispute is less than the present jurisdictional amount."

Reference is made to the case of *Moss v. Smith*, 171 Cal. 777, at pages 788 and 789, 155 P. 90, for approval of the principles of law expressed in *People v. Bank of San Luis Obispo*, 159 Cal. 65, 112 P. 866, 37 L. R. A. (N. S.) 934, Ann. Cas. 1912B, 1148 (cited in our former opinion herein); *McMinn v. Bliss*, 31 Cal. 122; *Flanigan v. Sierra County* (Cal.) 196 U. S. 553, 25 S. Ct. 314, 49 L. Ed. 597, and other cases therein cited. *Moss v. Smith*, supra, was approved in *Freeman v. Glenn County Telephone Co.*, 184 Cal. 508, 510, 194 P. 705.

"A repeal of a statute under which alone a right of action exists, operates as an extinguishment of actions pending when the repeal takes effect, unless there is a subsequent law which enables the court to try and determine them." *McMinn v. Bliss*, supra, approved in *People v. Bank of San Luis Obispo*, supra, and *Moss v. Smith*, supra.

In *Moye v. National Surety Co.* (Cal.) 280 P. 982, 983, the Supreme Court of California said: "It is clear that, so far as the instant matter is concerned, as the constitutional amendment in question related to a *change in remedy only*, the point advanced by appellant is not well taken."

Upon our further consideration of the case, we deem it proper that each party should bear his own costs on appeal. The order of dismissal heretofore filed is now modified to the extent that each party bear his own costs on appeal.

The petition for rehearing is denied.

D. Q. SERVICE CORPORATION (a Corporation), Plaintiff and Appellant, v. **SECURITIES LOAN & DISCOUNT COMPANY** (a Corporation), Defendant and Respondent.★
Civ. 5657.

District Court of Appeal, Second District, Division 1, California.

March 8, 1930.

Hearing Granted by Supreme Court April 7, 1930.

Appeal by plaintiff from a judgment of the Superior Court of Los Angeles County, Michael J. Roche, Judge, in an action for damages for conversion. Appeal dismissed.

On Rehearing.

For former opinion, see 285 P. 335.

Pacht, Pelton & Warne and William W. Leavitt, all of Los Angeles, for appellant.

Henry G. Bodkin, of Los Angeles, for respondent.

PER CURIAM.

All points and citations in support thereof by appellant in his petition for rehearing herein are fully covered by *Berg v. Traeger* (Cal. App.) 285 P. 332, and the order denying petition for rehearing therein this day filed 286 P. 469.

The order of dismissal heretofore filed herein is modified to the extent that each party shall bear its own costs on appeal.

Upon the authority of *Berg v. Traeger*, supra, the petition for rehearing is denied.

103 Cal. App. 741

**James B. STOUT, Plaintiff and Respondent, v.
Lyman FARWELL, Defendant and
Appellant.**
Civ. 5724.

District Court of Appeal, Second District, Division 1, California.
March 8, 1930.

Appeal by defendant from a judgment of the Superior Court of Los Angeles County, Hartley Shaw, Judge, affirming a judgment of the Municipal Court in an action for goods sold and delivered. Appeal dismissed.

On rehearing.

For former opinion, see 285 P. 336.

D. A. Knapp, of Los Angeles, for appellant.

Victor R. Hansen, of Los Angeles, for respondent.

PER CURIAM.

All points and citations in support thereof by appellant in his petition for rehearing herein are fully covered by *Berg v. Traeger* (Cal. App.) 285 P. 332, and the order denying petition for rehearing therein this day filed 286 P. 469.

The order of dismissal heretofore filed herein is modified to the extent that each party shall bear his own costs on appeal.

Upon the authority of *Berg v. Traeger*, supra, the petition for rehearing is denied.

104 Cal. App. 469

**GUBIN et al. v. SUPERIOR COURT IN AND
FOR LOS ANGELES COUNTY et al.**
Civ. 7009.

District Court of Appeal, Second District, Division 1, California.
March 13, 1930.

**Searches and seizures ☞7(22) — Examination
— Deposit boxes — Authority.**

Order for examination of contents of safety deposit boxes without limitation to particular certificates which have been identified held unauthorized (Const. art. 1, § 19).

On hearing to show cause why defendant should not pay alimony pending appeal, it was shown that defendant and his partner in business had safety deposit boxes for purpose of safekeeping of documents. There was evidence tending to prove existence of certain certificates of stock, some of which were in defendant's name. Plaintiff desired to obtain inspection

of all securities in safety deposit box, so that an appropriate order could be made on application for alimony. Defendant contended that the order directing him to open boxes violated constitutional provision against unreasonable seizures and searches, as stated in Const. art. 1, § 19.

Petition by Frank Gubin and others for a writ of prohibition to prevent Superior Court of the State of California, in and for the County of Los Angeles, and E. V. Rosenkranz, Judge, from enforcing an order which required petitioners to open boxes for inspection of their contents.

Writ granted.

See, also, 285 P. 1071.

Paul W. Schenck and Marcus L. Roberts, both of Los Angeles, for petitioners.

Charles C. Montgomery, Ben C. Cohen, and Sam Wolf, all of Los Angeles, for respondents.

CONREY, P. J.

The petitioners have made application to this court for a writ of prohibition to prevent respondents from enforcing an order which requires the petitioners to open, for inspection of their contents, certain safety deposit boxes. The proceedings in question have occurred in an action wherein Rhonie Gubin seeks to obtain a divorce from the defendant Frank Gubin. Oscar Gubin and Bertha Gubin are codefendants of Frank Gubin in that action. Oscar is a brother of Frank, and Oscar's wife Bertha is a sister of the plaintiff Rhonie Gubin. It is alleged in the complaint that a large amount of community property of plaintiff and her husband is held in the names of Oscar and Bertha Gubin, who are made defendants in order to obtain a complete adjudication of the plaintiff's alleged rights in said community property.

In said divorce action an order was made on August 9, 1929, requiring defendant Frank Gubin to make certain payments as alimony and attorney fees. The order was made pursuant to a stipulation. Thereafter the defendants, pursuant to notice given, moved the court to vacate said order of August 9th on the ground that the stipulation had been obtained by misrepresentation, fraud, and deceit. The court having denied the motion, the defendants appealed to the Supreme Court and filed a stay bond in an amount fixed by the superior court. Thereafter the defendant Frank Gubin was ordered to appear and show cause why he should not be punished for contempt for not having paid the \$250 per month alimony provided in the order of August 9th. In so far as the present proceeding is directed to the alleged right of respondents to enforce the order from

which an appeal has been taken, we shall assume that no writ of prohibition is necessary, since we are informed that in connection with the pending appeal to the Supreme Court that court has under consideration an application for supersedeas, and in connection therewith has granted a temporary stay of all proceedings in the matter of enforcement of said order of August 9th.

But there is another proceeding not included in said appeal and not included in said order of the Supreme Court. On October 3d plaintiff obtained from respondent court an order upon the defendant Frank Gubin to appear and show cause why he should not pay attorney fees, court costs, and alimony pending appeal from order of August 9th. Upon the hearing of this matter and for the purpose of determining what would be a reasonable amount which the defendant Frank Gubin should be required to pay for the stated purpose, the court entered upon an investigation of the amount of property and income of said defendant Frank Gubin. This investigation is being made under an order of reference to a commissioner to take testimony and to make report thereon to the court. The witnesses before the referee are the defendant Oscar Gubin and other persons. Some evidence had been introduced tending to prove (although the fact is disputed) that the defendants Frank Gubin and Oscar Gubin are and for many years have been partners in the jewelry business, and have been interested together in numerous real estate transactions, and that as a result of those activities large profits have been made, and that a large amount of the profits belonging to Frank Gubin are concealed in the possession and under the name of Oscar Gubin. In the course of the examination of the witnesses it was shown that the defendants, or some of them, for the purpose of safekeeping of documents, have safety deposit boxes in banks in the city of Los Angeles. In order to proceed more satisfactorily with the examination of the witnesses, counsel for the plaintiff Rhonie Gubin demanded that said boxes be opened for their inspection. Defendants having refused their consent to such inspection the application was reported to the court for its action. Thereupon the court, by order of October 24, 1929, ordered the defendant Oscar Gubin to open these boxes in the presence of the court commissioner and counsel and the parties and that a list of the securities be taken that stand in the name of the parties defendant, except Bertha Gubin, wife of Oscar Gubin, it appearing that said Bertha Gubin is absent from the state and has not been served with process in said action. The court stated as follows: "The order will be made clear, that it will affect only the boxes that stand in the name of the defendant Frank Gubin, or the defendant Oscar Gubin, or the defendants Frank Gubin and Oscar

Gubin jointly or severally, with this further qualification that if incidentally the wife of Oscar Gubin may also be named as one of the parties having the right of access to any or all of those boxes, that that shall not affect the order that I have made as to the remaining two brothers." It has been admitted by counsel for the respondent parties, during consideration in chambers of the present matter, that one of the three boxes to which the above court order applies is held in the name of Oscar Gubin, and that the other two boxes are held in the name of Frank Gubin and Oscar Gubin. The fourth box is excluded from the order because it is in the name of Rhonie Gubin, and she is not named as one of the parties having right of access to any of the other three boxes.

The superior court having made the order as above stated and having manifested its intention to enforce the same, the petitioners now present this application for a writ of prohibition. In that behalf petitioners claim said order violates constitutional rights of petitioners and is wholly without the jurisdiction of said court.

The particular right upon which they rely is described in the constitutional provision against unreasonable seizures and searches, as stated in section 19 of article I of the Constitution of California. Under the protection of that section it has been held that in no case should a person be forced to surrender his private books and papers to another who does not claim to hold or have any interest in them, except upon convincing proof that such books or papers contain evidence which materially affects the rights in litigation of the person demanding them. In *Kullman, Salz & Co. v. Superior Court*, 15 Cal. App. 276, 114 P. 589, 593, it appeared that there was pending in the superior court a divorce action of one Jean Kullman against her husband Jacob Kullman. In connection with her demand for an allowance for support and maintenance, the plaintiff made allegations similar to those made in the superior court as shown in the present proceeding, to the effect that certain of the defendants had entered into a combination and conspiracy for the purpose of concealing the property of the defendant husband, so as to prevent the plaintiff from obtaining the support and maintenance to which she was entitled. In connection with the action in the Kullman Case there was an application for alimony pendente lite, etc. In the hearing thereon the court made a certain order, of a general nature, for the production of books and records, without identification of any particular book or record properly subject to examination in connection with the issue then before the court for determination. The Court of Appeal held that the power of the court to compel the production of private books and papers can be exercised by the court only when the facts clearly and

without question warrant it, and where those facts are produced through the instrumentality of competent evidence. The court said: "There are, in other words, two essential facts which must be made to appear by clear and unequivocal proof as a condition precedent to the right of a court to require a person to deliver up for examination by a court his private books and papers, viz.: (1) That such person has a book or paper or document containing evidence material to the issue before the court. (2) That the precise book or paper or document containing such evidence be designated or so described as that it may be identified."

In the case now pending in respondent court there is some evidence tending to prove the existence of certain certificates of stock, some of which stand in the name of Frank Gubin and which it is admitted are or may be in one of the safety deposit boxes. Apparently this is true of 225 shares of Standard Oil Company of Indiana, and an undetermined amount of shares of General Builders' Inc., a corporation. In accordance with the decision in the Kullman Case, supra, and other decisions of similar import, we think that it is within the power of respondent court to require the production for inspection of those definitely identified certificates. The court would also have power, for the purposes of access to those certificates, to suspend the operation of its injunction against opening those boxes, so that under proper safeguards the particular certificates in question might be examined, in order that the information thereby obtained could be used, with the other evidence received, for the purpose of determining the amount of assets of Frank Gubin, so that an appropriate order may be made on the particular application for alimony which is now before that court. But respondent court by its order is attempting to go further. It is proposed to subject to examination by the court's commissioner and by the plaintiff or her counsel all of the contents of the safety deposit boxes specified in the order, without limitation to the particular certificates which have been identified and described. As plainly stated by counsel for appellant, they have asked that the defendants Oscar and Frank Gubin be required "to open up the two joint boxes in the presence of the commissioner so that we may see what is in those boxes in the way of valuable papers." It was in conformity with this request that the court ordered that the boxes be opened in the presence of the court commissioner, counsel, and the parties, "and that a list of the securities be taken that stand in the name of the party defendant here, excepting the wife of Oscar Gubin."

* * *

We are of the opinion that in making said order the court has exceeded its jurisdiction.

Let the peremptory writ issue in terms conforming to the views herein expressed.

We concur: HOUSER, J.; YORK, J.

104 Cal. App. 633

ALBERTONI v. ALBERTI. ★

Civ. 4023.

District Court of Appeal, Third District,
California.

March 21, 1930.

Rehearing Denied April 18, 1930. Hearing Denied by Supreme Court May 19, 1930.

1. Contracts ⇐167 — Applicable laws — Part of contract.

Applicable laws form part of contract as fully as if referred to in agreement.

2. Partnership ⇐84, 86 — Sharing profits and losses — Statute as part of contract.

Where parties did not agree on subject of their share in profits or losses, statute providing that in such cases shares of partners are equal became part of contract (Civ. Code, § 2403).

Appeal from Superior Court, Stanislaus County; J. C. Needham, Judge.

Action by R. Albertoni against Mariana Alberti for an accounting. From a judgment for plaintiff, defendant appeals.

Affirmed.

T. B. Scott, of Modesto, for appellant.
Hugo McKinley, of Modesto, for respondent.

FINCH, P. J.

The complaint and the answer both allege that in January, 1925, the parties entered into a partnership for the purpose of conducting a general dairying business on the defendant's land. The complaint alleges and the answer, by failing to deny, admits that on January 31, 1927, "by mutual consent of said partners the said partnership was terminated." Both parties prayed for an accounting. An accounting was had and the court found that the plaintiff is entitled to recover from the defendant the sum of \$1,303.34. Judgment was entered accordingly. The defendant has appealed from the judgment.

[1, 2] The agreement between the parties was oral. The defendant testified that by the terms thereof she was to receive one-half of the gross receipts from the business. The plaintiff and his wife both testified that the parties did not so agree, but that they agreed that the plaintiff and his family

and the defendant, who is the plaintiff's mother-in-law, were all "to live together and work together, and whatever money came out of the place we were to take it and help pay off the mortgage, and at the time of her death, * * * she would leave the place to us." The defendant squarely contradicted such testimony. The court evidently did not believe that the terms of the contract were as claimed by either party, but found that "the net profits of said business were to be divided equally between the parties hereto." Neither party attempted to prove any agreement relating to the sharing of profits and losses except as stated. "All applicable laws in existence when an agreement is made necessarily enter into it and form a part of it as fully as if they were expressly referred to and incorporated in its terms." 6 Cal. Jur. 310. At the time the agreement was entered into section 2403 of the Civil Code read as follows: "In the absence of any agreement on the subject the shares of partners in the profit or loss of the business are equal, and the share of each in the partnership property is the value of his original contribution, increased or diminished by his share of profit or loss." In the absence of an agreement on the subject, this section became one of the terms of the contract between the parties, and the finding in question is in strict accordance therewith. It is not contended that there are any errors in the account between the parties as found by the court except as based on the defendant's theory that she is entitled to one-half the gross receipts.

The judgment is affirmed.

We concur: PLUMMER, J.; R. L. THOMPSON, J.

104 Cal. App. 679

BROWN et al. v. MONTGOMERY WARD & CO., Inc., et al.

Civ. 6975.

District Court of Appeal, First District, Division 2, California.

March 25, 1930.

1. Automobiles ☞193(8) — Course of employment — Traveling auditor — Negligence — Employer's liability.

Traveling auditor going to his home in his auto after making a tour of employer's stores held in "course of employment," and master was liable for his negligence.

A route was planned for traveling auditor and he had to visit certain stores and complete trip in certain time. Otherwise his hours and time were in his discretion.

He drove his own car and was allowed a certain amount per mile for its use. Sometimes he traveled during regular working hours, and sometimes outside of regular working hours. Returning home from the last store, he passed his headquarters, which was closed for the night, and continued on home, and it was on this part of the journey that his automobile struck deceased.

[Ed. Note.—For other definitions of "Course of Employment," see Words and Phrases.]

2. Automobiles ☞244(50) — Pedestrian — Contributory negligence — Crossing street — Evidence — Looking.

Pedestrian struck by automobile was not proved contributorily negligent in crossing street on theory of failure to look for passing vehicles.

3. Trial ☞94 — Reception of evidence — Motion to strike — Sufficiency.

Motion to strike testimony as "not responsive and irrelevant, incompetent and immaterial," held properly denied as too broad.

4. Trial ☞92 — Reception of evidence — Motion to strike — Time.

Motion to strike testimony at end thereof, and just before witness left stand, came too late.

Appeal from Superior Court, Alameda County; Leon E. Gray, Judge.

Action by Charles W. Brown and others against Montgomery Ward & Co., Incorporated, and another. From judgment for plaintiffs, defendants appeal.

Affirmed.

Hadsell, Sweet & Ingalls, of San Francisco, and Snook, Snook & Chase, of Oakland, for appellants.

Ann, White & Aiken and Hamilton Wright, all of Oakland, for respondents.

STURTEVANT, J.

Mrs. M. A. Brown was struck by an automobile which was being driven by one of the employees of Montgomery Ward & Co. She died of the injuries sustained. Her heirs sued for damages. From a judgment in favor of the plaintiffs, the defendants have appealed.

[1] The defendants claim that the evidence did not show that at the time of the accident the defendant Vinje, who was driving the automobile, was acting within the scope and course of his employment. Mr. Vinje is an accountant, he owns his automobile, and resides in Berkeley. At the time of the accident he was a traveling auditor for the defendant Montgomery Ward & Co. That company

maintains a store in Oakland and a chain of stores located in different parts of the state. The head auditor is attached to the Oakland store. He has an assistant. Besides that assistant, the company has two or more traveling auditors. From time to time the head auditor and the traveling auditor, as the witnesses testified, "lay out a program of audits for a trip." That program includes certain designated stores and a certain designated period for the trip. Mr. Vinje was paid a certain sum per week, and he was allowed to travel in his own automobile and the company paid him nine cents per mile. That mileage was computed as follows: When he left his house the mileage was computed from the house to the first store, which was at Merced; thence to Tulare; thence to Hanford; thence to Salinas; and thence home. The work laid down in the program had to be done within the period therein stated; otherwise, Mr. Vinje commenced work, continued work, or stopped work at such time or times as he chose, worked or traveled on such hours as he chose, and was not under any order or orders in any respect. When auditing a store he usually worked during the working hours of that particular store, but sometimes took work to his hotel. When traveling he usually traveled during working hours, but sometimes started a trip earlier in the day or finished later in the day. As each store was audited a report was made out. One copy was mailed to the Chicago office and one to the Oakland office.

On Monday, about ten days prior to the accident, Mr. Vinje left his home to audit the stores located at Merced, Tulare, Hanford, and Salinas. He traveled in his automobile and carried with him a typewriter and some books of instruction which were the property of Montgomery Ward & Co. At about 3 o'clock on Friday, July 29, 1928, he had finished auditing the store at Salinas, which was the last store on his program, and had written out his reports. He put the typewriter, books of instruction, and Salinas reports in his automobile and started toward his home in Berkeley. As he traveled north he passed by the Oakland store, but did not stop. It was then 7:45 p. m. and the store had closed at 5 p. m. He continued on his way to his home in Berkeley and returned to the store Monday morning. While traveling between the Oakland store and his home the accident happened.

Under the foregoing facts it is patent that Mr. Vinje was employed by Montgomery Ward & Co.; that he was so employed on a fixed wage or salary; that it was his duty to go to the places designated on his program and at each place to audit the books of his employer's store located at that place; that it was his duty to audit such books according to certain written instructions contained in books of instruction which were delivered to

him; that while hours of work and travel were not prescribed in detail a general limit was placed on the time within which the program would be completed; and that when the program was completed it was the duty of the employee to return to the head office for further assignments. As the employee was not restricted from making some short days, neither was he restricted from working some long days. As the stores on his program were at a distance, necessarily he was compelled to go to each and finally return. Moreover, the facts show that his employer not only knew that he would travel by automobile, but his employer paid for its use nine cents a mile from the time the employee left his home until he returned to his home. That at a certain store the employee might have short hours or long hours and that in traveling he might travel either late or early was in the interest of the employer rather than against it. Moreover, such facts were expressly contemplated by the terms of the contract.

The defendants do not claim Mr. Vinje was an independent contractor. Their claim is merely that at the time and place of the accident he was not acting within the scope and course of his employment. However, we think the foregoing facts show that he was. If his employer would contend otherwise, then it should specify the hours of labor and the hours of travel or the employer should keep the store open to receive belated employees. If the accident had happened between Salinas and Oakland, the defendants would not even make the contention which they now make. After Mr. Vinje arrived at the Oakland store and found it closed, under the terms of his contract of employment, he was entitled to go to his home. Whether his program ended on arriving at his home or ended when, on Monday morning, he arrived at the office need not be determined. It had not ended when the accident occurred.

[2] The defendants claim the decedent was guilty of contributory negligence. The decedent left the northeast corner of Thirty-Fifth street and started to walk diagonally across Telegraph avenue to a mail box. She was seen to leave the sidewalk, but no witness testified that she did or did not look for passing vehicles. As she walked up the street she was, in the beginning, walking diagonally across the right-hand zone of the street. The defendants argue that as she could not see vehicles traveling on the right-hand side of the street without looking over her shoulder, she was guilty of contributory negligence. But there is no evidence she did not look over her shoulder. The point is without merit.

[3] In reply to a question that was not objected to, Mrs. Wasson made quite a long statement. Some of the substance was pertain-

nent to the issue. Some was not. Defendants' counsel made a motion: "I ask that be stricken out as not responsive, and irrelevant, incompetent and immaterial." The motion was too broad. The court did not err in denying it.

The surviving husband gave testimony regarding the extent to which the deceased managed the family purse, the length of time, and the success of her management. Included in the statement was some matter regarding her contributions from moneys which she had been given by a brother. The defendants made a motion to strike. It was denied. The same comment as above is pertinent to the form of the motion.

[4] The witness Hemphill testified as to some brake tests which he had made. No objection was made as to any question. After he had finished and just before he was leaving the stand, the defendants made a motion to strike out. The attack came too late.

Finally it is claimed the trial court erred in giving an instruction on the last clear chance doctrine. It will be enough to say that the instruction complained of is not addressed to the subject of the last clear chance.

The judgment is affirmed.

We concur: NOURSE, Acting P. J.; BURGESS, Justice pro tem.

104 Cal. App. 422

PEOPLE v. GALLOWAY.

Cr. 11.

District Court of Appeal, Fourth District,
California.

March 10, 1930.

1. Homicide $\S$ 166(1)—Refusing evidence of motive for assaults with deadly weapon with intent held not error where perpetration of acts was shown.

In prosecution for assaults with deadly weapons with intent to commit murder, refusing evidence to show motive for assault held not error, where perpetration of acts charged was brought home to defendant by abundant evidence making unimportant and immaterial motive for acts.

2. Homicide $\S$ 339—Defendant, prosecuted for assault to murder, offering no evidence thereon cannot complain of exclusion of evidence concerning intent, where not found guilty of specific intent to murder.

Exclusion of evidence concerning intent cannot be complained of by defendant, in prosecution for assault with deadly weapon to murder, where he offered no evidence thereon, and jury failed to find defendant guilty of specific intent to murder.

3. Homicide $\S$ 145—Law presumes unlawful intent where assaults with deadly weapons were abundantly established (Pen. Code, $\S$ 20; Code Civ. Proc. $\S$ 1963, subd. 2).

Where assaults with deadly weapons with intent to commit murder were abundantly established, law presumes in accordance with Code Civ. Proc. $\S$ 1963, subd. 2, an unlawful intent sufficient to comply with requirement of Pen. Code, $\S$ 20.

4. Assault and battery $\S$ 87—Past relations cannot be gone into to show which party to assault was in right, though motive is material.

Even when motive is material, past relations of parties may not be gone into with purpose of showing which party to assault was in right.

5. Homicide $\S$ 95—That prosecuting witness kept company with defendant's wife did not constitute provocation for assault to kill.

Circumstance that prosecuting witness, in prosecution for assault with deadly weapon to commit murder, kept company with wife of defendant did not constitute legal provocation for assaults and hence exclusion of evidence thereon was not error.

6. Homicide $\S$ 84—Whether there was heat of passion was immaterial where defendant pleaded not guilty of assault to murder.

Where defendant, prosecuted for assault with deadly weapons to commit murder, was being tried under pleas of not guilty, whether or not there was heat of passion was immaterial.

7. Homicide $\S$ 94—While extenuating circumstances may be considered by judge in pronouncing sentence, defendant prosecuted for assault to murder could not take law into own hands.

Though any extenuating circumstances might properly be considered by judge in pronouncing sentence, individual, prosecuted for assault with deadly weapons to commit murder, could not properly take law into own hands and commit assaults.

8. Witnesses $\S$ 388(2)—Refusing impeachment of prosecuting witness by examination on immaterial matter whether he knew defendant might assault him held not error, where no foundation was laid (Code Civ. Proc. $\S$ 2052).

In prosecution for assault with deadly weapons with intent to murder, refusing to permit impeachment of prosecuting witness by examination on immaterial matter, as to whether prosecuting witness knew defendant was likely to assault him, and as to whether he had endeavored to find out what activities of defendant were, held not error, where no foundation was laid or attempted to be laid in accordance with Code Civ. Proc. $\S$ 2052.

9. Criminal law $\S$ 1170½(1)—Error in refusing impeachment of own witness held of no avail to defendant, where matter was immaterial and no foundation was laid (Code Civ. Proc. $\S$ 2049, 2052).

In prosecution for assault with deadly weapons with intent to murder, error in refusing to allow impeachment of own witness of defendant

examining prosecuting witness, as provided for by Code Civ. Proc. § 2049, by interrogating him at to whether he had heard that defendant was likely to assault him, on ground that defendant could not impeach own witness *held* of no avail to defendant, for reason that it was attempt to impeach witness on immaterial matter, and because no foundation was laid or attempted to be laid in accordance with Code Civ. Proc. § 2052.

10. Criminal law ☞829(18)—Refusing instruction on reasonable doubt held not error where court read statute thereon (Pen. Code, § 1096).

In prosecution for assault with deadly weapon to commit murder, refusing instruction on reasonable doubt *held* not error, where court read to jury Pen. Code § 1096, relating thereto, in view of section 1096a providing that where that is done, no further instruction upon subject is necessary.

11. Homicide ☞309(6)—Refusing, in prosecution for assault to murder, instruction relating to manslaughter based on immaterial excluded matters held not error.

In prosecution for assault with deadly weapon to commit murder, refusing instruction relating to manslaughter which was not applicable and which was based on immaterial matters which were properly excluded from evidence, *held* not error.

12. Homicide ☞269—Intention with which assaults were made held material fact for jury in prosecution for assault to murder.

In prosecution for assault with deadly weapon to commit murder, intention with which assaults were committed was material fact to be determined by jury.

13. Assault and battery ☞96(1)—Refusing instruction on simple assault held not error where evidence showed assaults with deadly weapons (Pen. Code, § 1159).

In prosecution for assault with deadly weapon with intent to murder, refusing instruction that jury might find defendant guilty of simple assault *held* not error, where evidence showed assaults were made with deadly weapons so that it would not warrant verdict of guilty of simple assault though Pen. Code § 1159 provides defendant may be found guilty of an offense, commission of which is necessarily included in that with which he is charged.

14. Criminal law ☞1042—If sentences did not represent court's intention, matter should have been called to court's attention.

Matter should have been called to attention of trial court if it appeared, in prosecution for assaults with deadly weapons to commit murder, that sentences did not represent court's intention at time.

15. Criminal law ☞1144(17)—Sentences for assaults with deadly weapons must be presumed in accord with intention of court making no changes after being advised sentences must run consecutively and not concurrently.

Where court made no changes in sentences imposed for assaults with deadly weapons after

it was called to court's attention by district attorney that law required that sentences run consecutively and not concurrently, it must be presumed that sentences were in accord with intention of court.

Appeal from Superior Court, Tulare County; J. S. Clack, Judge.

James Galloway was convicted of two assaults each with a deadly weapon, and he appeals.

Affirmed.

Millspaugh & Smith, of Lindsay, for appellant.

U. S. Webb, Atty. Gen., John D. Richer, Deputy Atty. Gen., and Leroy McCormick, Dist. Atty., of Visalia, and W. G. Machetanz, Deputy Dist. Atty., of Exeter, for the People.

BARNARD, J.

This is an appeal from the judgments in two separate cases, which were consolidated and tried before the same jury. In each case the defendant was charged with assault with a deadly weapon with intent to commit murder, and in each case he was convicted of assault with a deadly weapon.

In the first case, the defendant was charged with making an assault upon one Fred Raynor, the uncontradicted evidence showing that said defendant appeared at a fruit packing house in Lindsay, Cal., where the said Raynor was at work; that Raynor heard his name called and looking up observed the defendant within eight or ten feet of him, and with a .22-caliber revolver pointed at him; and that Raynor immediately dropped down behind a truck, just as the defendant fired at him. Raynor testifies that he did not know the defendant was looking for him, and knew of no reason why he should shoot at him. The evidence also shows that while the defendant was being held, awaiting the arrival of an officer, he said he "wanted to kill the son of a bitch." While he was being led away by the officer, he stated that he "wanted to go back and get the sucker."

The uncontradicted evidence in the other case shows that on the day following the preliminary examination in the first case, the prosecuting witness, Raynor, entered a clothing store in Exeter, Cal., for the purpose of making a purchase. While Raynor was following the clerk to the hat rack, he observed the defendant just inside the door, coming at him with a knife in his hand. Raynor ran around the hat rack and attempted to escape, but the defendant pursued him and caught him at the door. Raynor felt the knife in his back and fell to the floor. The defendant placed himself astride him and stabbed and cut him in twenty-eight separate places, five of which stab wounds penetrated the pleural cavity.

The first assignment of error is, that the court erred in ruling out all evidence offered to show the motive or to inquire into the matter of the motive for the alleged crimes. In the case of *People v. Durrant*, 116 Cal. 179, 48 P. 75, 81, the Supreme Court says: "In every criminal case proof of the moving cause is permissible, and oftentimes is valuable; but it is never essential. Where the perpetration of a crime has been brought home to a defendant, the motive for its commission becomes unimportant. Evidence of motive is sometimes of assistance in removing doubt, and completing proof which might otherwise be unsatisfactory; and that motive may either be shown by positive evidence, or gleaned from the facts and surroundings of the act. The motive then becomes a circumstance, but nothing more than a circumstance, to be considered by the jury; and its absence is equally a circumstance in favor of the accused, to be given such weight as it deems proper. But proof of motive is never indispensable to a conviction."

[1] In the present case, the perpetration of the acts charged were brought home to the defendant by abundant evidence, and the motive for the acts was therefore unimportant and immaterial.

[2] The second assignment of error is thus stated: "That the court erred in excluding all evidence concerning intent of the defendant, except such evidence as related only to the time of the alleged crimes." No evidence was offered by the defendant to show any such intent, and since the jury failed to find the defendant guilty of the specific intent to murder, the defendant may not complain, and is not prejudiced. What is here objected to is not the question of intent, but the court's ruling as to the showing of provocation.

The third assignment of error is "that the court erred in excluding evidence offered to show legal provocation, and that the acts of which defendant was accused, were done while he was laboring under a heat of passion, reasonably provoked in him by the acts of the prosecuting witness."

[3-7] These first three assignments of error all go to the refusal of the court to permit the defendant to show certain previous relations between the parties. In one question asked by defendant's counsel, on cross-examination, it was indicated that the defense intended to be shown, was that the prosecuting witness was keeping company with defendant's wife. In the absence of the jury, the court asked defendant's counsel to state the nature of their defense. This defense was thus stated: "The defense proposes to show that there was a provocation here that extended over a period of two or three years, a deliberate scheming attempt to break up a man's home and ruin his happiness, such a one as would practically dethrone any rea-

sonable man's reason." While the argument is made that the matters sought to be introduced in evidence were admissible, as going to the intent and the motive, it is apparent that their admission was sought for the purpose of showing provocation. The unlawful act having been brought home to the defendant in both cases, the law presumes an unlawful intent sufficient to comply with the requirement of section 20 of the Penal Code. Section 1963, subd. 2, Code Civ. Proc. Under such circumstances, as was pointed out in *People v. Durrant*, supra, the motive is unimportant and immaterial. Even when the motive is material, the past relations of the parties may not be gone into with the purpose of showing which party was in the right. *People v. Yokum*, 118 Cal. 437, 50 P. 686; *People v. Colvin*, 118 Cal. 349, 50 P. 539; *People v. Conkling*, 111 Cal. 616, 44 P. 314; *People v. Thomson*, 92 Cal. 506, 28 P. 589. The introduction of this evidence was sought, not to show motive as claimed, but to show what the defendant terms a "legal provocation." The circumstances here sought to be shown as a defense did not constitute a legal provocation. The law does not recognize the right of any person to avenge his wrongs by shooting and stabbing. In cases of homicide, by special statute, where the crime is committed under sufficient heat of passion, the offense is reduced from murder to manslaughter. It may also be conceded that under certain circumstances such evidence might, under a plea of "not guilty by reason of insanity," be admissible for the purpose of showing its effect upon the mind and reason of the defendant. There is, however, no legal provocation in the sense here contended for. The defendant was here being tried under pleas of "not guilty," and whether or not there was heat of passion, makes no difference. The admission of the evidence in question was properly refused by the trial court. While any extenuating circumstances might properly be considered by the judge in pronouncing sentence, an individual may not thus take the law into his own hands.

[8] The next assignment of error is, that the court erred in refusing to permit the impeachment of the prosecuting witness. Upon cross-examination the prosecuting witness was asked, "Haven't you, as a matter of fact, Mr. Raynor, heard from several sources that Mr. Galloway was likely to go after you because you were chasing around with his wife?" And also, "Had you ever busied yourself during that time to find out what Mr. Galloway's activities were?" The court sustained objections to both of these questions as being incompetent, irrelevant, and immaterial. Defendant says in his brief, that these questions had to do with inconsistent statements made by the prosecuting witness at the preliminary hearing, the subject-matter being the relations of the prosecuting witness with

the wife of the defendant. This was plainly an attempt to impeach the witness on an immaterial matter. Not only that, but the record shows no foundation was laid, and no attempt was made to lay a foundation. The witness was neither asked whether he had at other times made statements inconsistent with his testimony on direct examination, nor was any purported transcript or purported copy of any such statement shown him.

[9] As a part of his own case the defendant called the prosecuting witness to the stand, as his own witness. Counsel started to interrogate him as to the matters just referred to. The court sustained the objection on the ground that he could not impeach his own witness. Under section 2049 of the Code of Civil Procedure, this ruling was error, but this can be of no avail to defendant, for the reason that it was an attempt to impeach the witness on an immaterial matter, and that no foundation was laid or attempted to be laid, in accordance with section 2052 of the Code of Civil Procedure. The real objection of the defendant to these rulings, in connection with his attempt to impeach the prosecuting witness, is his contention that he had a right to go into the matters referred to in the above specifications of error. The uncontradicted evidence shows that the witness had, in fact, been assaulted, and whether he knew why he had been assaulted, or what he had heard from other people in reference to the matter was of no materiality. The evidence shows the prosecuting witness had not seen the defendant for between two and three years, and there was no evidence of any threats on the part of the prosecuting witness toward the defendant, and the matters sought to be brought out were incompetent and immaterial.

[10] Appellant next contends that the court erred in refusing to give an instruction requested by him, which contained the following paragraph: "The doctrine of reasonable doubt goes not only to the whole evidence, but equally to every material issue, and if, after a review of all the evidence, including that of the defendant, if any, then if you entertain a reasonable doubt upon any one material issue, it is your duty to give the defendant the benefit of the doubt and acquit him." The court read to the jury section 1096 of the Penal Code, and under section 1096a of the same Code, no further instruction upon that subject need be given.

It is next claimed the court erred in refusing to give the following instruction: "You are instructed that if you find as a fact that the defendant committed the acts complained of in the information herein while in the heat of passion reasonably provoked in him by the conduct of the prosecuting witness, said Fred

Raynor, you must not find the defendant guilty of the charge laid in the foundation. The degree of such passion need only to be such as to render the mind of the defendant incapable of cool reflection and self control. It need not have been such that knowledge or volition were destroyed or reason was dethroned. Such passion must have existed at the time of the commission of the act or acts complained of, and it is your duty to determine whether or not such passion did exist, taking into consideration all the circumstances of this particular case, which include the nature of the defendant and the laws of the human mind as well as the nature and the circumstances of the provocation, the extent to which the passions were aroused, and the nature of the act or acts causing the provocation."

[11] Not only was this an attempt to secure an instruction, based upon immaterial matters which were properly excluded from evidence, but the instruction itself is a compilation of various excerpts from the law relating to manslaughter, taken out of their context, not applicable to the facts in this case, and the same was properly refused.

[12] The next assignment of error is, that the court refused to give an instruction requested by the defendant to the effect that the jury might find the defendant guilty of simple assault. The argument is made that the charge of assault with a deadly weapon with intent to commit murder, necessarily includes the lesser offense of simple assault. Appellant relies upon section 1159 of the Penal Code, which provides that the defendant may be found guilty of any offense, the commission of which is necessarily included in that with which he is charged. Under the charge here, the intention with which the assault was committed was a material fact, to be determined by the jury. *People v. Fine*, 53 Cal. 263. While the evidence would have been sufficient to sustain a conviction upon the original charge of assault with a deadly weapon with intent to commit murder, the jury has, by its verdict, found that the defendant did not actually intend to commit murder. It does not follow, however, that the jury should have been permitted to find a verdict of simple assault. Where the evidence is such that a verdict of manslaughter cannot legally be found, it has been held not error to fail to instruct as to manslaughter. *People v. Turley*, 50 Cal. 469; *People v. Fellows*, 122 Cal. 233, 54 P. 830; *People v. DiDonato*, 90 Cal. App. 366, 265 P. 978. In *People v. Rogers*, 163 Cal. 476, 126 P. 143, 145, the court says: "It is thoroughly established in this state that it is proper to refuse to instruct a jury as to a lesser offense or degree included within the offense charged, where the evidence is of such a nature as to warrant, in the event that the defendant is

guilty at all, only a verdict for the higher offense or degree." The uncontradicted evidence in these cases shows the defendant was at least guilty of assault with a deadly weapon, in each case, if he was guilty of any offense whatever. In each case the assault was without warning. In the first case the possession of the pistol, the use of the pistol and the intention to so use it, are clearly shown by the uncontradicted evidence, including the statements of the defendant. In the case of the assault with the pocket knife, the evidence shows that the defendant was armed with a knife with a blade three inches long; that he pursued his victim until he caught him, and, having knocked him to the floor, got astride him and repeatedly stabbed him, inflicting twenty-eight separate wounds, five of which penetrated the lung; and that he did not desist until he was pulled off by an officer. In each case, the nature of the weapon used, and the manner of its use, leave no question that the means of assault used in each instance, constituted a "deadly weapon."

[13] We think this evidence did not warrant a verdict of "guilty of simple assault," and the requested instruction could be based only upon the assumption that the jury would not do its duty. To have so instructed the jury would have authorized them to find a verdict not in accordance with the evidence.

[14, 15] Defendant's last assignment of error is that the court erred in imposing the maximum sentence upon each conviction, thinking that such sentences would run concurrently, when, as a matter of law, such sentences will have to be served consecutively. In each of the two cases the defendant was sentenced to imprisonment in the state prison. Appellant says in his brief, that after passing sentence in each case, the court stated he was of the opinion that such sentences would run concurrently and that the district attorney pointed out that such sentences would run consecutively. There is nothing in the record to show these facts, and nothing to show that the sentences did not represent the intention of the court at the time of imposing sentence. The record shows no objection was made at the time, and if it appeared that the sentence did not represent the court's intention at the time, this matter should have been called to the attention of the trial court. It appears, however, from counsel's statement, that after the law was called to the court's attention by the district attorney, no change in the sentences was made by the trial judge. It must be presumed that the sentences were in accord with the court's intentions.

No prejudicial error being shown, the judgments in both cases are affirmed.

We concur: SLOANE, P. J.; MARKS, J.

104 Cal. App. 511
WILD et al. v. ARRAND et al.
Civ. 7257.

District Court of Appeal, First District, Division 2, California.
March 17, 1930.

1. Appeal and error §544(1) — Bill of exceptions — Transcript — Evidence — Review.

There being neither bill of exceptions nor transcript, Court of Appeal was precluded from examining evidence (Code Civ. Proc. §§ 650, 953a et seq.).

2. Appeal and error §907(3) — Bill of exceptions — Transcript — Findings — Review.

Court of Appeal, prevented from examining evidence by absence of bill of exceptions and transcript must take trial court's findings as facts.

3. Exchange of property §13(4) — Consideration — Failure — Finding — Sufficiency.

Finding defendants delivered registration certificate to plaintiffs suing to rescind automobile exchange contract for failure of consideration, and that plaintiffs did not offer to restore property, sustained judgment for defendants (California Vehicle Act 1923, p. 524, § 45(e) as amended by Stats. 1925, p. 402, § 7; Civ. Code, § 1691).

Appeal from Superior Court, Los Angeles County; W. A. Anderson, Judge.

Action by Bruce M. Wild and another against Mary M. Arrand and others. From a judgment for defendants, plaintiffs appeal.

Affirmed.

Charles S. Conner, of Los Angeles, for appellants.

Winterer, Combs & Ritchie, of Los Angeles, for respondents.

BURROUGHS, Justice pro tem.

This is an action for the rescission of a contract. Judgment was entered in favor of the defendants. The plaintiffs appeal.

[1, 2] The only point presented for a reversal of the judgment is the insufficiency of the evidence to justify the findings of fact. The evidence taken at the trial is not before us. There is neither a bill of exceptions prepared in accordance with section 650 of the Code of Civil Procedure nor a transcript of the evidence under the provisions of section 953a et seq. of said Code. We are therefore precluded from examining the evidence. *Bell v. Brigance*, 194 Cal. 445, 229 P. 27; *Philbrook v. Randall*, 195 Cal. 95, 231 P. 739. Under such circumstances the findings of the trial court must be accepted as the facts of the case. *Spring Valley Water Co. v. County of Alameda*, 88 Cal. App. 157, 263 P. 318.

[3] Plaintiffs claim that the title to a certain automobile which they received under the terms of the contract never vested in them, and therefore there was a failure of consideration. Section 45(e) p. 524, California Vehicle Act of 1923, as amended by section 7 of Act of 1925, p. 402. On this subject the court found: "That on or about the 23d day of November, 1923, and within a reasonable time after said exchange, defendants secured a certificate of registration for the said Mitchell car from the State of California, and delivered the same to plaintiffs, and at the said time defendants offered to transfer the said certificate of registration to plaintiffs, but plaintiffs refused to accept such transfer."

The court also found that appellants did not restore or offer to restore what they had received from the defendant. Section 1691, Civ. Code.

These findings are sufficient to sustain the judgment.

No error has been shown. The judgment is affirmed.

We concur: NOURSE, Acting P. J.; STURTEVANT, J.

104 Cal. App. 677

RIDENS v. ECONOMY HOME BUILDERS, Inc., et al.

Civ. No. 7264.

District Court of Appeal, First District, Division 2, California.

March 25, 1930.

1. Mechanics' Liens §302 — Foreclosure — Deficiency Judgment — Party liable.

Deficiency judgment in lien foreclosure proceedings is proper only against party personally liable under statute (Code Civ. Proc. § 1194).

2. Mechanics' Liens §304(1) — Deficiency Judgment — Agency — Independent contractor — Personal liability.

If corporation employing laborer was agent of owner and not independent contractor, owner would be party personally liable and subject to deficiency judgment under statute (Code Civ. Proc. § 1194).

3. Appeal and error §934(1) — Presumption — Judgment — Regularity.

Appellate Court must presume regularity of judgment.

4. Appeal and error §1026 — Prejudicial errors — Objection to findings — Review.

Appellate Court considers only prejudicial errors, especially where point was not

raised by objection to findings under statute (Code Civ. Proc. §§ 634, 663).

Appeal from Superior Court, Los Angeles County; George J. Thompson, Judge.

Action by J. C. Ridens against the Economy Home Builders, Inc., and others. Judgment for plaintiff, and defendant Thomas Berry appeals.

Affirmed.

Dana R. Weller, of Los Angeles, for appellant.

Duke Stone, of Los Angeles, for respondent.

NOURSE, Acting P. J.

Plaintiff sued to foreclose a mechanic's lien. He had judgment against defendant Berry alone for \$518.70. The appeal is on typewritten transcripts.

The cause was dismissed as to all defendants other than Berry, the owner of the premises where the labor was performed. As to him plaintiff proved every essential element justifying his claim to a foreclosure of his lien. The defendant offered no defense. Findings and judgment were prepared and signed in which it was decreed that plaintiff have judgment in foreclosure "and for such lien purposes only." But the judgment contained a direction that if the proceeds of the sale should be insufficient, a deficiency judgment for the amount unpaid should be entered in favor of plaintiff.

[1, 2] On this appeal, error is predicated upon the latter portion of the judgment. It is error, of course, unless the appellant is "the party personally liable therefor" within the meaning of section 1194, Code of Civil Procedure. There is some evidence in the record showing the appellant executed a conditional sales contract with its codefendant Economy Home Builders, Inc., whereby the corporation agreed to subdivide the premises, erect homes thereon, and sell the same for the benefit of the appellant. The contract is not in the record, and no other evidence of its terms was offered. The trial court found that the respondent's services, which are the basis of his claim of lien, were engaged by the corporation, and the respondent now argues that it is a fair inference from the evidence that, in this respect, the corporation was merely the agent of appellant and that the appellant was, in reality, the contractor for whom the services were performed. If the corporation was but an agent of the appellant for this purpose, and not an independent contractor, then the appellant would be the party personally liable for the services, under section 1194, and the deficiency judgment against him was proper.

[3, 4] We must presume the regularity of the judgment, and the fact that the point was not

raised in the trial court by objection to the findings under section 634, Code of Civil Procedure, or by motion under section 663, Code of Civil Procedure, indicates that the appellant did not deem the error, if any, prejudicial. The lien is for a comparatively small sum. It covers a number of lots of land, the proceeds from the sale of any one of which may be sufficient to satisfy the judgment. We have frequently said that we are here to consider only such errors as are shown to be prejudicial. The matter complained of is not of that character.

Judgment affirmed.

We concur: STURTEVANT, J.; BURROUGHS, Justice pro tem.

104 Cal. App. 647

MATTESON v. BOARD OF EDUCATION OF CITY OF LOS ANGELES.

Civ. 5872.

District Court of Appeal, Second District, Division 2, California.

March 22, 1930.

1. Mandamus ☞163 — Petition — Legal sufficiency — Demurrer.

Respondent in mandamus proceeding has right to test legal sufficiency of petition for writ by demurrer thereto (Code Civ. Proc. §§ 1084-1097, 1109).

Code Civ. Proc. §§ 1084-1097, contains no direct provisions for a demurrer to petition for writ of mandate, but section 1109, however, provides that except as otherwise provided in that portion of the Code relating to writs of review, mandate, and prohibition, the provisions of part 2, which relate to procedure in civil actions generally, are applicable to and constitute the rules of practice in proceedings mentioned in title.

2. Mandamus ☞163 — Demurrer — Allegations — Conformity to statute.

That demurrer alleged facts stated in petition for mandamus did not entitle petitioner to relief, instead using language of statute, was immaterial (Code Civ. Proc. § 430).

3. Pleading ☞189 — Demurrer — Purpose — Legal sufficiency.

Purpose of general demurrer is to raise issue as to legal sufficiency of facts pleaded and for purpose of demurrer deemed true.

4. Appeal and error ☞193(9) — Objections in lower court — Pleading — Legal sufficiency.

Legal sufficiency of facts may be raised at any state of proceedings, even for first time on appeal from judgment.

5. Pleading ☞208 — Demurrer — Specification — Want of facts.

Generally, no particular specification is required in demurrer for want of facts.

6. Limitation of actions ☞180(2) — Pleading — Defect on face — Demurrer.

Bar of limitations may be set up by demurrer, where defect appears on face of petition or complaint.

7. Pleading ☞218(1) — Demurrer — Argument — Right to open and close.

Demurring party always has right to open and close argument on demurrer.

8. Constitutional law ☞310 — Due process — Judgment on pleadings — Demurrer.

Denial of right to present and argue petition on motion for judgment on pleadings consisting of petition and demurrer thereto was not denial of due process (Const. U. S. Amend. 14).

9. Schools and school districts ☞131 — Teachers — Life diploma — Employment — Particular school.

Possession of life diploma did not confer right on holder thereof to pick out any school in state and demand employment (Pol. Code, § 1696).

Pol. Code, § 1696, requires a teacher before assuming charge of a school to file his or her certificate with superintendent of schools with the proviso that, when any teacher so employed holds an educational or a life diploma, upon presentation thereof to the superintendent he shall record the name of such holder in a book provided for that purpose in his office, and the holder thereof shall be absolved from provisions of subdivision.

10. Mandamus ☞151(2) — Parties — Board of education — Enrollment as teacher — County superintendent.

Petition for writ of mandate to require board of education to enroll name on list of eligible teachers, failing to make county superintendent party thereto, was defective (Pol. Code, § 1696).

11. Limitation of actions ☞34(1) — Mandamus — Board of education — Employment of teacher — Date of diploma — Discharge.

Petition to require board of education to enroll name on list of eligible teachers filed approximately 8½ years after date of diploma and discharge was barred (Code Civ. Proc. § 338).

Appeal from Superior Court, Los Angeles County; Hartley Shaw, Judge.

Petition for writ of mandate by A. G. Matteson, Sr., against the Board of Education of the City of Los Angeles. From a judgment sustaining a demurrer to the petition, petitioner appeals.

Affirmed.

A. G. Matteson, Sr., in pro. per.

Everett W. Mattoon, Co. Counsel, and Ernest R. Purdum, Deputy Co. Counsel, both of Los Angeles, for respondents.

BURNELL, Justice pro tem.

The appellant, appearing in propria persona throughout these proceedings, filed in the superior court a verified document entitled "Petition for Court Order," which, although obviously prepared without legal assistance, may be here regarded as it was in the court below, as a petition for a writ of mandate. Omitting most of the numerous conclusions of law stated in the petition, it contains the following allegations of fact: Petitioner was employed by the respondent as a secondary grade teacher on September 1, 1912, and continued as such until his discharge "without cause" on June 30, 1919; at all times since the last-mentioned date he has "diligently sought reelection to and employment in" his position as a teacher, secondary grade, "as attested by" his life diploma entitling him to teach in all the "public educational institutions" in the state, but has been at all times refused and denied employment in any of the city schools, although the respondent has admitted and still admits his "particular educational, technical and practical competency"; the respondent has refused to "restore and record" petitioner's name on the list of eligible teachers of the city of Los Angeles. The relief prayed for is an order directing the respondent to enroll petitioner's name upon the list of eligible teachers, secondary grade, "or appear and show cause" for its refusal to do so. To this petition the respondent interposed a demurrer alleging that the facts stated in the petition did not entitle the petitioner to any relief and that it appeared on the face of the petition that the action was barred by the provisions of section 338, Code of Civil Procedure. The demurrer having been sustained without leave to amend, the judgment was entered from which this appeal is taken.

The grounds upon which appellant urges a reversal of the judgment (and asks that we order the writ to issue) are the following, to wit:

1. That our laws do not permit the interposition of a demurrer to a petition for a writ of mandate, hence that the so-called demurrer should have been treated merely as an unverified answer to a verified petition, thus entitling petitioner to a judgment on the pleadings;

2. That the form of the demurrer, regarded as such, was insufficient;

3. That the statute of limitations may not be set up by demurrer;

4. That the petitioner was by law entitled to the opening and closing arguments upon the hearing of the demurrer, and that the court erred in permitting the county counsel, appearing for the respondent, to usurp that right;

5. That a teacher's "life diploma" empowers its holder to compel any school district he may select to employ him;

6. That petitioner's "federal rights" have been denied.

[1] As to the first point, it is true that the chapter of the Code of Civil Procedure dealing with the writ of mandate (sections 1084-1097) contains no direct provision for a demurrer to the petition, the only pleading on the part of the respondent specifically mentioned being an answer under oath, but it is likewise true that section 1109 of the same Code provides that except as otherwise provided in that portion of the Code relating to writs of review, mandate, and prohibition, the provisions of part 2, which relate to the procedure in civil actions generally, "are applicable to and constitute the rules of practice in the proceedings mentioned in this title." The right of the respondent in a mandamus proceeding to test the legal sufficiency of the petition for a writ by demurrer thereto has always been recognized by the courts of this state. 16 Cal. Jur. 866; Barber v. Mulford, 117 Cal. 356, 49 P. 206; Metropolitan Life Insurance Co. v. Rolph, 184 Cal. 557, 564, 194 P. 1005; Los Angeles City School Dist. v. Odell, 200 Cal. 637, 254 P. 570; Bailey v. Security Trust Co., 34 Cal. App. 348, 167 P. 409; Pavilion Ice Rink v. Bryant, 58 Cal. App. 584, 209 P. 76; Stewart v. Eaves, 84 Cal. App. 312, 257 P. 917.

In support of his contention as to the form of the demurrer, appellant argues:

"That if same was incubated to perform the office of general demurrer, it is believed that the poetic euphony of same is only exceeded by the juridical nullity thereof, as the unity of expression of the statute and *not* inartificial, revolutionary poetic license, determines with *equal* simplicity and exactitude, the correct form of the demurrer, and as waivable matter, the due form of the statute should not have been rejected to petitioners embarrassment and prejudice for any vague substitute, despite its *el canto* cadence or poetic lure.

"It is as hazardous to encourage the peculiar and too prevalent impulse and urge of ultra Americans to evade or violate the settled forms of law by the native pale, pink pallor persuasion, as it is dangerous to temporize with the red, rancorous and revolutionary foreign variety, and it not only behooves all

those posited in the forums of leadership to meticulously observe and follow the spirit of our laws, but to practice the same without abating one jot from the letter thereof, lest the somewhat delicate balance favoring law and order be reversed and liberate the pandemonium of Milton to the encouragement of a rampant, rapacious, bomb throwing, revolutionary Moscow."

We find nothing in the record, nor is any authority cited to us, from which we may conclude that the dire results so graphically depicted by appellant will, as a necessary consequence, follow the county counsel's departure from the exact language of the code section. As for the foreign entanglements to which he alludes we can only say that the whole subject of the relations between this country and other nations is beyond our jurisdiction and rests entirely with the President and Congress. U. S. Const., art. 1, §§ 8, 10; art. 2, § 2.

[2-5] The fact that the demurrer alleges "that the facts stated in said petition do not entitle the petitioner to the relief demanded or to any relief," instead of averring, in the language of section 430 of the Code of Civil Procedure, "that the complaint does not state facts sufficient to constitute a cause of action," is immaterial. The two statements mean exactly the same thing. The purpose of a general demurrer is to raise the issue as to the legal sufficiency of the facts pleaded, and for the purpose of the demurrer deemed true, to warrant the granting of relief to the pleader. That issue, which may be raised at any state of the proceedings, even for the first time on appeal from the judgment (2 Cal. Jur. 257 and cases there cited) was squarely presented by the demurrer herein. Nor is there merit in the theory advanced by appellant that it was incumbent upon the respondent to specify the particulars in which the petition was insufficient. It is the general rule "that no particular specification is required in a demurrer for want of facts." *California Safe Deposit, etc., Co. v. Sierra, etc., Co.*, 158 Cal. 690, 112 P. 274, 278, Ann. Cas. 1912A, 729; *Kent v. Snyder*, 80 Cal. 666.

[6] That the bar of the statute of limitations may be set up by demurrer where the defect appears on the face of the petition or complaint is too well settled to warrant discussion. *California Safe Deposit, etc., Co. v. Sierra, etc., Co.*, supra; *Smith v. Richmond*, 19 Cal. 476; *Sutherland's Code Pleading*, § 323; 21 Cal. Jur. 107; 16 Cal. Jur. 606.

[7] Upon the point that most grievous error was committed by the court in permitting the county counsel to open the argument when the demurrer came on for hearing appellant's brief contains the following pertinent and persuasive argument:

"It is with dread and almost dismay that petitioner now approaches the trial; of which he is forced to relate events so strange and

ultra juris as never yet heard of a *Coram judice* proceeding.

"On 31 May 27, at the trial hereof, defendants' counsel claimed and usurped petitioners strict legal *right to open* and petitioner was forced to suffer this tyrannous pernicious, rapacious desecration and total but ephemeral subversion of the sacred dictums of the precepts of jurisprudence, namely '*Juris Praecepta Sunt Haec, honeste vivere, alturam non lacerare, suum cique tribure*, the greatest of which is that the law must hear before it decides, and it must hear the affirmative first.

"This precept of natural equity and justice was maintained through the absolutism of Feudal England by the great oracle of law, Sir Edward Coke, whom, upon being summoned before King Charles to answer why he, Coke, and his brother justices of Kings Bench opposed the prerogative of the King to decide causes between his subjects without hearing both, either or the affirmative sides first, answered the King, saying: Thus wrote Bracton, '*Rex non debet esse sub homine, sed sub Deo et lege*' (1 Campbell 393).

"Upon this oracular authority it is shown that despotic Kings of feudal times were prevented by the law of the land from accroaching the *right to open and be heard*, therefore petitioner challenges adverse counsel for the county of Los Angeles to justify himself in arrogating this interdicted power to himself.

"To fully stigmatize such usurpation would possibly exhaust the volcanic, viriolic invective of the peerless Sir Edward Coke himself, and as it is difficult to discuss this revolutionary act with moderation it is accounted for upon the ground that '*Man, proud man, dressed in a little brief authority, cuts such capers before high heaven as make the angels weep*' Shake. * * * '*Measure for Measure*.'

"Although county counsel procured thus, a great advantage, to the dire prejudice of Petitioner's legal rights, Petitioner contents himself with the knowledge that in contemplation of law such procedure is in contravention thereof and is therefore open and now is subjected to review, without rancor or malice as Petitioner has ever practised and taught moderation and has met all past, and will meet all prospective assaults on law and order and the abuse thereof with all expedient and expeditious consideration, with patient but adamant opposition, as the heirophants [sic] of history agree that a multitude of ignorant men will ruin the courts, '*Multitudo imperitorum perdit ciriam*' (Com. v. Roby, 12 Pick. 496) and that thereafter juridical anarchy may reign until the foundation of society dissolve.

"Indifference, ignorance or disrespect for the law of the land and the due process thereof has commanded just rebuke, which has heretofore been pronounced by this High

Court respecting the *right to open* 'The plaintiff, always in contemplation of law, has the affirmative, and has the right to open and conclude' (Benham v. Rowe, 2 Cal. 387, 56 Am. Dec. 342) applying 'Audi alteram partem' (Windsor v. McVeigh, 93 U. S. 274, 23 L. Ed. 914)."

While we have the greatest respect for the authorities above quoted, we feel that appellant must continue, unaided by this court, to practice those principles of Christian fortitude and forbearance his addiction to which is admitted by his brief, since the demurring party under our practice always has the right to open and close the argument on the demurrer.

[8] It is appellant's theory that his "federal rights," as well as his rights under the Constitution of this state, were violated by the denial of "his lawful right to present and argue his petition and motion for judgment on the pleadings as such denial rendered the proceeding *coram non iudice*, without the pale of law, in excess of the court's jurisdiction and violative of due process of law and the state and United States Constitution. (Const. of Cal., art. 4, §§ 2, 11, 21, 23; Const. of U. S., 14th amendment.)" Examining those provisions of our own Constitution which appellant cites as having been violated by the action of the court, we find that section 2 of article 4 provides for biennial and bifurcated sections of the Legislature, section 11 of the same article relates to legislative immunity from arrest, section 21 to ineligibility for public office by reason of conviction of certain crimes, and section 23 to the salaries of members of the Legislature. We are unable to discover in what manner any right of appellant under any of these provisions has been affected. Nor do we find that there has been any denial of due process of law to appellant or any abridgment of his privileges or immunities by reason of any of the matters appearing in the record. No such procedure as a motion for judgment on the pleadings prior to the filing of an answer is known to our law. Appellant, in preparing and presenting such a motion, very evidently labored under the mistaken theory that the demurrer should be regarded as an unverified answer which failed to put in issue the material averments of his petition.

[9] Consideration of the sufficiency of the facts set forth in the petition to warrant the relief sought involves a discussion of appellant's contention as to the effect of his possession of a life diploma. Section 1696 of the Political Code, on which appellant relies as requiring the recordation of such diplomas, has to do with the duties of teachers. The first subdivision of the section requires a teacher, "before assuming charge of a school" to "file his or her certificate with the superintendent of schools" with the proviso that "when any teacher so employed" holds "an

educational or a life diploma of California, upon presentation thereof to the superintendent he shall record the name of said holder in a book provided for that purpose in his office, and the holder of said diploma shall thereupon be absolved from the provisions of this subdivision." (Italics ours.) It is obvious that the provision from which the holder of such a diploma may be absolved is that requiring him to file his certificate with the superintendent before assuming charge of a school in which he has actually been employed as a teacher. Most certainly it cannot be construed as conferring the right on the holder of such a diploma to pick out any school in the state, regardless of whether or not there is a vacancy therein and demand that he be there employed. "The power to employ teachers is given to city boards of education by section 1617 Pol. Code, which, as was said in *Kennedy v. Board of Education*, 82 Cal. 483, 22 P. 1042, 'confers upon boards of education unlimited power to employ teachers.'" *Bradley v. Board of Education*, 1 Cal. App. 212, 81 P. 1036, 1037. "It has been uniformly held in this state that in the absence of a constitutional or statutory limitation, boards of education may exercise an unlimited discretion in the employment and dismissal of teachers, as well as in their transfer and assignment." *Loehr v. Board of Education*, 12 Cal. App. 671, 108 P. 325, 327. "Here the right of removal stands alone; and it has been uniformly held in this state that boards of education may exercise an unlimited discretion in the employment and dismissal of teachers under like employment with appellant." *Catania v. Board of Education*, 37 Cal. App. 593, at page 597, 174 P. 332, 334. While these cases are no longer authorities on the power to *discharge*, on account of the amendments passed to section 1609 introducing teachers' tenure, there have been no statutory amendments imposing any restrictions upon the unlimited discretion vested in the board to *employ* what ever qualified person it may select. In another case somewhat analogous in principle it is said: "This is a proceeding in mandate to compel the board of education of the city of San Bernardino school district to prefer the plaintiff for appointment and employment as a janitor of the high school building of said city, and to retain and continue him as such, under an act of the legislature, approved March 31, 1891; he being an honorably discharged ex-Union soldier of the War of the Rebellion. * * * The petitioner was employed for the period of one year as janitor, and a few days prior to the expiration of the term was discharged and another party appointed to the place. After the expiration of the year, he began this proceeding. A demurrer was sustained to the petition, and this appeal was taken from the judgment entered thereon. * * * If a man filling the demands set forth in the act of the legislature has the preference, then this petitioner does

not show but that there are hundreds of men possessing the qualifications that he possesses who are ready and willing and anxious to be employed as janitor by this board of education. If there be other ex-Union soldiers equally qualified with petitioner, he has no absolute right to the place, and the board cannot be compelled by mandate to appoint him. In other words, he would only be entitled to the writ upon a showing made that he was the only man coming within the provisions of the act who was desirous of the appointment. The petition before us entirely fails to make such a showing." *Allison v. Board of Education*, 125 Cal. 72, 57 P. 673.

[10] Another fatal defect in the petition is that the county superintendent of Los Angeles county was not made a party. The duty of recording the name of the holder of a life diploma, where, under section 1696 of the Political Code, such holder is entitled to such recordation, devolves by the terms of that section upon the superintendent, not upon the city board of education, which is the only party named as respondent in the petition herein.

[11] It further appears from the life diploma, a copy of which is attached to the petition as an exhibit, that the same was issued to appellant October 1, 1919. His petition alleges that "defendants' mistaken, wrongful and unlawful refusal to recognize and give due respect and effect to the authority of" his life diploma has continued ever since his discharge in 1919. His petition in this proceeding was filed in May, 1927, approximately eight and a half years after the dates of his diploma and of his discharge. His right of action, if he ever had any, was barred by limitation. *Harby v. Board of Education*, 2 Cal. App. 418, 83 P. 1081; *Kramer v. Board of Police Commissioners*, 39 Cal. App. 396, 179 P. 216; *Barber v. Mulford*, 117 Cal. 356, 49 P. 206.

The petition failed to state facts sufficient to warrant any relief, and the demurrer was rightly sustained.

Judgment affirmed.

We concur: WORKS, P. J.; CRAIG, J.

104 Cal. App. 551

**NASAROFF v. NATIONAL UNION FIRE
INS. CO. OF PITTSBURGH, PA.**
Civ. 3683.

District Court of Appeal, Third District,
California.

March 18, 1930.

I. Trusts — §86 — Resulting trusts — Transfer to third person — Consideration — Presumption.

Trust is presumed to have resulted in favor of one paying full consideration for transfer of property to another (Civ. Code § 853).

2. Insurance — §282(3) — Unconditional and sole ownership — Consideration.

Interest of one paying full consideration for property transferred to another was that of unconditional and sole ownership within fire policy (Civ. Code § 762).

The evidence disclosed that the insured had paid the full consideration for property and that title was acquired by the deed in which insured and wife were named as grantees, though person named as his wife was not in fact his wife during any of the time material, but was his housekeeper during such period.

3. Trusts — §88 — Resulting trust — Proof — Parol evidence.

Facts which establish resulting trust may be proved by parol evidence.

Appeal from Superior Court, Yolo County;
W. A. Anderson, Judge.

Action by John Nasaroff against the National Union Fire Ins. Co. of Pittsburgh, Pa. Judgment for plaintiff, and defendant appeals.

Affirmed.

James Sykes, of San Francisco, for appellant.

M. S. Wahrhaftig, of Sacramento, for respondent.

FINCH, P. J.

The plaintiff brought this action to recover on a fire insurance policy covering buildings and furniture and fixtures, which were destroyed by fire. Judgment was entered in favor of the plaintiff, and the defendant has appealed.

The answer alleges that the plaintiff, with intent to defraud the defendant, caused the property to be burned. The jury found against this defense, and the appellant concedes that such finding is conclusive on appeal. The policy provides:

"Unless otherwise provided by agreement endorsed hereon or added hereto, this entire policy shall be void, * * * if the interest of the insured be other than unconditional and sole ownership, or if the subject of insurance be a building on ground not owned by the insured in fee simple."

Plaintiff's title was acquired by a deed in which plaintiff, John Nasaroff, and "Natalie Nasaroff, his wife," are named as grantees. It appears from the evidence that the true name of the woman described in the deed as the plaintiff's wife is Natalie Oshen, and that she was not his wife during any of the time which is material here, but that during all of that time she was the plaintiff's housekeeper, both of them having been married and both having children, all of which children lived in the plaintiff's home and were cared for by

Mrs. Oshen. On cross-examination the plaintiff was asked: "And you have lived with this Natalie Nasaroff as your wife?" He answered: "Not as his wife." The form of the answer is due to the fact that the plaintiff testified through an inexperienced interpreter. In the name of "Natalie Nasaroff," Mrs. Oshen joined the plaintiff in the execution of a trust deed conveying the property in question as security for the payment of money borrowed by the plaintiff, she, being unable to write, signing by her mark. The plaintiff testified that at the time he purchased the property he intended to marry Mrs. Oshen, that he paid the whole of the purchase price thereof and that "nobody else * * * ever had any interest" therein. Mrs. Oshen testified that she paid nothing for the property, that she "never accepted it from anybody as property belonging to" her, that the plaintiff never talked to her about naming her in the deed, that she never knew her name appeared therein, that she had no interest in the property, and that she and the plaintiff owned no property together.

Appellant seems to contend that the only inference from the evidence is that the plaintiff and Mrs. Oshen lived together in the relation of husband and wife without the formality of a marriage, but the plaintiff's statement that she did not live with him "as his wife," while equivocal, is sufficient to warrant a finding by the jury against such contention. If it was material to the defendant's case to show that the plaintiff and Mrs. Oshen were living together in a meretricious relation, more certain proof thereof should have been made.

[1, 2] The plaintiff having paid the full consideration for the transfer of the property to Mrs. Oshen, a trust is presumed to have resulted in his favor, under which he was the equitable owner of the property of which she held the naked legal title. Civ. Code, § 853. His interest in the insured property, therefore, in accordance with such presumption, and as proved by the testimony of himself and Mrs. Oshen, was that of "unconditional and sole ownership" within the meaning of that term as used in the policy. "An insured's ownership is sole when no one else has any interest in the property as owner, and is unconditional when the quality of the estate is not limited or affected by any condition." 14 R. C. L. 1053. The building was on ground owned by the plaintiff in "fee simple." "Every estate of inheritance is a fee, and every such estate, when not defeasible or conditional, is a fee-simple or an absolute fee." Civ. Code, § 762. "An equitable title in the insured is a sufficient compliance with the condition in question." *McCullough v. Home Ins. Co.*, 155 Cal. 659, 662, 102 P. 814, 815, 18 Ann. Cas. 862; *Lee v. United States Fire Ins. Co.*, 55 Cal. App. 391, 394, 203 P. 774; *Ramirez v. United Fire-*

men's Ins. Co., 46 Cal. App. 451, 453, 189 P. 309.

[3] Appellant contends that it was error to admit the foregoing evidence of Mrs. Oshen, but the facts which establish a resulting trust may be proved by parol evidence. 25 Cal. Jur. 179.

The judgment is affirmed.

We concur: PLUMMER, J.; ROLFE L. THOMPSON, J.

104 Cal. App. 544
ROCKEFELLER v. SMITH.
Civ. 6233.

District Court of Appeal, Second District,
Division 1, California.

March 18, 1930.

1. Escrows ⇨9 — Conditions — Time to perform — Reasonable time.

Escrow relating to oil lease extension agreement, open from April 18, 1924, until May 25, 1925, *held* open reasonable time to deposit deeds, where time was not limited by escrow.

Contract provided for extension of lease for oil and gas lands in consideration of transfer of certain land which was incumbered at the time of making agreement, and escrow was to give time to remove incumbrances.

2. Escrow ⇨8(1)—Abandonment — Delivery — Effect.

Where escrow is abandoned, delivery of instrument in escrow becomes ineffectual for any purpose (Civ. Code, §§ 1054, 1057, 1059).

3. Mines and minerals ⇨75 — Oil and gas lease — Extension agreement — Nondelivery.

Where extension of oil and gas lease, though signed, was never delivered, extension agreement was ineffectual (Code Civ. Proc. § 1933; Civ. Code, §§ 1053, 1626, 1627).

4. Appeal and error ⇨1170(7) — Reversal — Technical error — Evidence — Exclusion — Extension of lease.

Excluding evidence of signing of oil lease extension agreement, if error, *held* harmless, in action for rent, where agreement had never been delivered (Const. art. 6, § 4½).

5. Mines and minerals ⇨73 — Oil and gas lease — Estoppel — Knowledge of facts.

Lessor *held* not estopped to deny execution of oil lease extension agreement, where lessee knew facts.

Lessee knew extension agreement respecting oil and gas lease had been put in escrow and had not fulfilled escrow conditions to be performed by him. Lessor failed during this time to demand monthly rental due during pendency of escrow.

Appeal from Superior Court, Los Angeles County; William C. Doran, Judge.

Action by Eunice E. Rockefeller against O. Bernard Smith. From a judgment for plaintiff, defendant appeals.

Affirmed.

John Schlegel, Homer N. Boardman, and Hunsaker, Britt & Cosgrove, all of Los Angeles, for appellants.

Irvin C. Taplin, Ivan Miller, and Harry M. Hunt, all of Los Angeles, for respondent.

CRAIG, Justice pro tem.

This is an appeal by defendant from a judgment of the superior court of Los Angeles county against him in the sum of \$14,000 and costs.

On or about June 2, 1923, plaintiff, as lessor, and defendant, as lessee, entered into a written oil and gas lease of certain real property for a term of twenty years (unless said period be terminated earlier under the provisions thereof). The lessee agreed "to pay the Lessor a monthly rental of \$800.00 per month from June 25, 1923, payable on the 25th day of each and every calendar month, the first monthly payment to be made on June 25, 1923, and said rental to continue until the said lessee shall have actually commenced drilling operations on the first well provided for herein, at which time the said monthly rental shall cease, the said rental shall also cease in the event the lease be terminated as herein provided. * * *" The lease then provided, in substance, that, if lessee did not commence drilling operations within twelve months thereafter, the lessor could declare the lease terminated on thirty days' notice; also, that "lessee may at any time before the discovery of oil on the demised premises, quitclaim the said property, or any part thereof, to lessor, * * * and thereupon all rights and obligations of the parties hereto, one to the other, shall thereupon cease and determine as to the premises quitclaimed."

Defendant paid nine monthly installments of rent; i. e., to and including the installment which became due on February 25, 1924. No drilling operations were ever commenced.

Plaintiff commenced this action on July 30, 1925, praying for \$12,000. On September 10, 1925, defendant quitclaimed the premises to plaintiff. On November 29, 1925, plaintiff filed an amended and supplemental complaint praying for \$14,400 for unpaid rental from March 25, 1924 (inclusive), to and including the installment of August 25, 1925. The judg-

ment was granted as prayed for by plaintiff, except that the installment of August 25, 1925, was prorated to September 10, 1925.

Defendant's principal defense was, in substance, that, on or about April 11, 1924, defendant and plaintiff entered into a written agreement wherein defendant agreed to convey to plaintiff certain real property at a valuation of \$6,600 "in exchange for an extension agreement extending the time for drilling the first well * * * for an additional period of twelve months from June 2, 1924. No further payments of rental provided for in said lease to be made to the lessor other than those payments made at this date. Good and valid extension agreement to be entered into between the parties of said lease." Plaintiff denied ever signing such agreement.

Appellant in his opening brief presents three points: (1) The trial court committed prejudicial error in refusing to allow appellant to prove that respondent signed the alleged agreement of April 11, 1924; (2) the trial court committed prejudicial error in refusing to allow appellant to prove, by secondary evidence, the alleged agreement of April 11, 1924; and (3), even though respondent did not sign the purported agreement of April 11, 1924, she is estopped by her actions to deny that she did.

Points 1 and 2 may be considered together. For the purpose of this portion of the present discussion we will take the evidence which appellant attempted to offer, together with the evidence received, and will disregard the findings of the court adverse to appellant, thereby placing the whole matter in the most favorable light to appellant.

The uncontradicted facts show that on or about April 11, 1924, plaintiff and defendant had a conversation in reference to the lease. That at about that time Fred D. Turner, business manager of defendant, prepared, in triplicate, the said alleged agreement of April 11, 1924, hereinafter referred to as the extension agreement. One copy, unsigned by any one, was retained by said Turner in the office files of defendant. Beyond question one copy was signed by appellant and given to respondent, but this copy was produced in court and was not signed by respondent. The third copy was not produced. Let us therefore assume that respondent did sign it and that its contents were identical with the other copies as defendant claims that he attempted to show at the trial.

"The execution of an instrument is the subscribing and delivering it, with or without affixing a seal." Code Civ. Proc. § 1933. The term "execution" as applied to instruments in writing is considered as importing both a signing and a delivery. *Ivey v. Kern County Land Co.*, 115 Cal. 196, 46 P. 926.

"A contract in writing takes effect upon its delivery to the party in whose favor it is

made, or to his agent." Civ. Code, § 1626. "Delivery of the instrument is the final act essential to its consummation as an obligation." *Loud v. Collins*, 12 Cal. App. 786, 789, 108 P. 880, 881; *Gas App. S. Co. v. Bastian Mfg. Co.*, 87 Cal. App. 301, 305, 262 P. 452.

"A transfer in writing is called a grant, or conveyance, or bill of sale. The term 'grant,' in this and the next two articles, includes all these instruments, unless it is specially applied to real property." Civ. Code, § 1053. The term "grant," as used in the definition of an escrow given by the Civil Code, is comprehensive enough to include instruments other than deeds. 10 Cal. Jur. 577. "The provisions of the chapter on transfers in general, concerning the delivery of grants, absolute and conditional, apply to all written contracts." Civ. Code, § 1627.

"A grant takes effect, so as to vest the interest intended to be transferred, only upon its delivery by the grantor." Civ. Code, § 1054.

"A grant may be deposited by the grantor with a third person, to be delivered on performance of a condition, and, on delivery by the depository, it will take effect. While in the possession of the third person, and subject to condition, it is called an escrow." Civ. Code, § 1057.

"Though a grant be not actually delivered into the possession of the grantee, it is yet to be deemed constructively delivered in the following cases:

"1. Where the instrument is, by the agreement of the parties at the time of execution, understood to be delivered, and under such circumstances that the grantee is entitled to immediate delivery; or,

"2. Where it is delivered to a stranger for the benefit of the grantee, and his assent is shown, or may be presumed." Civ. Code, § 1059.

Throughout the whole case there is no contention on the part of appellant that there was ever a delivery of the extension agreement to appellant or that it was ever placed beyond the control of respondent (except possibly while in escrow).

Defendant O. Bernard Smith testified in part as follows: "A Mrs. Rockefeller came in and she brought this document with her. She had taken it away when I made it and she said, 'I will accept your proposition.' I told her that the lots in question here were encumbered and it would have to be put in escrow so I would have time to clear these lots. * * * A. I said I would put it in the Citizens Trust & Savings Bank, and she said, 'That is all right.' * * *

The witness Fred D. Turner, produced on behalf of defendant, testified in part that he was business manager of Mr. Smith and took care of all details of his transactions, that he

prepared the extension document in triplicate; "that one was filed (in Mr. Smith's office), one was placed in escrow at the Citizens Trust & Savings Bank, and one was handed to Mrs. Rockefeller"; that Mr. Smith told Mrs. Rockefeller "that the lots could not be delivered at that time, otherwise he would turn over the deed to the lots and take the extension at the same time"; that Mrs. Rockefeller said "that would be satisfactory to put the extension agreement in escrow up against the deed of Mr. Smith"; that he personally accompanied Mrs. Rockefeller to the bank; and "Q. How did you happen to go to that bank? A. It was explained to Mrs. Rockefeller that this property that was coming to her was held in trust there and it would be the simplest place to handle a proposition of this kind. Q. Why was it necessary or thought necessary for you to accompany her to the bank? A. She had the extension agreement, that was her property. Q. Why was it necessary for you to go there with her? A. I went there to the bank to show her who to go to. This trust property was handled by one party. It would simplify the matter if he had all the papers, and he was to turn over the deed to her and to turn the extension agreement over to him (Smith). I took her there to show her where she should go."

Apparently no escrow instruction was ever given by defendant. Plaintiff's escrow instructions, under date of April 18, 1924, are as follows: "I herewith hand you an extension agreement which you are authorized to deliver to O. Bernard Smith, when you hold for me deed covering lots 31, 32 and 33, block 5, tract 6220, and certificate of title covering said property, showing title vested in Eunice E. Rockefeller, a married woman, free and clear of all encumbrances, except second half of 1923-24 taxes and subsequent. [Signed] Eunice E. Rockefeller."

[1] The escrow was opened about April 18, 1924. About May 25, 1925, the papers theretofore deposited by plaintiff were withdrawn by her. The deeds were never deposited by appellant. If the time is not limited by the terms of the escrow, appellant was bound to perform the conditions of the escrow within a reasonable length of time. Civ. Code, § 1657. We think that in this matter respondent allowed appellant a reasonable time between the opening of the escrow and the withdrawal from escrow for compliance by him with the escrow requirements.

[2] Where the escrow is abandoned, delivery of the instrument in escrow becomes ineffectual for any purpose. *Whitney v. Sherman*, 178 Cal. 435, 173 P. 931.

[3, 4] No delivery having been effected or wrongfully withheld, the extension agreement is ineffectual. It is therefore our conclusion that errors, if any there be, of the trial court in excluding evidence of the signing of the

extension agreement by respondent and of the actual contents of such agreement, did not "result in a miscarriage of justice" within the meaning of that phrase under section 4½ of article 6 of the Constitution.

Appellant states that the case of *Bauer v. State*, 144 Cal. 740, 78 P. 280, is decisive of the question presented by point 1. We have studied that case and find that it is not in point, for the reason that the testimony therein offered and rejected, in addition to testimony of signing, included testimony that as so signed the documents had been delivered to the witness as agent for the assignor of the plaintiff in that case.

[5] As to appellant's third point, to wit, estoppel, the answer thereto is against appellant's contention. In order for an estoppel to exist, it is essential that the party claiming the estoppel shall have been ignorant of the true state of facts. *Stoner v. Security Trust Co.*, 47 Cal. App. 216, 190 P. 500; *Barstow v. Savage Mining Co.*, 64 Cal. 388, 1 P. 349, 49 Am. Rep. 705. There is no claim or suggestion of a claim on the part of appellant that he was ignorant of any of the true facts in the matter or that respondent misled him as regards the facts in any particular. He does claim that he relied upon the extension agreement. This agreement, however, was in escrow to his full knowledge. If he relied thereon it was in ignorance of the law and not of the facts. He further claims that he was misled to his prejudice by the failure of respondent to demand the monthly rentals during the pendency of the escrow. We see no merit to this contention. Respondent's failure to demand rentals during the pendency of the escrow to us is but evidence of her good faith and willingness to abide by the agreement then in escrow.

The judgment is affirmed.

We concur: CONREY, P. J.; HOUSER, J.

104 Cal. App. 727

LUKE v. SOUTHERN SURETY CO.
Civ. 6344.

District Court of Appeal, Second District, Division 1, California.
March 28, 1930.

1. Mechanics' liens — 313, 315 — Contractor's bond — Liability.

Surety and building contractor may make any bond acceptable to owner, and surety cannot be held beyond express terms of that bond.

2. Mechanics' liens — 313 — Building bond — Rights of materialmen.

If building bond did not meet requirements of mechanics' lien statute, materialman was entitled to lien upon property irrespective of contract price (Code Civ. Proc. § 1183).

Code Civ. Proc. § 1183, in substance, gives mechanics lien upon property on which they have labored, and contains further provision for giving and filing of bond.

3. Mechanics' liens — 315 — Claim — Recording — Liability on bond.

Mechanic's lien claimant is not required to record claim of lien as prerequisite to suit on contractor's bond.

4. Mechanics' liens — 313 — Building bond — Filing statement — Impossibility of performance.

Requirement in building contractor's bond as to filing verified statement with public board held impossible of performance, where bond covered private work (Code Civ. Proc. § 1187; Public Works Act, § 2).

Building contractor's bond for benefit of materialmen and laborers was executed on form ordinarily used on public works, and contained provision requiring filing of verified statement of claim with public board, as prescribed by Code Civ. Proc. § 1187, and Public Works Act, § 2 (St. 1919, p. 487).

5. Mechanics' liens — 317 — Statute — Application — Suit on contractor's bond.

Statute requiring suit to enforce mechanics' liens to be commenced within ninety days after filing of lien held inapplicable to suit on building contractor's bond (Code Civ. Proc. § 1190).

6. Mechanics' liens — 313 — Contractor's completion bond — Surety's liability.

Subcontractor's claim for materials and labor furnished under building contract held not covered by contractor's completion bond to owner.

Contractor's completion bond provided that no right of action shall accrue under this bond to or for use of any person other than said owner.

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Action by R. J. Luke against the Southern Surety Company. Judgment for defendant, and plaintiff appeals.

Reversed and remanded, with directions.

Charles S. Conner, of Los Angeles, for appellant.

Wilson, Haas & Stevens, of Los Angeles, for respondent.

CRAIG, Justice pro tem.

This is an action by a subcontractor against the surety of a building contractor on a *private* work for the value of certain materials and labor furnished and performed upon the building. The demurrer to the amended complaint was sustained without leave to amend and judgment of dismissal followed. The legal difficulties of the case arise out of the fact that the contractor's bond for the benefit of materialmen and laborers, is on the form of bond ordinarily used by surety companies on *public* works, and contains the following provision: " * * * Provided that any and all claims hereunder shall be filed and proceedings had in connection herewith as required by the provisions of the Act of Legislature of the State of California designated as chapter 303 of the statutes of 1919, approved May 10th, 1919, and any amendments thereof." The act referred to is the Public Works Act of 1919, and requires the filing of a verified statement of the claim with the board of trustees, supervisors, etc., or other board by which such contract was awarded, "at any time prior to the expiration of the period within which claims of lien must be filed for record, as prescribed by the provisions of section one thousand one hundred eighty-seven of the Code of Civil Procedure," and further provides that "at any time within 90 days following the expiration of the period last mentioned, the person, [etc.] filing the same may commence an action against the surety or sureties on the bond." Section 2.

[1, 2] The surety and the contractor had a legal right to make any bond, acceptable to the owner, they saw fit so to do, and the surety cannot be held beyond the express terms of that bond. If the bond as given did not meet the requirements of section 1183 of the Code of Civil Procedure, as that section read on April 7, 1925 (date of bond), the only penalty was that the materialmen, etc., could have liens upon the property of the owner irrespective of contract price.

The demurrer in this case is founded upon three specific objections, to wit: (1) That plaintiff did not file "his claim in the office of the county recorder as required by the provisions of the Act of Legislature as set forth in said bond"; (2) that plaintiff's claim

was filed only with the contractor, and "that no other or further proceedings were had by plaintiff in accordance with the Act of Legislature set forth in the bond"; and (3) "that said complaint was not filed within the time prescribed by section 1190, Code of Civil Procedure."

[3] As to point 1 of the demurrer, we have read the Public Works Act and find no requirement therein for filing or recording any claim or mechanic's lien in the office of the county recorder. The mechanics' lien laws do not require the recording of a claim of lien as a prerequisite to suit on the bond. *Fraters, etc., Co. v. Southwestern, etc., Co.*, 200 Cal. 688, 254 P. 1097.

[4] As to point 2 the requirement of the bond as to filing a verified statement with the board, etc., of a public corporation by which the contract was awarded was impossible of performance, for the reason that this is a private work. Respondent contends that such claim should have been filed with the owner, but we cannot agree with this contention. No act was required as a substitute for the impossible as regards such filing of a verified claim.

[5] As to point 3, section 1190 of the Code of Civil Procedure, requiring suit to be commenced within ninety days after filing of lien, has no application to this case. That section has reference to liens of mechanics, etc., on real property, and not to a suit on a contractor's bond.

[6] Plaintiff has attempted to found his cause of action also upon the contractor's completion bond to owner. This contention cannot be sustained, for the reason that by its own terms said bond is limited only to the owner, to wit: "No right of action shall accrue under this bond to or for the use of any person other than the said * * * (owner)." *Terry v. Southwestern Bldg. Co.*, 43 Cal. App. 366, 185 P. 212.

We conclude, therefore, that the demurrer as filed should have been overruled upon each and all of the three grounds presented therein.

The judgment is reversed, and the case is remanded to the trial court, with direction that the demurrer be overruled.

We concur: CONREY, P. J.; HOUSER, J.

**BLODGETT v. SUPERIOR COURT OF
SANTA BARBARA COUNTY.***

Civ. 7106.

District Court of Appeal, Second District, Division 1, California.

March 20, 1930.

Rehearing Denied April 11, 1930. Hearing Granted by Supreme Court May 15, 1930.

1. Judges ⇨39—Disqualification — Contempt proceedings — Statute.

Statutory provisions concerning right to have trial of action or proceeding transferred from disqualified judge to another judge *held* applicable to contempt proceedings (Code Civ. Proc. § 170, as amended by St. 1929, p. 957).

2. Constitutional law ⇨55 — Procedure — Statute.

Though Legislature may not interfere with courts' inherent power to punish for contempt, Legislature may regulate procedure to be followed in contempt proceedings.

3. Judges ⇨51(4) — Disqualification — Contempt proceedings.

Order finding petitioner guilty of contempt of court *held* void, where he filed answer alleging judge was disqualified, and judge, ignoring objections, proceeded to determine contempt proceedings (Code Civ. Proc. § 170, as amended by St. 1929, p. 957).

Certiorari to Review an Order of Superior Court, Santa Barbara County; Frank C. Collier, Judge.

D. T. Blodgett was cited to appear before the Superior Court of the County of Santa Barbara to show cause why he should not be punished for contempt of court, was found guilty of contempt, and he files a petition for writ of review.

Order annulled, and proceeding remanded.

D. T. Blodgett, in pro. per.

Schauer, Ryon & Goux, Heaney, Price & Postel, and Atwell Westwick, all of Santa Barbara, for respondent.

CONREY, P. J.

By an order duly issued and served, petitioner Blodgett was cited to appear before respondent court, to show cause why he should not be punished for contempt of court, for having willfully and knowingly filed with the clerk of said court a certain document styled "Points and Authorities," in an action then pending in the court. This order to show cause was made by Hon. Frank C. Collier, at that time acting as a judge of said court. In response to the citation, the said Blodgett, who was plaintiff in said action, filed an answer wherein he alleged that "the Honorable Frank C. Collier is so greatly incensed

against this plaintiff that it would be impossible to have a fair and impartial hearing of the issues of law and fact in the contempt proceedings instituted by the said Frank C. Collier in the above-entitled action on the 16th day of December, 1929; that said feeling against this plaintiff in the above-entitled action was occasioned by the receipt of a letter by the said Frank C. Collier on the 14th day of December, 1929, a copy of which letter is attached hereto marked 'Exhibit A.'" The copy of letter was attached to the answer, which was duly verified. Nevertheless, the court and the said judge acting therein and ignoring the objections stated in said answer proceeded to hear and determine the contempt proceeding, found Blodgett guilty of contempt of court, and imposed upon him a sentence of punishment therefor. Immediately thereafter the petition for writ of review herein was filed. The preceding statement of facts is supported by the record as shown in the return of the writ.

In this proceeding it is not necessary for us to pass upon the merits of the contempt proceeding. The sole question involved herein relates to the authority of Judge Collier, to act in the matter, and the jurisdiction of the Superior Court to act through said judge while the matter was in the condition shown by the record.

Section 170 of the Code of Civil Procedure, as amended in the year 1929 (St. 1929, p. 957), prescribes in much detail the procedure to be followed, where it is claimed that by reason of bias or prejudice of a judge a fair and impartial trial cannot be had before him:

"170. No justice, judge or justice of the peace shall sit or act as such in any action or proceeding: * * *

"5. When it is made to appear probable that, by reason of bias or prejudice of such justice, judge, or justice of the peace a fair and impartial trial cannot be had before him.

"Whenever a judge of a court of record shall have knowledge of any fact or facts which, under the provisions of this section, disqualify him to sit or act as such in any action or proceeding pending before him, it shall be his duty to declare the same in open court and cause a memorandum thereof to be entered in the minutes. * * *

"Whenever a judge of a court of record who shall be disqualified under the provisions of this section, to sit or act as such in any action or proceeding pending before him, neglects or fails to declare his disqualification in the manner hereinbefore provided, any party to such action or proceeding who has appeared therein may present to the court and file with the clerk a written statement objecting to the hearing of such matter or the trial of any issue of fact or law in such action or proceeding before such judge, and setting forth the fact or facts constituting

the ground of the disqualification of such judge."

Immediately following the language above quoted the section contains provisions under which the judge may either consent to trial of the action or proceeding before another judge, or may file his answer to the allegations made by the objecting party. The section then proceeds as follows:

"No judge of a court of record, who shall deny his disqualification, shall hear or pass upon the question of his own disqualification; but in every such case, the question of the judge's disqualification shall be heard and determined by some other judge agreed upon by the parties who shall have appeared in the action or proceeding, or, in the event of their failing to agree, by a judge requested to act by the chairman of the judicial council. * * * Provision is further made for the selection of another judge to hear the action or proceeding when the disqualification of the first judge has been established, or when the judge has consented that the matter be tried before another judge.

[1] We are of the opinion that the provisions of law concerning the right of a party to have the trial of an action or proceeding transferred from a disqualified judge to another judge not so disqualified are applicable to contempt proceedings. The decisions upon which respondent relies in relation to this question were made prior to the enactment of the amended section 170, Code of Civil Procedure, containing the provisions hereinabove stated.

[2] The next contention of respondent is that courts have inherent power to punish for contempt, which power cannot be abridged by statute. This rule is well supported by authority. *Lamberson v. Superior Court*, 151 Cal. 458, 91 P. 100, 11 L. R. A. (N. S.) 619; *In re Shortridge*, 99 Cal. 526, 34 P. 227, 21 L. R. A. 755, 37 Am. St. Rep. 78; *Paddon v. Superior Court*, 65 Cal. App. 34, 223 P. 91. But it is further true, and is so affirmed in all of the above-cited cases, that the Legislature may regulate the procedure to be followed in contempt proceedings.

[3] The provisions of section 170, Code of Civil Procedure, as amended by the statute of 1929, supra, do not in the slightest degree abridge the power of respondent court to punish petitioner for any contempt committed by him. If upon a hearing before a qualified judge, of petitioner's challenge to the qualifications of Judge Collier to hear the contempt proceeding, it shall be determined that Judge Collier is not disqualified, he may then proceed to hear and determine the merits of the contempt proceeding. If, on the other hand, it be determined that Judge Collier is disqualified, the power of the court re-

mains unimpaired to hear and determine said contempt proceeding through the agency of another judge. The order now under review is void, not because the court is without jurisdiction, but because in the present status of the proceeding Judge Collier is without authority to hear and determine the merits thereof.

The order is annulled, and the entire subject-matter of said contempt proceeding is remanded to respondent court for further action in conformity with this decision.

We concur: HOUSER, J.; YORK, J.

104 Cal. App. 586
PEOPLE v. CARRILLO.
Cr. 22.

District Court of Appeal, Fourth District, California.

March 19, 1930.

1. Criminal law § 823(9) — Instructions — Presumption of innocence — Cure of error.

Instruction that presumption of innocence rule is not intended to aid guilty to escape held not prejudicial, considered with other instructions (Pen. Code, § 1096).

The entire instruction, of which the language complained of was only a part, was to effect that rule which clothes every person accused of crime with presumption of innocence and imposes upon state burden of establishing his guilt beyond reasonable doubt is not intended to aid anyone to escape who is in fact guilty of crime, but it is a humane provision of law, intended, so far as human agency can, to guard against danger of any innocent person being unjustly punished. The court also gave an instruction charging in accordance with Pen. Code, § 1096, and a number of other instructions on this subject.

2. Homicide § 309(1) — Instruction — Provocation — Manslaughter.

Instruction regarding circumstances sufficient to reduce offense of murder to manslaughter, and as to what is adequate provocation, held to properly state law.

One of the instructions was to effect that when mortal blow, though unlawful, is struck in heat of passion, excited by sudden quarrel, and of sufficient violence to amount to adequate provocation, law will disregard actual intent and will reduce offense to manslaughter, and the other instruction was to effect that, if intent exists and killing is unlawful, it will be

murder even though done upon sudden quarrel or heat of passion, unless there was adequate provocation, and that neither provocation by words only, or insulting actions, or gestures, without an assault upon the person, nor any trespass, are of themselves sufficient to reduce offense of intentional homicide with deadly weapon from murder to manslaughter.

3. Criminal law Ⓒ1144(14) — **Instructions — Repeating — Presumption on appeal.**

Appellate court must presume court had good reason for repeating instruction, absent showing to contrary.

4. Criminal law Ⓒ823(17) — **Instructions — Repeating — Error cured.**

Repeating instructions regarding what provocation was not sufficient to reduce offense from murder to manslaughter, if error, *held* cured by other instructions.

The court instructed the jury that the fact that a proposition of law was repeated in instructions did not make it any more important than any other proposition, and that jury were to disregard any expression or inference therefrom that might seem to indicate an opinion about facts on part of court, and that the question of guilt or innocence of defendant was for jury alone.

5. Criminal law Ⓒ763, 764(10) — **Instruction — Intention — Dangerous weapon — Suggesting facts.**

Instruction presumption is that one assaulting with dangerous weapon intended death, following paragraph that in determining intention jury should consider means used *held* not to make suggestion regarding facts (Pen. Code, § 21).

The entire instruction, of which language complained of was part, was to effect that in determining intention of defendant, it was important to consider means used to accomplish killing, and that a person must be presumed to intend to do that which he voluntarily does and must also be presumed to intend all natural, probable, and usual consequences of his own acts, and that, therefore, when one person assails another violently with dangerous weapon, likely to kill, and which does in fact destroy life, natural presumption is that such assailant intended death.

6. Criminal law Ⓒ863(1) — **Instructions — Self-defense — Rereading — Court's reluctance.**

In murder prosecution, court's reluctance to reread instructions regarding self-defense at jury's request *held* not prejudicial.

Appeal from Superior Court, San Diego County; S. M. Marsh, Judge.

Frank Carrillo was convicted of murder in the second degree, and he appeals.

Affirmed.

Edgar B. Hervey, of San Diego, for appellant.

U. S. Webb, Atty. Gen., and James S. Howie, Deputy Atty. Gen., Stephen Connell, Dist. Atty., and Ernest N. Clark, Deputy Dist. Atty., all of San Diego, for the People.

BARNARD, J.

The defendant was charged with the murder of one Pedro M. Badillo, and was convicted of murder in the second degree. This appeal is from the judgment upon the verdict, and from an order of the court denying a motion for a new trial.

The evidence shows that the Carrillo and Badillo families lived in adjoining houses at Palm City, in San Diego county; that certain differences had arisen between the wife of defendant and the wife and daughter of the deceased; that Mrs. Carrillo had complained to her husband concerning the manner in which she was treated by the Badillo family; and that the defendant had on several occasions talked with the deceased in reference to the situation.

The defendant testified that on the morning of the day of the shooting he went to a nearby store to get some provisions and met Badillo; that they had some talk about the difficulty between the two families; that as they were parting Badillo showed defendant a gun and threatened to break the gun over his head; that when defendant returned to his home he saw Badillo lying on the front porch of his own house; that defendant went upstairs and got his gun; that he went out on the front porch of his house, and then could see Badillo reclining on his own porch, with his wife and daughter sitting near him; that from his front yard he spoke to Badillo in regard to this dispute; that Badillo asked him to come over to his house, but he replied he had no business in his house; that he walked through the front gate and over to a telephone pole that was approximately on a line between the two places; that Badillo entered his house and came out a few minutes later with a gun stuck in his trousers; that Badillo walked out to where defendant was standing; that after a little discussion Badillo said: "What my daughter say is the truth." The defendant replied "anybody says so is a liar" and that after a little more discussion, both drew their guns and began to fire. Mrs. Jones, a disinterested witness, testified that she saw the defendant draw a pistol and fire immediately, and that he fired before Badillo

did; that the deceased backed away and went clear across his lot on the adjoining lot, and that the defendant followed the deceased and continued shooting. A number of shots were fired by both parties during the time Badillo was retreating, and the testimony of the autopsy surgeon indicates that he was instantly killed by the last shot.

The defense contended that the deceased was the first to draw his weapon and fire, and that the defendant fired only in self-defense. While the jury has, by its verdict, found to the contrary, it is argued that the evidence upon which they so found is so unsatisfactory and so far from convincing that the issue might well have been determined the other way, and therefore, that even the slightest expression from the court, or the slightest attitude manifested by the court toward the theory of the defense, became so important, under the circumstances, as to constitute reversible error. The appellant does not attack the sufficiency of the evidence, other than making the claim just mentioned. He sets forth four assignments of error, all in connection with instructions given, or the manner in which they were given. While we do not regard the evidence as not convincing, or as being in the least unsatisfactory, we have given careful consideration to the points raised.

[1] The first objection is, that after the court had instructed the jury as to the doctrine of reasonable doubt, and the presumption of innocence, it then instructed them as follows: "The rule of law which clothes every person accused of crime with the presumption of innocence and imposes upon the state the burden of establishing his guilt beyond a reasonable doubt, is not intended to aid anyone to escape, who is, in fact, guilty of crime." It is argued that the court, after correctly instructing the jury upon these rules of law, thus used argumentative and persuasive language, which had a tendency to minimize to the jury the importance of these rules; that this had a tendency to suggest to the jury that this particular case was one where caution should be exercised in applying said rules of law; and that this even suggested to the jury the belief on the part of the court that the defendant was guilty. The entire instruction, of which the language complained of was only a part, is as follows:

"The rule of law which clothes every person accused of crime with the presumption of innocence, and imposes upon the state the burden of establishing his guilt beyond a reasonable doubt, is not intended to aid any one to escape who is in fact guilty of crime. But it is a humane provision of the law, intended, so far as human agency can, to guard against the danger of any innocent person being unjustly punished."

Appellant has not complied with rule 8 of the rules governing this court, which pro-

vides for the setting forth of all other instructions given upon a certain subject, when one instruction upon that subject is claimed to be erroneous. However, the record shows that the court gave an instruction substantially in accordance with section 1096 of the Penal Code, and, in addition, gave a number of other instructions frequently given on this subject in the past, and which are not attacked by appellant. While complaint is made of the first portion of this instruction, it is but the complement of the second portion, which expressly tells the jury that the purpose of these rules of law is to prevent an innocent person being punished, and the entire instruction could not mislead the jury, and is not prejudicial to the defendant. All of the instructions, taken together, show that the jury was fully and properly instructed on the question of reasonable doubt and presumption of innocence.

[2-4] The second instruction complained of is as follows:

"But if the intent exists and the killing is unlawful, it will be murder, even though done upon a sudden quarrel or heat of passion, unless there was adequate provocation. In considering what is regarded as such adequate provocation, it is a settled rule in law that neither provocation by words only, however opprobrious, or contemptuous, or insulting actions, or gestures, without an assault, upon the person, nor any trespass against land or goods, are of themselves sufficient to reduce the offense of an intentional homicide with a deadly weapon from murder to manslaughter."

After reading this instruction the court said: "I think I will read that last paragraph again," after which the instruction was repeated. Appellant contends that if the jury was satisfied that the defendant had not acted in self-defense, they might still have believed that the killing was done in the heat of passion, upon a sudden quarrel and upon adequate provocation, and have reduced the offense to manslaughter, and that the effect of repeating this instruction was to suggest to the jury that, in the court's opinion, no adequate provocation had been shown in this case. This instruction was preceded by the following instruction:

"And when the mortal blow, though unlawful, is struck in the heat of passion, excited by a sudden quarrel, and of sufficient violence to amount to adequate provocation, the law, out of forbearance for the weakness of human nature, will disregard the actual intent, and will reduce the offense to manslaughter. In such case, although the intent to kill exists, it is not that deliberate and malicious intent which is an essential element in the crime of murder."

These instructions did not go to the guilt or innocence of the defendant, but to the degree of the crime, and they properly stated the

law. *People v. Turley*, 50 Cal. 469; *People v. Jones*, 160 Cal. 358, 117 P. 176. The jury was fully instructed as to the definition of murder in the first degree, murder in the second degree, and manslaughter, with appropriate definitions and the distinguishing characteristics of each. There is nothing in the record to show that the rereading of the instruction was done for the purpose of emphasis, and the same may well have occurred because of some disturbance, or other condition that made it doubtful whether the jury had heard it. In the absence of anything to show the contrary, it must be presumed that the court had good reason for its action, and the inference cannot be drawn that the court's purpose in rereading the instruction was to give undue emphasis to the same. Furthermore, the court instructed the jury as follows:

"In preparing these lengthy instructions there is more or less repetition of the same thing. I have tried to avoid that as much as possible, but it does not seem to be possible, and so, as I say, you will find or perhaps have already observed and will have observed in discussing that matter that some propositions of law have been repeated and others have not. That should not have any significance whatever. These instructions that have been repeated have been so repeated by mistake, and so the mere fact that one or more instructions has or have been repeated should have no weight with you whatever. If the proposition of law is stated once, that is sufficient, and if the same thing is said five or six times that does not make this any more important than any other because of its having been repeated."

The court also fully instructed the jury that they were to disregard any expression, or inference therefrom, that might seem to indicate an opinion about the facts, on the part of the court, and that the question of the guilt or innocence of the defendant was for the jury alone. If any error could be inferred from the mere fact that the record shows this instruction was repeated, this was cured by these other instructions.

[5] Error is next claimed in that the court gave the following instruction:

"Therefore, when one person assails another violently with a dangerous weapon, likely to kill, and it does in fact, destroy the life of the party assailed, the natural presumption is that such assailant intended death, or other great bodily harm, and in the absence of evidence to the contrary, this presumption must prevail," which is stated to have been in a paragraph which immediately followed a paragraph in which appeared the following: "In determining the intention of the defendant at the time of the transaction complained of, it is important to consider the means used to accomplish the killing."

The claim is made that, in thus placing the two statements in such proximity, the court was suggesting to the jury that, in fact, the defendant here had assailed the deceased; that the natural presumption was that the defendant intended to kill Badillo; and that there was no evidence to the contrary. This contention is without merit. The entire instruction, parts of which are complained of, is as follows:

"In determining the intention of the defendant at the time of the transaction complained of, it is important to consider the means used to accomplish the killing. The intent or intention is manifested by the circumstances connected with the offense, and the sound mind and discretion of the accused. All persons are of sound mind who are neither idiots, nor lunatics, nor affected with insanity."

"A person must be presumed to intend to do that which he voluntarily and willfully does in fact do, and must also be presumed to intend all the natural, probable and usual consequences of his own acts. Therefore when one person assails another violently with a dangerous weapon, likely to kill, and which does in fact destroy the life of the party assailed, the natural presumption is that such assailant intended death, or other great bodily harm, and in the absence of evidence to the contrary this presumption must prevail."

The instruction, as given, properly states the law. *People v. Jones*, supra; Pen. Code, § 21. It contains no suggestion on the part of the court, as to the facts.

[6] The last assignment of error is in connection with the alleged reluctance of the court to reread certain instructions concerning self-defense, which were requested by the jury. After the jury had retired to deliberate upon their verdict, they returned into court requesting that further instructions be given them, defining first degree murder, second degree murder, and manslaughter. The court thereupon repeated those portions of his instructions previously given, containing the definitions requested by the jury. Thereafter a juror stated: "Some of the members of the jury have asked that the Court give us further instructions as to the plea of self-defense, and of the legal meaning of the term 'malice.'" The attorneys stipulated that those additional instructions might be given, whereupon the court said: "Of course, the whole thing is—I can give the definition of the term 'malice,' which is right before me here, but so far as self-defense is concerned that is in every part of the instructions; so I would probably have to read the whole instructions." After a few more statements, between both counsel and the court, the court stated: "Well, I think that it would not serve any useful purpose to have all of the instruc-

tions on self-defense read over again, because that constitutes a large proportion, and run through the whole instructions bearing on that question. Some of them were presented by the defendant's counsel and some of them presented by the People's counsel." Defendant's attorney then noted an exception to the refusal of the court to reread those instructions to the jury. The court then replied in part, as follows: "Well, I am inclined to be accommodating, but I think that in view of the situation I will not give all the instructions over again." After then repeating instructions on malice, the court then said: "And I think that is all I will repeat here now, because of course the jury has had all of this and it is just a question of whether it would be in any way to advantage to go over it all again, which would take me a long time." Upon counsel for defendant again insisting that instructions on self-defense be reread, the court indicated that it was his understanding that the jury desired further explanations upon the subject of defense, more specific than the ones previously given. A juror then stated that what was desired was the rereading of those portions of the court's instructions which relate to self-defense. The court then replied: "If all of you want those instructions read here on self-defense, of course, it would take an hour or so, so I will stay here and give it, if that is the wish of all the jurors." In reply to a question by the court, as to the exact request of the jury, a juror replied: "Yes, the jury asked me, as foreman of the jury, to request the Court to read again that portion of his instructions with reference to self-defense. Not the entire instructions, but that portion of the instructions that cover self-defense." The court then replied: "Well, I don't know whether I can find those or not. Possibly we better come back here after the bailiff has taken the jury out to dinner. In the meanwhile, I can sort out those that relate to self-defense, so that if all the jurors want that done, I will give that. Of course it was not requested originally, but it is possible that I can sort out the most of these." Thereafter, the court repeated the instructions theretofore given, upon the subject of self-defense. The argument is made that, in view of the promptness with which the court repeated the instructions requested as to the definition of first degree murder, second degree murder, and manslaughter, his apparent reluctance to instruct the jury upon the subject of self-defense could only be taken by the jury as an indication that the court felt those instructions were of relatively little importance, and that this had the effect of minimizing their importance in the minds of the

jurors. And, further, that the court thus disclosed to the jury that his reluctance to give the instructions in question was because they had been prepared by defendant's counsel. It is insisted that this was an indication to the jury of the opinion of the court upon the evidence and the guilt of the defendant, and that the same was prejudicial to him.

The instructions given by the court were somewhat lengthy, taking up more than thirty closely written pages in the reporter's transcript. There were a number of instructions relating to self-defense, and these were interspersed through the other instructions. We have carefully read this portion of the transcript, and find nothing therein to indicate that the reluctance of the court to read these particular instructions again was occasioned by anything other than a feeling on the part of the court that it would take too long to segregate them, and possibly a desire to avoid the difficulty of rereading such instructions without repeating a number of other instructions, with which they were interwoven. We feel there is nothing in the record to show that the court considered them unimportant, and that the court's action in this regard did not indicate to the jury the court's opinion as to whether or not self-defense had been proved. Under the circumstances, the instructions in question should have been reread to the jury, and in our opinion the error that otherwise would have appeared was cured when they were again read to the jury by the court. The court also instructed the jury as follows:

"I have not expressed or intended to express, nor have I intimated or intended to intimate, any opinion as to what facts have been established or what inference should be drawn from the evidence adduced, and if any expression of mine seems to indicate an opinion relating to any of these matters, such opinion you must entirely disregard."

"The court instructs the jury that rulings have been made by the court in your presence, and questions may have been asked of witnesses by the court. From such occurrences, or from anything that has occurred in the trial, you are not to infer what the opinion of the court may be as to the guilt or innocence of the accused."

The matter of self-defense was fully and completely covered in the instructions of the court, and the matters here complained of could not have misled the jury.

No reversible errors appearing, the order and judgment are affirmed.

We concur: SLOANE, P. J.; MARKS, J.

PALMER et al. v. FIX et al.★

Civ. 3980.

District Court of Appeal, Third District, California.

March 19, 1930.

Rehearing Denied April 18, 1930. Hearing Denied by Supreme Court May 15, 1930.

1. Appeal and error ⇨1071(5) — Harmless error — Finding — Judgment otherwise supported.

That finding of account stated was erroneous does not require reversal where judgment was supported, in view of other findings and stipulation.

2. Trial ⇨404(2) — Findings — Conclusions of law — Construction — Cancellation of contracts.

Findings that plaintiff canceled contract because of defendants' violation thereof, and that defendants were not entitled to commissions, constituted findings of fact as distinguished from conclusions of law.

3. Contracts ⇨322(3) — Advertising — Breach — Evidence — Sufficiency.

Evidence justified finding of breach by distributors of contract to advertise and sell plaintiff's product, and that distributors were not entitled to commissions after plaintiff's cancellation.

The contract required that all advertising and sales talks must be censored by plaintiff. The evidence disclosed that this provision was not complied with, and that in many instances the advertisements were so framed as to give the impression that defendants, who were financially interested in a competing machine, were the manufacturers.

4. Appeal and error ⇨1011(1) — Review — Finding — Conflicting evidence.

Reviewing court may not interfere with trial court's finding on conflicting evidence.

5. Contracts ⇨171(1) — "Entire contract."

Contract is entire when it is contemplated that all its parts shall be interdependent; "entire contract."

[Ed. Note.—For other definitions of "Entire Contract," see Words and Phrases.]

6. Contracts ⇨171(1) — "Severable contract."

"Severable contract" is one susceptible of division and apportionment.

[Ed. Note.—For other definitions of "Severable Contract," see Words and Phrases.]

7. Contracts ⇨171(1) — Entire or severable — Construction — Intention.

Whether contract is entire or severable is determined according to intention of parties upon considering all circumstances.

8. Contracts ⇨171(1) — Advertising contract — Severable covenant — Censorship.

Provision in contract appointing distributors for manufacturer's product to advertise, solicit, and sell product for commissions as exclusive agents, that all advertising must be submitted to manufacturer for censoring, held not independent covenant severable from other provisions.

9. Arbitration and award ⇨8 — Agreement — Court — Jurisdiction.

Generally, agreement between parties to submit to arbitration will not prevent court from assuming jurisdiction.

10. Arbitration and award ⇨7 — Construction — Attitude of courts.

Principle that courts favor arbitrations is generally limited to proceedings which have resulted in award.

11. Contracts ⇨284(2) — Agreement to arbitrate — Action — Condition precedent.

No action can be brought before arbitration where contract provides that decision of arbitrators on certain questions shall be condition precedent to right of action.

12. Contracts ⇨284(2) — Advertising contract — Agreement to arbitrate — Action — Condition precedent.

Provision in contract appointing distributors to advertise and sell manufacturer's product, requiring arbitration as to diligence of distributors, did not prevent manufacturer from suing for breach of agreement to submit advertising for manufacturer's approval.

Appeal from Superior Court, Los Angeles County; Walter S. Gates, Judge.

Action by Fred Palmer and others, copartners, doing business under the name of the Torrance Perforating Company, and by the Watson Perforating Company against M. J. Fix and H. S. Plunkett, individually and as copartners doing business under the name of the Watson Pipe and Supply Company, and another, in which defendants named filed a cross-action. From a judgment for the Watson Perforating Company, the defendants named appeal.

Affirmed.

See, also, 271 P. 749, 750.

John A. Jorgenson, C. H. Tyler, and Charles H. Sherrick, all of Los Angeles, for appellants.

Verge & Cooney, Arthur C. Verge, and Harold F. Collins, all of Los Angeles, for respondents.

BURROUGHS, Justice pro tem.

Plaintiffs brought this action to recover from the defendants the sum of \$3,571.88, together with interest and costs of suit. The complaint sets forth three causes of action. The first one alleges the common count for money; the second one is upon an account stated; the third one for money had and received to the use of the plaintiffs. The defendants answered, denied the indebtedness, and, by way of a cross-complaint, stated a cause of action against the defendants for an accounting based upon a contract of agency between the parties, whereby the cross-complainants claimed there was due them the sum of \$30,000. The cross-defendants denied the indebtedness. Upon the issues thus framed, the cause was tried. Findings of fact and conclusions of law were made and filed, and, in accordance therewith, judgment was entered in favor of the plaintiff Watson Perforating Company and against the defendants M. J. Fix and H. S. Plunkett, copartners doing business under the name of Watson Pipe and Supply Company, in the sum of \$3,571.88, together with costs. The action upon the cross-complaint was dismissed. The defendants and cross-complainants appeal from the whole of said judgment.

[1] The appellants claim that the finding of the trial court that there was an account stated between the parties is without support in the evidence, and therefore constitutes such prejudicial error as to require a reversal of the judgment. At the outset of the trial, it was stipulated by the parties that the defendants had in their possession \$3,571.88, as alleged in the complaint, subject to the amount claimed by the defendants, as alleged in their cross-complaint. The court found that defendants were not entitled to recover on their cross-complaint; therefore, under the admission, as aforesaid, the court was justified in finding in favor of the plaintiff. Another complete answer to the foregoing claim is that, in addition to the cause of action upon an account stated, there is also a cause of action based on a common count for money, and another for money had and received to the use of plaintiff, either one of which measures up to the admission of the defendants as to the amount due plaintiffs. In 24 California Jurisprudence, page 1000, § 221, it is said: "If a judgment is fully supported by, and rests upon valid findings, it may not be set aside because not supported by other findings, which may be ignored as being immaterial. * * *" The same rule is stated in *Miller & Lux v. Secara*, 193 Cal. 755, 227 P. 171, 177, where the court held: "The finding of the trial court that plaintiff's cause of action is barred by the provisions of sections 68, 69, and 72 of the act was

predicated upon an erroneous conclusion of law; but, as this finding is in no way essential to support the judgment, the error is immaterial." It follows that, even though the finding of an account stated is erroneous, the finding becomes immaterial, and is not necessary to support the judgment.

[2] The next assignment of error is that the findings of fact do not support the judgment. It is claimed that a part of finding nine, all of ten, and a part of eleven are mere conclusions of law. The portion of finding nine to which appellant objects is to the effect that on March 28, 1925, plaintiffs canceled the sales contract between themselves and the defendants "because of its violation by defendants and cross-complainants," and finding ten, "That it is not true that the plaintiffs and cross-defendants have failed and refused to pay the defendants and cross-plaintiffs any commissions due the defendants and cross-plaintiffs, in the manner provided in the said contract." That part of finding eleven objected to reads as follows: "That said defendants and cross-plaintiffs are not entitled to any commission on the sale of any goods, wares or merchandise of the plaintiffs or cross-defendants, after the said 28th day of March, 1925." In *Weidenmueller v. Stearns, etc., Co.*, 128 Cal. 623, 61 P. 374, it was claimed that the following finding of fact was a conclusion of law: "That plaintiff had no prescriptive or other right to receive water from said canal at any other level than the bottom of the canal." This was held to be a proper finding of fact. In passing upon the distinction between a finding of fact and a conclusion of law, in the case last cited, it is said, (citing from *Levins v. Rovegno*, 71 Cal. 275 [12 P. 161]): "The line of demarkation between what are questions of fact and conclusions of law is not one easy to be drawn in all cases. * * * If, from the facts in evidence, the result can be reached by that process of natural reasoning adopted in the investigation of truth, it becomes an ultimate fact, to be found as such. If, on the other hand, resort must be had to the artificial processes of the law in order to reach final determination, the result is a conclusion of law." The following have been held to be findings of fact: "That plaintiff did not rescind said sales." *Hollenbach v. Schnabel*, 101 Cal. 317, 35 P. 872, 40 Am. St. Rep. 57. "That plaintiff was not the owner." *Daly v. Sorocco*, 80 Cal. 368, 22 P. 211. "That Elizabeth Zink has no right, title, interest, claim, or lien of, in, or to or against any of the land or premises." *Dam v. Zink*, 112 Cal. 93, 44 P. 331. In the latter case it is said that it was not necessary for the court to state certain facts "as a reason for finding the issue as to the lien against the appellant." In this case it was not necessary for the court to give its reason for finding that plaintiff had no prescriptive or other right to receive water from any other level than the bottom of the canal. The evidence given at

the trial furnished the reasons for the ultimate finding. * * * In the case at bar, the court found that the contract was canceled "because of its violation by defendants and cross-complainants." Under the decisions above cited, it was not necessary that the court state in the findings the reason for such cancellation, it being an ultimate fact found by the court. The same rule applies with equal force to the objections to findings ten and eleven. Furthermore, in *Butler v. Agnes*, 9 Cal. App. 327, 330, 99 P. 395, it is held that in case of a doubt as to which class the findings belong, the doubt should be resolved in favor of the judgment. The findings in the instant case support the judgment.

[3,4] It is further contended that the findings are not supported by the evidence. The contract provides in part: "That in consideration of the agreement of said second party (defendants) to advertise, solicit and sell the products of said first parties (plaintiffs), to-wit: cone screen casing, straight drilled screen casing, and other products which the first parties may from time to time manufacture, the first said parties do hereby appoint the said second parties as California distributors, with power to advertise, solicit and sell their products under the conditions herein stated, to-wit:" Then follows a statement of the conditions, among them, that the second parties are the general and exclusive agents, the latter to use due diligence in advertising and making sales of said products personally and by subagents. It also provides that: "All advertising and sales talks must be censored and O. K'd by said first parties." The evidence discloses that the provisions of the contract for submitting advertising matter to the first parties for approval were not complied with. It further appears that in many instances the products of the plaintiffs were not advertised as the products of plaintiffs. The advertisements in many instances were so framed that the impression was left upon the mind of the reader that the defendants were the manufacturers and not the distributors of plaintiff's products, the name of the plaintiff company and the word "distributors" being omitted from many of the advertisements.

It further appears from the record that appellants were financially interested in a machine being built that would be competitive to the machine owned by the respondents. It also appears that the plaintiffs demanded many times that the advertising be submitted to them for censoring, as required by the contract, and that there were many disputes over the method of advertising under the contract. At one time the plaintiff Grau stated to one of the appellants: "You are advertising yourself and we are being strangled to death as far as business is concerned * * * and it won't be long before you will have us where we can't do anything, * * * and we will be

up the river if you fellows don't snap out of it." On March 28, 1925, the plaintiffs canceled the contract, and thereafter brought this action to recover the balance alleged to be due them for the amount collected by the defendants from sales of goods made by them prior to the cancellation of said contract. The defendants by cross-complaint, alleged a cause of action for commission due them on sales made after the said cancellation, and prior to the day the contract expired, according to its terms.

It is true that the foregoing statement rests upon a sharp conflict, in the evidence, but, nevertheless, it was the duty of the trial court to pass upon the conflict, and, having resolved it in favor of the plaintiffs, this court may not interfere.

[5-8] It is another contention of appellants that conceding a breach of the covenant to submit to plaintiffs the advertising for censoring, such covenant is an independent one and subsidiary and subservient to the primary and substantial promises of the contract. The contract provides that appellants are to advertise, solicit, and sell the products manufactured by respondents, as their exclusive agents, and said agents are to use due diligence in advertising and making sales of said products, personally and by subagents, for which they receive a certain percentage of the price received from all sales. "All advertising and sales talks must be censored and O. K'd by said first parties."

In passing upon the question of what constitutes entire and severable contracts, the following general rules are applicable: An entire contract is defined in 13 Cor. Jur. p. 561, as follows: "As a general rule, it may be said that a contract is entire when by its terms, nature and purpose it contemplates and intends that each and all of its parts and the consideration shall be common each to the other and interdependent." A severable contract is defined in 13 Cor. Jur. p. 561, in the following language: "One which in its nature and purpose is susceptible of division and apportionment." In *Mahana v. Los Angeles E. & M. Co.*, 82 Cal. App. 710, 714, 256 P. 279, it is held that the line of demarcation between entire and severable contracts has been definitely drawn in this state, and it is a question of interpretation to be determined according to the intention of the parties upon consideration of all the circumstances. The same rule is laid down in *Sterling v. Gregory*, 149 Cal. 117, 85 P. 305; *L. A. Gas & Electric Co. v. Amalgamated Oil Co.*, 156 Cal. 776, 106 P. 55. In the light of these authorities, the contract now before the court provides that advertising is one of its principal features, and it also provides that defendants must submit the advertising to plaintiffs for censoring. That this latter provision was an important part of the contract appears from the evidence, which shows that the defendants, by their failure to submit the advertising to the plaintiffs for

censoring, were enabled to advertise the products as their own. In some instances they omitted the word "distributor," thereby making the advertisement appear that the goods were their own product; at another time advertising themselves as the manufacturers. Furthermore, for their services as such agents, they were to receive a fixed compensation as a whole. We are of the opinion that the contract is an entire one.

[9-11] There is a provision in the contract that if the parties "cannot agree as to the diligence of the second parties, copartners, to live up to and perform their said agreements to well and reasonably advertise the said products, and to push the sale of said products, then the matter shall be submitted to arbitration. * * *" Provisions are then made for the appointment and selection of arbitrators and that a majority shall decide the issue, and the decision shall be final. If they decide in favor of the contentions of the first party, then they shall be at liberty to appoint another distributor. If the decision is in favor of the second parties, then the plaintiffs cannot again compel a resubmission of the same question for three months. Plaintiffs commenced this action without invoking the above provision of the contract for arbitration. The complaint in this case was filed in the superior court of Los Angeles county, July 20, 1925; the cause was tried March 27, 1927, and judgment entered October 10, 1927. The Legislature of the state of California amended the provisions of the law relative to the right of arbitration, effective July 27, 1927. The following decision of the question of arbitration here invoked is based upon the code provisions and decisions of the court as they were prior to said amendments. It is our conclusion that said amendments are not retroactive, but, if so construed, section 1284 of the Code of Civil Procedure has not been followed. It is therein provided that in a pending action, where provision is made for arbitration, if the application is made therefor, and the court is satisfied that it is a proper case for arbitration, the court must stay the proceeding pending arbitration. No such application was made. It is claimed by the appellants that respondents' remedy was to arbitrate in accordance with the terms of the contract. It is a general rule that an agreement between parties to submit a dispute to arbitration will be disregarded by the courts, and they will take jurisdiction and determine a dispute between the parties, notwithstanding such an agreement. *North American Co. v. Outer Harbor Co.*, 178 Cal. 406, 173 P. 756. This general rule is based upon the principle that "parties will not be permitted, by agreements to submit to arbitration, to oust the jurisdiction of the courts, whether the agreement relates to existing differences or to those which may arise in the future. In other words, the courts may disregard such agreements, assume jurisdiction, and determine the

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matters in dispute which constitute the subject-matter of the agreements, on the principle that the parties cannot deprive themselves of the right to resort to the proper legal tribunals for the submission of their controversies. The general principle that courts favor arbitrations and will indulge every reasonable presumption to uphold arbitration proceedings is strictly limited to proceedings which have resulted in an award, in consequence of which submissions to arbitration cannot be specifically enforced, and the parties to the submission may revoke it at any time before the award is made." 5 Cor. Jur. p. 20; *Blodgett Co. v. Bebe Co.*, 190 Cal. 665, 669, 214 P. 38, 40, 26 A. L. R. 1070. There is, however, an exception to this settled principle of law, that "Where a contract contains a stipulation, not that all questions arising thereunder, whether as to the validity or effect of such contract or otherwise, shall be submitted to arbitration, but that the decision of arbitrators on a certain question or questions, such as the quantity, quality, or price of materials or workmanship, the value of work, the amount of loss or damage, or the like, shall be a condition precedent to the right of action on the contract itself, no fixed sum being stated in the contract, such stipulation will be enforced, because the parties to a contract have a right to adopt whatever method they see fit for determining such questions, and until the method adopted has been pursued, or some sufficient reason given for not pursuing it, no action can be brought on the contract." *Davison v. East Whittier Land & Water Co.*, 153 Cal. 81, 96 P. 88. This rule finds sanction in *Holmes v. Richet*, 56 Cal. 307, 38 Am. Rep. 54; *Blodgett Co. v. Bebe Co.*, supra.

[12] Under the above provision of the contract relating to arbitration, does the subject matter of the dispute between the parties come within the purview of the cases last above cited? The contract provides for arbitration as to the "diligence of the second parties, copartners, to live up to and perform their said agreements to well and reasonably advertise the said products and to push the sale of said products." From an analysis of the contract, there can be no question that advertising the products manufactured by the plaintiffs was a subject of first importance. The principal dispute between the parties was plaintiffs' right to censor the advertising, and thus pass upon the character of the advertising. The arbitration clause relates to the "diligence" of the second parties to advertise, and not to the character or quality thereof. Webster's International Dictionary defines "diligence" as: "Interested and persevering application; devoted and painstaking effort to accomplish what was undertaken; assiduity in service." Therefore, the clause to submit differences to arbitration does not relate to the submission of advertising to be censored, but to the effort and good faith with which the second parties performed

their part of the contract. We are of the opinion that the plaintiffs were not required, under the terms of the agreement, to submit the case to arbitration.

Appellants have assigned eleven rulings of the trial court on objections to the admission or rejection of evidence adverse to the appellants, which they claim constitute reversible error. We have examined each ruling objected to, and are satisfied that none of them constitute reversible error. Section 4½, art. 6, Const.

The judgment is affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

104 Cal. App. 765

PEOPLE v. GILLISPIE.

Cr. 23.

District Court of Appeal, Fourth District.
California.

March 28, 1930.

1. Criminal law §1170(2) — Child stealing — Exclusion of testimony — Reversible error — Subsequent testimony.

Exclusion of question whether girl alleged to have been stolen talked to defendant about leaving home *held* not prejudicial error, where subsequently testified to.

2. Kidnapping §1 — Child stealing — Voluntary act — Offense against parent.

Whether girl accompanied defendant voluntarily is immaterial in offense of child stealing, which is offense against parent.

3. Kidnapping §5 — Child stealing — Fraudulent taking — Evidence.

Evidence that defendant charged with child stealing represented to girl's mother that he was taking daughter to party, but intended to run away with her, showed taking was fraudulent.

4. Kidnapping §5 — Child stealing — Intention to conceal — Evidence.

Admission by defendant charged with child stealing that action taken was planned and deception used showed intention to detain and conceal child.

5. Kidnapping §5 — Child stealing — Evidence — Conviction.

Conviction for child stealing *held* sustained (Pen. Code, § 21).

The defendant charged with child stealing represented to his stepmother that he

was taking her fifteen year old daughter by former marriage to a party. The defendant surreptitiously returned to remove personal effects, and thereafter drove to another state during first two nights and married the girl under an assumed name, and subsequently took the girl to other states. The defendant testified that the trip and marriage had been planned before they started to the party.

6. Names §16(2) — Prior conviction — Names — idem sonans.

In determining whether defendant Gillispie was person previously convicted under record of sentence of one Gillespie, principle of idem sonans applies.

7. Criminal law §1202(3) — Prior conviction — Admission.

Admission by defendant to witness that he had served term in prison *held* sufficient to show prior conviction.

8. Criminal law §1202(3) — Prior conviction — Admission — Evidence.

Stepmother's statement that she knew defendant served in prison, together with defendant's admission that he was convicted and evidence that defendant was person convicted, sustained finding of prior conviction.

Appeal from Superior Court, Riverside County; George R. Freeman, Judge.

James G. Gillispie was convicted of child stealing with two prior convictions of felony, and he appeals.

Affirmed.

W. E. Balcom, of San Bernardino, for appellant.

U. S. Webb, Atty. Gen., John W. Maltman, Deputy Atty. Gen., and Warner I. Praul, of Los Angeles, for the People.

BARNARD, J.

The defendant was found guilty by a jury of the crime of child stealing, a felony, and the jury also found that he had suffered two prior convictions for felonies. This is an appeal from the judgment based upon the verdict, and from an order denying a motion for a new trial.

It appears from the record that the defendant, who is about twenty-eight years old, came, about May 2, 1929, to reside with his father and stepmother in the town of Elsinore, California. There were other children in the family, including a fifteen year old daughter of defendant's stepmother, by a former marriage. On May 21, 1929, defendant represented to his stepmother that a party was being given at Wildemar, a few miles away. With the permission of the stepmother, de-

fendant left the home around 7 o'clock in the evening with the girl and her brother, ostensibly to attend this party. So far as the parents knew, they never returned until after the defendant was arrested. The defendant took the girl to the state of Nevada, where he married her under an assumed name. They then went into Utah and later into Oregon, where the defendant was arrested about a month after he left Elsinore. The mother testified that she did not hear from her daughter until some time in June, and that she had not consented to the daughter's going away with defendant, other than to attend this party. The evidence shows that instead of going to a party, they picked up another girl at Wildemar, and later in the evening returned home, secured their personal belongings without the knowledge of the parents, and departed. The evidence shows they proceeded at once into Nevada, traveling all night the first two nights; and that later they went to see certain relatives of the girl in Salt Lake City. The defendant testified that the trip and marriage had been planned before they started to the supposed party at Wildemar.

[1, 2] Appellant's first contention is that the trial court erred in sustaining an objection to a question asked of him on direct examination, "Did she ever talk to you about going away from home?" The argument is made that, if the girl accompanied appellant of her own volition, and not as a result of force, fraud, or enticement, this would constitute a defense to the charge of child stealing. Even if it be conceded that an answer to the question should have been permitted, the record shows that the appellant was later permitted to go into the matter fully and to narrate at length the circumstances under which the girl accompanied him. He was permitted to testify that he did not take the girl by force or use any fraud or deceit; that he did not try to persuade the girl to go with him; and that he did not endeavor to prevent her from returning to her mother. He was permitted to testify that he had heard the girl express a desire to leave home because she was not satisfied; and, further, that she was the one that desired to go away. In any event, it is immaterial whether the girl accompanied appellant voluntarily or not. *People v. Torres*, 48 Cal. App. 606, 192 P. 175; *People v. Munos*, 84 Cal. App. 6, 257 P. 549. The offense involved in such a charge is the offense against the parent and not that against the child.

Appellant's next objection is to the following portions of certain instructions:

"* * * That it is immaterial whether or not the said minor girl consented to such taking and went with the defendant freely and voluntarily and of her own accord, and you must not consider for any purpose of this action whether said girl went voluntarily or otherwise."

"It is, therefore, immaterial whether the children went voluntarily and requested that they be taken away."

The court gave very full and complete instructions to which no objection is made, except that the portions above quoted deprived the appellant of a defense to which he was entitled. There is no merit in this contention. *People v. Torres*, supra; *People v. Munos*, supra.

[3-5] Appellant next contends that there was no evidence to show that he maliciously, forcibly, or fraudulently took and enticed away the girl, or that he detained and concealed her. The evidence that appellant represented to the girl's mother that he was taking her daughter to a party, with his admission that his real intention was to run away with her, and that when they left it was not their intention to return, and that the trip had been planned in advance, is amply sufficient to show that the taking away was fraudulent. Appellant's admission that the action taken was planned in advance, with the deception used, is sufficient of itself to show the intention to detain and conceal. In addition to the deception practiced in order to get her away from the home, appellant's intentions are fully shown by his surreptitious return to remove their personal effects; by his driving all of the first two nights; by his taking the girl out of the state; by his marrying her under an assumed name; and by later taking her to two other states. All of the other surrounding circumstances furnish ample corroboration. *Pen. Code*, § 21; *People v. Munos*, supra.

Upon the issue of prior convictions, the prosecution introduced a certified copy of the record of the sentence of one James J. Gillespie, alias James Dorsey, to imprisonment in the State Prison at San Quentin, by the superior court of Imperial county, under date of August 29, 1921, upon the charge of destroying and injuring a jail. There was also introduced a certified copy of the proceedings upon the sentence of one James Gillespie to imprisonment in Folsom Penitentiary by the superior court of Alameda county, under date of November 20, 1923, for the crime of burglary. This record sets forth that, upon the defendant's being informed of the information charging him with burglary and a prior conviction for destroying and injuring a jail, he entered a plea of guilty to the charge and admitted that he had suffered the prior conviction charged in the information.

[6, 7] It is urged that the evidence is not sufficient to show that this defendant is the same person previously convicted, as described in the two certified copies referred to. While there is a slight difference in the spelling of the name, the principle of *idem sonans* applies. Even the attorney for appellant spells the name Gillespie, throughout his brief filed in this appeal. The defendant,

himself, upon the stand, denied any prior convictions. The stepmother of defendant was asked the following question: "Q. What was it that Mr. James Gillespie told you about having been where he could not ride in automobiles?" After an objection was overruled, she replied: "A. Why he was in Folsom prison, been there for five years. Q. Do you know what for? A. Yes, sir, stealing." She also testified that she knew that he was sentenced in the superior court of Alameda county to a term in Folsom prison for burglary; that he had written to them from the prison; that her husband had signed the papers to get him out on parole, and had brought him to their home in order to give him a fresh start. An effort was made to attack the weight of this evidence by showing on cross-examination that the witness was blind, and therefore could not read; that she had never been in court at the time the defendant was convicted; and that she had not actually seen the parole papers. In addition to such weight as the circumstances give to the other portions of her evidence, her answer to the first question, above quoted, shows an admission by the defendant to her that he had served a term in Folsom prison. We think this alone is sufficient. *People v. Hettick*, 126 Cal. 425, 58 P. 918. On cross-examination, she stated she had not talked a great deal to the defendant about the matter, but nothing was brought out to shake her statement that she had some conversation with him on the subject. Appellant's father also testified that he knew his son had served a term in Folsom prison for burglary; also that he had corresponded with appellant while he was at Folsom, and, when asked if knew how appellant's release from Folsom had been obtained, he replied: "Why, I saw his parole officer, I signed for his release."

[8] In reference to the prior conviction in Imperial county, not only does the certified copy of the proceedings in the superior court of Alameda county show that the defendant in that case admitted such a prior conviction in Imperial county, but, in addition, defendant's mother testified that she knew appellant had served a term in San Quentin, and that this was on account of a sentence by the Imperial county court on or about August 29, 1921. On cross-examination, she admitted that she was not personally present in court when he was convicted, but she was not cross-examined on other sources of knowledge, and, so far as appears from the record, she may have seen him there. In the absence of anything to throw any doubt upon it, we think that her statement that she knew he had served such a term, together with the admission of the defendant in the Alameda county case, that he had been convicted of such an offense in Imperial county, with the other evidence that the person convicted in

the proceedings in question in Alameda county was the same person as this defendant, is sufficient to sustain the finding as to this prior conviction.

The judgment and order are affirmed.

We concur: MARKS, Acting P. J.; BEAUMONT, Justice pro tem.

104 Cal. App. 528

HAMMOND LUMBER CO. v. MOORE et al.
Civ. 7236.

District Court of Appeal, First District, Division 1, California.

March 18, 1930.

1. Statutes $\S$ 35½ — Adoption by Initiation — Effect — Constitutional restrictions.

That Land Title Law was adopted by initiation did not remove it from restrictions of Constitution (Land Title Law, § 93).

2. Statutes $\S$ 115(2) — Title — Subject-matter.

Land Title Law, adopted by initiative method, must express subject of act in title (Land Title Law, § 93; Const. art. 4, § 24).

3. Statutes $\S$ 35½ — Constitutional restrictions — Application — Initiatory measures.

Mandate, limitation, and restriction imposed on Legislature by Constitution is obligatory on people when legislating by initiatory method (Const. art. 20, § 15).

4. Records $\S$ 9(2) — Statute — Filing of lien — Constitutionality.

Law requiring notice of mechanics' liens to be filed in registrar's office *held* not unconstitutional as impairing right to lien or unduly hampering its exercise (Land Title Law, §§ 29, 47, 93; Const. art. 20, § 15).

5. Statutes $\S$ 117(3) — Filing notice of lien — Constitutionality — Title.

Law requiring that notice of mechanics' liens be filed in registrar's office *held* not unconstitutional as not being expressed in title of act (Land Title Law, § 93; Const. art. 4, § 24).

6. Mechanics' liens $\S$ 3 — Special enactment — Prior statute — Conflicts.

Land Title Law, being special enactment, controls earlier enacted Code provisions in conflict therewith (Land Title Law, § 93; Code Civ. Proc. § 1187).

Land Title Law, § 93 (St. 1915, p. 1946), after expressly recognizing provisions of

Mechanics' Lien Law, did not purport to supersede requirements of Code Civ. Proc. § 1187, as to recordation of the claim of lien and its contents, but merely supplements that section by adding a new procedural step by requiring filing of another notice in a different form and place.

7. Records — 9(13¼) — Recording — Filing notice of lien.

Lien claimant who recorded lien, as required by Code, but did not register it with registrar, as required by Land Title Law, *held* not entitled to lien, notwithstanding recorder and registrar were same person (Code Civ. Proc. § 1187; Land Title Law, §§ 47, 93).

Appeal from Superior Court, Los Angeles County; Fletcher Bowron, Judge.

Action by the Hammond Lumber Company against F. Allen Moore, Elizabeth M. Johnson, and others. Judgment for plaintiff against the first named defendant. From a judgment against Elizabeth M. Johnson, and others, plaintiff appeals.

Affirmed.

R. L. Horton, of Los Angeles, for appellant.

Wilbert C. Hamilton and Charles H. Dummer, both of Los Angeles, for respondents.

GRAY, Justice pro tem.

In this action to foreclose a materialman's lien, the court, in accordance with the admissions and stipulations of the parties, found that respondent Johnson, the owner of the land involved, contracted with defendant Moore for the construction of a building on that land; that appellant sold to defendant Moore building material, which was actually used by him in such construction, but for which payment had never been made; that appellant recorded in the office of the county recorder its claim of lien in the manner, form, and time required by section 1187 of the Code of Civil Procedure, but never filed any notice of its lien, as required by section 93 of the "Land Title Law" (Stats. 1915, p. 1932); that, prior to the furnishing of any material, the title to said land had been registered under the "Torrens Law" (Stats. 1897, p. 138, superseded by the "Land Title Law"); and that a deed of trust, conveying such land in trust, as security for a note owned by respondent Cressey had been registered, subsequent to the commencement of furnishing such material. From these findings, the court concluded that appellant was entitled to a personal judgment against defendant Moore, but that it had no lien upon said land because of its failure to file its notice of lien as required by said section 93. Appellant appeals from the judgment denying it a lien, in accordance with the conclusions of law, urging that such

conclusions are erroneous (1) because said section 93 is unconstitutional in that (a) it, by unreasonable increase of procedure, violates article 20, section 15, of the Constitution, creating mechanics' liens and commanding and restricting the Legislature to provide for their speedy and efficient enforcement, and (b) the omission in the title—"Land Title Law"—of the subject of said section, mechanics' liens, makes said section void under article 4, section 24, of the Constitution, and (2) because, as a matter of construction, the "Land Title Law," which is a general law, cannot amend the Mechanics' Lien Law, which is a special law, enacted in the Code.

[1-3] At the outset, we feel that respondents' argument that, as the "Land Title Law" was adopted by initiation, it is equal in force and effect and unrestricted by the Constitution, is incorrect. *Wallace v. Zinman*, 200 Cal. 585, 254 P. 946, 62 A. L. R. 1341. That decision is also authority adverse to their contention that article 4, section 24, requiring the subject of an act to be expressed in its title, is not here applicable, because the law in question is an initiatory measure. Furthermore, the reasoning of that case satisfies us that the mandate, limitation and restriction, literally imposed upon the Legislature by article 20, section 15, is also obligatory upon the people when legislating by the initiatory method.

The relation between the right to a lien and the mandate for legislative provision for its enforcement is well stated in *Diamond M. Co. v. Sanitary F. Co.*, 70 Cal. App. 695, at page 701, 234 P. 322, 325, as follows:

"The right of mechanics, materialmen, etc., to a lien upon property upon which they have bestowed labor, or in the improvement of which material which they have furnished have been used, for the value of such labor or materials, is guaranteed by the Constitution, the mode and manner of the enforcement of such right being committed to the Legislature. Article 20, § 15, Const. Manifestly, the Legislature is not thus vested with arbitrary power or discretion in attending to this business. Indeed, rather than power so vested in the Legislature, it is a command addressed by the Constitution to the lawmaking body to establish a reasonably framed system for enforcing the right which the organic law vouchsafes to the classes named. Clearly, it is not within the right or province of the Legislature, by a cumbersome or ultratechnical scheme designed for the enforcement of the right of lien, to impair that right or unduly hamper its exercise. Every provision of the law which the legislature may enact for the enforcement of the liens mentioned in section 15 of article 20 of the Constitution must be subordinate to and in consonance with that constitutional provision. *Hampton v. Christensen*, 148 Cal. 729, 737, 84 P. 200."

[4] Does section 93 of the "Land Title Law" impair the right to lien or unduly hamper its exercise? If so, such section must be held unconstitutional as violative of article 20, section 15. Section 93 reads as follows:

"Notice of liens under the provisions of the mechanics' lien laws of this state shall be filed in the registrar's office, and a memorial thereof entered by him upon the register, as in the case of other charges, and such liens may be enforced as now or hereafter allowed by law. Until such notice is so filed and registered, no lien shall be deemed to have been created."

Before such notice can be filed or affect the title of the land, or impart any notice, it "must have noted thereon a statement of the fact that the land sought to be affected is registered land, with the name of the registered owner and with the number * * * of the certificate * * * of the last registration thereof." Section 47 of the act. As to similar matters, section 1187 of the Code of Civil Procedure requires that the claim of lien shall be recorded in the office of the county recorder, and shall give the name of the owner or reputed owner, if known, and a description of the property sufficient for identification. No error in the description of the property invalidates the lien unless the property has passed to an innocent purchaser without notice direct or constructive. Code Civ. Proc. § 1203. The requirement of said section 93 for an additional filing of a notice does not appear to be unduly burdensome. Nor can it be said that the requirement of said section 47 as to the matters to be stated on such notice unduly hampers the enforcement of the lien, because such information can be readily obtained by an examination of the "register of titles," provided by section 29 of the act. Such additional labor in the preparation of the notice of lien lessens the work preparatory to filing the foreclosure complaint, because this examination provides the names of the defendants who are interested in the land.

[5] Appellant argues that, as the subject of mechanics' liens treated in section 93 is not expressed in the title of the act—"Land Title Law"—such section is void. Const. art. 4, § 24. In holding untenable a similar attack, broader, but inclusive of the same point, upon the "Torrens Law," the Supreme Court in *Robinson v. Kerrigan*, 151 Cal. 40, 50, 90 P. 129, 133, 121 Am. St. Rep. 90, 12 Ann. Cas. 829 (approved in *Frances Investment Co. v. Superior Court*, 189 Cal. 107, 208 P. 105), used the following language, here decisive:

"These provisions relate to the subjects of felonies, county officers, county government, principal and surety, attorneys at law, judgments, liens, procedure, and adverse claims, respectively, and it is claimed that the act is void because none of them are mentioned in

the title. And it is intimated that, if they were mentioned, the law would be contrary to the mandate of the Constitution that the act shall embrace but one subject. If the first proposition is well taken, it is certain that the second is also established; but the mere statement of the objection is almost sufficient to refute it. While it is true that none of the subjects thus designated are expressed in the title, they are all germane to the general subject there expressed, and, taken together, they compose a part of the general scheme and are appropriate to effect the main object of the law. Further examination would have disclosed a large number of such 'subjects' in the body of the act, which are not mentioned in the title. The same criticism might be made of many acts on a general subject which have always been considered as valid. The act establishing the scheme is the appropriate place for provisions necessary to make it effective and symmetrical. If it were necessary to mention every subdivision of the general subject of an act in the title, to the extent here claimed, our statutes would present a somewhat ludicrous appearance. The statement of the subject in the title would generally occupy almost as much space as the act itself. Furthermore, if subjects, as intended by the Constitution, must be so minutely subdivided, it would be impracticable to enact any comprehensive law on any general subject, by reason of the necessity of dividing it into so many separate acts. The provision must receive, and it has received, a more liberal construction. The word 'subject' is given a broader meaning. *People v. Mullender*, 132 Cal. 217, 64 P. 299. All the provisions objected to as constituting a different subject are reasonably necessary as means for attaining the object of the act indicated by the subject which is expressed, and hence they are considered as included in the title, as subdivisions of the general subject there stated. *People v. Parks*, 58 Cal. 636; *Ex parte Liddell*, 93 Cal. 633, 29 P. 251; *Hellman v. Shoulters*, 114 Cal. 136, 44 P. 915, 45 P. 1057; *People v. Linda Vista Irr. Dist.*, 128 Cal. 477, 61 P. 86; *Deyoe v. Superior Court*, 140 Cal. 476, 488, 98 Am. St. Rep. 73, 74 P. 28. We think the title to the act sufficiently expresses the subject to which it relates, and that it embraces but one general subject."

The single subject of the act, expressed in its title, is the establishment of a system for the registration of title to land whereby the official certificate will always show the state of the title and all interests therein. *Pioneer, etc., Guaranty Co. v. Feraud*, 91 Cal. App. 278, 267 P. 134. The manner of enforcement of mechanics' liens is a detail in the accomplishment of such purpose, and is therefore logically germane to the title of the act and included within its scope. *Buelke v. Levenstadt*, 190 Cal. 684, 214 P. 42; *Estate of Welings*, 192 Cal. 506, 221 P. 628.

MILES v. McFARLANE et al.

Civ. 4030.

District Court of Appeal, Third District, California.

March 17, 1930.

[6] We are unable to see the pertinency of appellant's argument that, as a matter of construction, section 93 cannot be held amendatory of, or in anywise affecting, section 1187, because the former is a general law and the latter is a special one, enacted in the Code. No such question has arisen, because a comparison of their respective terms discloses no irreconcilable inconsistency in the treatment of the same subject. *Riley v. Forbes*, 193 Cal. 740, 227 P. 768. Section 93, in its first sentence, after expressly recognizing the provisions of the Mechanics' Lien Law, does not purport to supersede the requirements of the Code section, as to recordation of the claim of lien and its contents, but merely supplements that section, by adding a new procedural step, in requiring the filing of another notice in a different form and place. It may be that the second sentence of section 93, by denying the creation of a lien unless the notice is filed, violates the fore part of article 20, section 15, of the Constitution, granting a lien. However, we are only here concerned with the first sentence, which, because it is distinct and separate from the second sentence, is not affected by the latter's invalidity. 5 Cal. Jur. 643. Assuming the pertinency of the argument, it is fallacious, because the "Land Title Law" is a special act, and controls earlier enacted Code provisions in conflict therewith. *Gill v. Johnson* (Cal. App.) 284 P. 510. Our conclusions are in accord with prior decisions holding other similar sections of the "Land Title Law" applicable to the enforcement of a lien, created under Street Improvement Act of 1913 (*Hayes v. Handley*, 182 Cal. 273, 187 P. 952), created by "Improvement Act of 1911" (*Rutledge v. City of Eureka*, 195 Cal. 404, 234 P. 82), and for nonpayment of taxes (*In re Seick*, 46 Cal. App. 363, 189 P. 314).

[7] Lastly, appellant urges that it should not be deprived of its lien, since the recorder, being the same person who is registrar (section 1 of Land Title Law), should have entered a memorial of it in the "register of titles." But identity of person does not create an identity of office and the duties thereof. *More v. Board of Supervisors*, 31 Cal. App. 388, 160 P. 702. As above noted, section 47 requires certain information not contained in the claim of lien to be noted on the notice of lien, and prohibits the registrar from filing the notice without such information, and further provides that a notice, not having noted thereon this information, does not affect the title to the land. Obviously, if the recorder, as registrar, had filed the claim of lien as a purported notice of lien, it would have been an idle act. *Pioneer, etc., Guaranty Co. v. Feraud*, supra.

The judgment is affirmed.

We concur: TYLER, P. J.; CASHIN, J.

1. Pleading $\S$ 339 — Complaint — Cause of action — Waiver.

That plaintiff dismissed count in assumpsit, and that prayer omitted reference to such cause of action, indicated waiver thereof.

The complaint, which was by a stockholder of corporation which contracted to buy gold mining claims, paying annual installments therefor, contained three counts, one of which was intended to allege fraud and collusion on part of selling corporation and its stockholders in inducing plaintiff to pay one annual installment, in reliance on representations that sufficient ore could be mined in four or five months with which to repay plaintiff. This count also contained allegations which might have raised issue in assumpsit. The prayer made no reference to cause of action in assumpsit, and another count drawn on that theory was voluntarily dismissed by plaintiff after demurrer thereto had been overruled.

2. Fraud $\S$ 41 — Complaint — Sufficiency.

Complaint by stockholder of corporation which contracted to buy mining claims on installments, alleging fraud by inducing plaintiff to pay installment, held demurrable.

3. Pleading $\S$ 8(1) — Facts — Conclusion — Special demurrer.

Although fact stated as conclusion may be sufficient, in absence of special demurrer, it is insufficient when facts recited fail to justify conclusion.

4. Corporations $\S$ 206(2) — Representative suit — Demand — Refusal — Condition precedent.

Stockholder, before suing for benefit of corporation or its stockholders, must demand that corporation bring action, unless demand would be futile.

5. Corporations $\S$ 320(7) — Complaint — Fraud — Mismanagement — Sufficiency.

Stockholder's complaint alleging fraud arising from "sundry acts of mismanagement, the nature whereof plaintiff is unable to state," fails to state cause of action.

6. Fraud $\S$ 43 — Allegations — Specific acts.

Fraudulent acts relied on for cause of action must be specifically alleged.

7. Frauds, statute of §23(1) — Payment — Debt of another.

Stockholder of corporation which contracted to buy gold mine on installments, when paying amount equivalent to one installment, was not answering for debt of another (Civ. Code, § 1624).

8. Frauds, statute of §158(1) — Payment — Debt of another — Writing — Presumption.

When statute requires written contract, allegation involving promise to answer for debt of another raises presumption contract was written (Civ. Code, § 1624).

9. Contracts §337(2) — Promise to pay — Specific fund.

Count alleging promise to repay from proceeds of sale of gold gravel in certain mine, and that promisors "refused to take the same from said mine," stated no cause of action.

This count of complaint contained no allegations regarding ownership of mine, nor did it allege that promisors were authorized to remove or sell gold. It declared merely that promisors "now have possession of said gold gravel and (have) failed, neglected and refused to take the same from said mine and either mill or sell the same."

10. Pleading §236(1) — Complaint — Second amendment — Discretion.

Court did not abuse discretion in denying leave to amend complaint second time.

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action by E. C. Miles against Malcolm McFarlane and others. From a judgment for defendants, plaintiff appeals.

Affirmed.

Dowd & Reagh, of San Francisco, for appellant.

James M. Hanley, of San Francisco, for respondents.

R. L. THOMPSON, J.

This is an appeal from a judgment which was entered against the plaintiff upon an order sustaining a demurrer to the amended complaint and denying leave to again amend the pleading.

The amended complaint contained three counts, the last of which was dismissed by the plaintiff. This last cause of action was based upon allegations of simple assumption.

It was alleged the Marguerite Placer Mining Company executed and delivered to William H. Dowe on May 26, 1921, a written agreement to sell certain gold mining claims in Placer county consisting of 1,100 acres of

land, for the sum of \$150,000, payable in annual installments of \$22,500, which were due on the 15th day of each October until the purchase price was fully paid; first payment was made October 15, 1921; after the first payment one-half of the net proceeds from the operation of the mine was to be turned over to the selling corporation to be applied on the purchase price of the mine; pursuant to authorization the contract was immediately assigned to the Feather Forks Gold Gravel Company, in which corporation the plaintiff held 20 per cent. of the capital stock and became a vice president and director; the three McFarlane brothers who were named as defendants owned 85 per cent. of the stock of the selling corporation; one of these defendants, Gilbert McFarlane, possessed practical mining experience, and had a knowledge of the character and value of the ore contained in the mine and the manner of operating it; he was elected director and managing agent of the new mining enterprise; the plaintiff was without experience in mining, and had great confidence in the knowledge and ability of the said Gilbert McFarlane in that regard; the purchasing corporation defaulted in the payment of the second installment of the purchase price of the property which was due October 15, 1922, and had no assets with which to meet this obligation. It is then alleged that, said sum of \$22,500 being due and unpaid, "defendants * * * entered into a conspiracy to induce plaintiff to pay to them the said sum of \$22,500, intending that * * * they would * * * make it impossible for said Feather Forks Gold Gravel Company to either repay the said sum to plaintiff or secure sufficient funds by its mining operations to continue to make payments under the said contract, so that the same should become forfeited. * * *" It was then alleged that the last-mentioned corporation was without assets with which to make these payments except such proceeds as might be derived from the mining, milling, and sale of the gold secured from the operation of said claims; that the defendants represented to the plaintiff that "there was then available, blocked out, ascertainable and readily convertible into cash over \$50,000 worth of gold ore in said mining properties, and that it would take no more than four or five months at the latest to carry operations in said mine to the point where the said ore could be sold or milled so that money could be realized therefrom and that if plaintiff would advance said sum * * * to save the rights of the said Feather Forks Gold Gravel Company in its contract, * * * both said companies could and would severally repay to plaintiff the said sum; * * * that out of said ore it would be possible to repay plaintiff at the rate of \$4,000 per month."

It was then alleged that, relying on these representations, the plaintiff did pay to the

defendants said sum of \$22,500, but that the defendants made no real effort to operate the mine or extract the gold therefrom, but, upon the contrary, "wilfully, corruptly, deliberately and wantonly impeded, hindered and destroyed the production of said mine by means of sundry acts of mismanagement the nature whereof the plaintiff is unable to state, * * *" with the purpose of causing a breach and forfeiture of said contract; that the purchasing corporation "was unable to secure any funds wherewith to make payments on said contract, and * * * by reason of failure to make any further or additional payments, * * * said mine, under the terms of said contract reverted to and became the property of defendant, The Marguerite Placer Mining Company"; that therefore no part of said sum of \$22,500 has been repaid the plaintiff, but that the whole thereof remains due and unpaid; that said mine contains gold ore of the value of \$50,000; that the mine became flooded by water, and the operation thereof was abandoned; and that the selling corporation threatens to convert said mine and the proceeds therefrom to its own use and thus prevent the repayment of said sum of money to the plaintiff.

The second cause of action merely alleges that on November 28, 1922, the defendants agreed that, if the plaintiff would pay the defendant corporation the sum of \$22,500, the defendants would cause the repayment thereof to be made in installments of \$4,000 each month from the gold which was to be taken from said mining claims; that the plaintiff thereupon advanced said sum of \$22,500 to the defendant corporation, no part of which has been repaid. It was, however, not alleged that any gold from which this loan was to be repaid was ever secured from the operation of said mining property, or that the defendants had authority to operate the same.

The prayer of the amended complaint asked that a trust and lien be impressed upon the mining property to secure to the plaintiff the repayment of said sum of \$22,500, and that a receiver be appointed to take charge and operate said mine for the benefit of the plaintiff until said indebtedness was fully repaid. There was no demand for a judgment for money had and received.

[1] The first cause of action was intended to be based upon a charge of fraud and collusion. It did, however, contain allegations which might raise an issue based on assumpsit, except for the fact that the prayer of the complaint omits reference to such a cause of action, and the third count, which was drawn upon that very theory, was voluntarily dismissed by the plaintiff, after a demurrer to this count had been overruled and the defendants were given fifteen days in which to answer it. It must be assumed, therefore, that the plaintiff intended to waive his right to

prosecute the action on the ground of assumpsit.

This leaves only the question as to whether the first count sufficiently states a cause of action founded on fraud and collusion, and whether the second cause of action is sufficiently alleged.

[2-4] Neither cause of action is sufficiently alleged, and the trial court properly sustained the demurrer. The first cause consisted of allegations of fraud and collusion against the Marguerite Placer Mining Company and its majority stockholders. The purchasing corporation, which held the equitable title to the property, was not made a party to the action. It is difficult to see how the plaintiff could hope to procure the appointment of a receiver and take charge of the Feather Forks Gold Gravel Company without making it a party to the action. By virtue of the contract this purchasing corporation had the exclusive right of possession. The complaint fails to adequately allege that the Marguerite Placer Mining Company became reinvested with the title to the mine. It is stated that "by reason of failure to make * * * payments * * * said mine, *under the terms of said contract* reverted." This is a mere conclusion which is expressly based upon the assumption that the contract declares an automatic forfeiture for failure to pay the installments. While the allegation of an asserted fact which is stated in the form of a conclusion may ordinarily be sufficient in the absence of a special demurrer, it is rendered inadequate, however, when the recited facts upon which it depends fail to support the conclusion. A conclusion has no greater force than the express premise upon which it is founded. The allegation regarding the reversion of title to the mine is based solely upon the assumption that it occurred "under the terms of the contract." The contract is made a part of the complaint, and it contains no such provision for a forfeiture or reversion of title for default in the payment of installments of the purchase price. The complaint therefore fails to adequately allege title or right of possession of the mine in the selling corporation. The plaintiff held no title to the mining property equitable or otherwise, except as a stockholder of the purchasing corporation. There is nothing in the allegations of the complaint that would create an involuntary trust in the property in the plaintiff's favor, nor impress the mine with a lien to secure the payment of the \$22,500 which he paid to the corporation defendant. If, as a stockholder of the Feather Forks Gold Gravel Company, the plaintiff desired to institute an action for the benefit of that corporation or its stockholders, it was necessary that he should first demand of the corporation that it should institute the action in its own behalf and receive its refusal to do so, or

it must appear that such demand would be futile because the corporation was in the control of hostile representatives. 6 Fletcher's Cyc. of Corp., p. 6936, § 4068; Fornaseri v. Cosmosart Realty & Bldg. Corp. (Cal. App.) 274 P. 597. No such demand, refusal, or situation is alleged or appears in the pleadings.

[5, 6] The complaint fails to specify the acts of alleged fraud upon which the plaintiff relies. It affirmatively appears that he complains of "sundry acts of mismanagement, the nature whereof plaintiff is unable to state." This is fatally defective. Fraudulent acts which are relied upon for a cause of action must be specifically alleged. 12 Cal. Jur. 800, § 62.

[7, 8] The respondent assumes that the payment of the \$22,500 by the plaintiff was based upon a promise to answer for the debt of the Feather Forks Gold Gravel Company, and that, under section 1624 of the Civil Code, it would be void, unless some memorandum thereof were in writing. This payment, however, appears to constitute an original obligation. The transaction was not a promise to pay the debt of another. It was the actual payment of a sum of money. Whether it were recoverable as money had and received by the defendants, or upon the theory of money procured by fraud or false representations, it would constitute an original obligation on the part of the defendants. But, even though it be deemed to be founded on the promise to answer for the debt of another, the allegation of an agreement to repay the money presumes that the contract was in writing, when the statute requires it. 12 Cal. Jur. 938, § 107.

[9] The second cause of action merely alleges the payment of the money and a promise on the part of the defendants to repay it within six months, from a specific fund, to wit, the proceeds from the sale of gold gravel in a certain described mine. No reference is made to the allegations contained in the first count. The ownership of the mine and the gold contained therein is not alleged. Nor is it stated that the defendants were authorized to mine or sell the gold. All that is alleged in that regard is that the defendants "now have possession of said gold gravel and (have) failed, neglected and refused to take the same from said mine and either mill or sell the same." This count, therefore, fails to state a cause of action. When the intent of the parties is expressed to the effect that the payment of money is to be made from a specific fund, and not otherwise, the failure of such fund will defeat the right of recovery. 48 C. J. 594, § 11; 6 Cal. Jur. 452, § 269; Lynch v. Keystone Cons. Mining Co., 163 Cal. 690, 126 P. 968; Clarey v. Security Portland Cement Co. (Cal. App.) 279 P. 483.

[10] The plaintiff was granted leave to file one amended complaint. No abuse of discretion on the part of the court appears in denying leave to again amend the pleading. In the absence of such abuse of discretion, the judgment which is entered upon an order sustaining the demurrer will be upheld. 21 Cal. Jur. 119, § 77.

The judgment is affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

104 Cal. App. 700
MERRITT v. REY.
Civ. 4022.

District Court of Appeal, Third District, California.

March 27, 1930.

1. Appeal and error ⇨1010(1) — Review — Finding of fact — Delivery of deed — Intent.

Grantor's intention in executing and leaving deed with conveyancer *held* question of fact for trial court, whose solution will not be disturbed on appeal, if supported by substantial evidence.

2. Deeds ⇨208(3) — Possession — Grantee — Prima facie evidence.

Possession of deed by grantee creates prima facie evidence of absolute delivery and grantor's intention to vest title in grantee.

3. Deeds ⇨142 — Reservations — Life estate — Validity.

Realty may be conveyed to be enjoyed by grantee only at grantor's death, in which case grantor will be regarded as presently conveying title subject to life estate (Civ. Code, § 767).

Civ. Code, § 767, provides in substance that future estate may be limited by act of party to commence in possession at future day.

4. Deeds ⇨60 — Evidence ⇨461(2) — Grantor's intention — Parol testimony — Title after delivery.

Though oral testimony is admissible to show grantor's intention in parting with custody of deed, grantee after delivery takes title free from incumbrances not expressed.

5. Deeds ⇨208(3) — Delivery — Evidence — Sufficiency.

Evidence in action to quiet title *held* to support conclusion that grantor absolutely delivered deed, though she reserved life estate.

6. Deeds ⇨209 — Record — Estoppel — Evidence.

Evidence in action to quiet title *held* not to support conclusion that grantee was estopped to assert title, notwithstanding failure to record deed.

7. Deeds ⇨88 — Unrecorded deed — Validity.

Unrecorded deed is valid as between parties and those having notice thereof (Civ. Code, §§ 1213, 1217).

8. Adverse possession ⇨115(1) — Question of fact.

Question of adverse possession is one of fact to be determined from circumstances and conduct of parties.

9. Adverse possession ⇨85(1) — Delivery — Grantor's use or occupancy — Subject to legal title.

Where realty was absolutely conveyed, grantor's use or occupancy of premises will be deemed to have been subject to grantee's legal title (Code Civ. Proc. § 321).

Code Civ. Proc. § 321, provides in substance that person establishing legal title to property is presumed to have been possessed thereof within time required by law.

10. Adverse possession ⇨63(4) — Vendor and purchaser — Grantor's hostile possession.

Grantor may acquire title by adverse possession against grantee notwithstanding conveyance where he retains hostile possession, openly and notoriously asserting title (Civ. Code, §§ 1006, 1007).

Civ. Code, §§ 1006, 1007, provides in substance that occupancy for any period of time confers title sufficient against all, and that occupancy for period prescribed by Code Civil Procedure as sufficient to bar action for recovery of property confers title thereto denominated title by prescription which is sufficient against all.

11. Limitation of actions ⇨197(1) — Realty — Possession within five years — Evidence — Sufficiency.

Evidence in action to quiet title *held* to show grantee's predecessor was seized or possessed of property within five years before commencement of action (Code Civ. Proc. § 318).

Appeal from Superior Court, Solano County; W. T. O'Donnell, Judge.

Action by Ellen E. Merritt against John Rey, as administrator of the estate of Mary J. Rey, deceased. Judgment for plaintiff, and defendant appeals.

Affirmed.

O'Hara, Hatch & Pope, of Vallejo, for appellant.

Percy E. Towne, of San Francisco, for respondent.

R. L. THOMPSON, J.

This is an appeal from a decree quieting title to an apartment house and lot in Vallejo which was conveyed to the respondent by a gift deed from her sister. It is claimed the evidence fails to show a valid delivery of the deed.

Mary J. Kelly held title to the family home of her parents situated at Vallejo, which was conveyed to her by a gift deed from her mother in October, 1906. The property was valued at \$3,500. She married John Rey April 14, 1909. The respondent, who is the sister of Mrs. Rey, was formerly named Ellen E. Jahn. She lived in San Francisco. There was a close bond of attachment between these sisters. The homestead was rented, and Mary Kelly lived with her brother Frank at Vallejo. The day before the wedding Mary Kelly summoned her sister to Vallejo, and, informing her of the proposed marriage, said: "I am going to transfer my property over to you as a deed of gift. * * * I want the property to stay in the Kelly family, and you are entitled to the property, and I want to deed it to you for the kindness you have shown me all your life. * * * She told me that * * * she wanted to deed that to me before she was married because she did not want her husband to have any of that property that belonged to my father and mother." They went together to the office of a conveyancer named James O'Hara, who drew the deed, reciting the consideration to be that of "love and affection." The deed was then handed to the grantee by either the grantor or the conveyancer, and she hand it back to Mr. O'Hara "for safe keeping," because, as she said, "I had no deposit box; I had no place to keep the deed."

He kept the deed in his safe until about two years later, when, at the request of the grantor, he sent it to the grantee, accompanied with the following letter:

"Vallejo, California, February 18th, 1911.

"Dear Mrs. Jahn: Your sister requested me to forward the enclosed (deed) to you. I suppose she saw you in reference to the same.

"Very truly yours,

"James V. O'Hara."

The respondent kept the deed in her own safe deposit box until after the death of her sister, which occurred March 18, 1926. She then recorded it March 20, 1926.

The foregoing transaction respecting the execution and delivery of the deed is substantially corroborated by Mr. O'Hara. The object and fact of the transfer as above related were corroborated by Miss Katie Callen, a

lifelong friend of the grantor, who related statements frequently made to her by Mary Kelly.

In the execution and delivery of this deed, it was understood by the parties to the conveyance that the grantor reserved the use and benefits of the property during her lifetime. From all the conversations and conduct of the parties with relation to the property, it seems clear that the transfer of title was made absolute, subject, however, to the reservation of a life estate in the grantor. After the marriage of Mary Kelly and John Rey, they lived with her brother Frank at Vallejo for some time, paying him rent for their apartment. From time to time the homestead, which is involved in this appeal, was substantially improved at an expenditure of several thousand dollars. At the time of the death of Mrs. Rey the value of the property had increased to \$10,000. It was converted into a four-flat apartment house. For several years it was rented for \$65 or more a month. Mary J. Rey paid all the taxes, insurance, and cost of improvements, which expenditures she told her sister were eventually repaid by the income from the property. In making the improvements and maintaining the property during the seventeen years which elapsed between the time of the execution of the deed and the death of the grantor, she borrowed money from time to time, securing the several loans by mortgages upon this property. In 1910 she and her husband joined in a mortgage to the First Savings Bank of Vallejo to secure a loan of \$1,600. This mortgage was subsequently renewed in January, 1914, to secure the balance of \$1,400. In both of these mortgages it was recited that the property was "the separate property of Mary J. Rey." In 1917 a loan of \$2,500 from the Central Bank of Vallejo was also secured by a mortgage on the same premises. In December, 1922, Mrs. Rey was ill. She still owed the Central Bank \$400. Mr. Tarmey, the manager of this bank, testified that Mr. Rey wanted to borrow the additional sum of \$1,000. It was agreed that the respondent would advance sufficient money to pay off the obligation to the bank and also furnish Mr. Rey with the additional sum of \$1,000. It developed during the interview that Mrs. Rey was already indebted to her sister for a balance of \$500. Mr. Tarmey advised the spouses to execute a mortgage upon the same premises for the entire indebtedness amounting to \$1,900. This was done. Nothing was said about the existence of the gift deed. About the time the last loan was negotiated, and while Mrs. Rey was ill, she told her sister that Mr. Rey was worrying her about conveying the property to him, and that she was "uneasy." In reply to this, the respondent testified: "I told my sister that if it would make peace in the family, and would make Mr. Rey and her happier, I would deed it back to her. My sister said

she would not listen to anything of the sort." A reconveyance was not made.

The appellant, as the duly qualified administrator of the estate of Mary J. Rey, deceased, contends that: (1) The evidence shows a failure to deliver the deed or an intent on the part of the grantor to then pass the title to the grantee; (2) the conduct of the respondent in failing to record her deed and in permitting the grantor to continue to enjoy the use and benefits derived from the property and the mortgaging thereof estops the grantee from asserting title thereto; (3) appellant held title adversely to the grantee; and (4) the statute of limitations bars this action.

[1, 2] We are of the opinion that none of these claims is well founded. These problems are all merged in the question as to whether title was actually vested in the grantee by the deed of conveyance. While there is a conflict of testimony regarding the delivery of the deed and affecting the intent of the grantor to presently convey title to the property, the findings and judgment are amply supported by the evidence. The question regarding the intent of the grantor in executing and leaving the deed with the conveyancer and as to whether she thereby parted with all control over the instrument and then actually transferred title to the grantee are problems of fact to be determined by the court, and its solution will not be disturbed on appeal, where there is substantial evidence to support the conclusions. *Moore v. Trott*, 162 Cal. 268, 122 P. 462; *Hefner v. Sealey*, 175 Cal. 18, 164 P. 898; *Hodoian v. Garabedian*, 79 Cal. App. 762, 251 P. 227. Even though a doubt may exist as to the absolute delivery of the deed at the time when it was first left with the conveyancer, there can be no doubt of the grantor's complete surrender of all control over the instrument when, at her direction, it was subsequently sent by the conveyancer to the grantee, who thereafter retained sole and complete dominion over the document until it was recorded after the death of the grantor. The very possession of the deed by the grantee creates prima facie evidence of both an absolute delivery and intent to then vest in the grantee the title to the property therein described. *Stewart v. Silva*, 192 Cal. 405, 221 P. 191; *Hodoian v. Garabedian*, 79 Cal. App. 762, 251 P. 227; 8 R. C. L. 999, § 62; 2 *Tiffany on Real Property*, p. 1750, § 461.

[3-6] The fact that the grantor improved the property and increased its value, that she paid the taxes, insurance, and cost of improvements, and appropriated the income therefrom, may reasonably be reconciled with her declaration that she wished to reserve the use and benefit of the property during her lifetime. There is now in America no legal obstruction to the conveying of title to real property which is to be enjoyed by the gran-

tee only at the death of the grantor. Under such circumstances the grantor will be regarded as presently conveying the title subject to the reservation of a life estate therein. Section 767, Civ. Code; *Ripperdan v. Weldy*, 149 Cal. 667, 674, 87 P. 276; 1 *Tiffany on Real Property* (2d Ed.) p. 551, § 159. While oral testimony is admissible for the purpose of determining the intent with which the grantor relinquished her custody of the deed (*Williams v. Kidd*, 170 Cal. 631, 151 P. 1, Ann. Cas. 1916E, 703; *Hodoian v. Garabedian*, 79 Cal. App. 762, 769, 251 P. 227), after the delivery of the deed has been adequately shown, the grantee takes the title free from all conditions which are not expressed therein (*Mowry v. Heney*, 86 Cal. 471, 25 P. 17; *Blackledge v. McIntosh*, 85 Cal. App. 475, 483, 259 P. 770; *Weldon v. Lawrence*, 76 Cal. App. 530, 535, 245 P. 451). While it was, therefore, proper to consider the reservation by the grantor of the use and benefits derived from the property during her lifetime in order to determine whether she intended to presently pass the title to the grantee, this situation is not necessarily in conflict with the theory of an absolute conveyance of title, and is insufficient upon which to upset the findings of the court to the effect that title actually did pass to the respondent. Nor is the fact that the grantor assumed the right to subsequently mortgage this property upon several occasions inconsistent with the absolute transfer of the title. There was no legal obstacle to the grantor mortgaging her life interest. In the case of *Brandt v. Brandt*, 85 Cal. App. 720, 260 P. 342, a deed of gift which was executed and delivered in escrow was held to convey absolute title to the grantee in spite of the fact that the grantor subsequently executed five different mortgages on the property and attempted to deed it to another grantee. The circumstance most favorable to the contention of the appellant in the present case was the fact that the grantee permitted the mortgaging of this property to herself to secure her loan of \$1,900. Even this transaction is, however, not conclusive evidence of a failure to actually convey title. It is a mere circumstance to be weighed for the same purpose that the other mortgages were considered in determining the intent of the grantor in executing and delivering the deed of conveyance. The facts of this case do not conclusively establish either a failure to transfer the title on the part

of the grantor nor estoppel on the part of the grantee. There is substantial evidence to support the judgment on both of these issues.

[7] The failure to record the deed had no particular significance in the present case. An unrecorded deed is valid as between the parties and with all those who have notice thereof. *Blackledge v. McIntosh*, 85 Cal. App. 475, 483, 259 P. 770; sections 1213 and 1217, Civ. Code; *Lewis v. Brown*, 22 Cal. App. 38, 133 P. 331.

[8-10] So, likewise, the question of adverse possession is one of fact to be determined by the circumstances and conduct of the parties. Assuming that the evidence in the present case adequately supports the finding of an absolute conveyance of title to the grantee, the use or occupancy of the premises by the grantor will be deemed to have been subject to the legal title of the grantee. Section 321, Code Civ. Proc.; 2 C. J. 143, § 246; *Gernon v. Sisson*, 21 Cal. App. 123, 131 P. 85; *Wolf v. Gall*, 176 Cal. 787, 792, 169 P. 1017; 2 *Tiffany on Real Property* (2d Ed.) p. 1932, § 503. It is true that a grantor may acquire title by adverse possession pursuant to sections 1006 and 1007 of the Civil Code against his grantee in spite of a preceding deed of conveyance, where he retains hostile possession of the premises openly and notoriously asserting title thereto. *Baker v. Clark*, 128 Cal. 181, 187, 60 P. 677; *Lord v. Sawyer*, 57 Cal. 65. There is, however, no evidence in the present case to support such a claim. The grantor never asserted title to this property hostile to the grantee after her execution and delivery of the deed to her sister.

[11] It is contended that this action is barred by the provisions of section 318 of the Code of Civil Procedure on the ground that the grantee's predecessor in title was not actually "seized or possessed of the property in question, within five years before the commencement of the action." There is no merit in this claim. The evidence is without conflict to the effect that the grantor was seized and in possession of the property to the very time of her death, enjoying the benefits of the life estate which she had specifically reserved therein.

The judgment is affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

104 Cal. App. 708

PEOPLE v. WEEKS.**Cr. 19.**

District Court of Appeal, Fourth District,
California.

March 27, 1930.

1. Homicide ☞253(1)—Murder — First degree — Evidence — Sufficiency.

Evidence *held* sufficient to sustain conviction for murder in first degree.

The evidence showed that defendant fired shotgun through screen and canvas-covered opening near front door of his home, from which three guests had just departed. The defendant had quarreled with two of them, making threats against their lives, but had no enmity toward the man whom he shot.

2. Homicide ☞7 — Murder — Definition.

"Murder" is unlawful killing of human being with malice aforethought, whether express or implied.

[Ed. Note.—For other definitions of "Murder," see Words and Phrases.]

3. Homicide ☞12 — Express malice — Murder — Intent to kill.

"Express malice aforethought," as element of crime of murder, exists when there is manifested deliberate intention unlawfully to take life of human being.

[Ed. Note.—For other definitions of "Express Malice," see Words and Phrases.]

4. Homicide ☞9 — Murder — First degree — Definition.

If intent to take human life unlawfully be followed by act, whether or not appreciable time intervenes, which results in taking of human life with malice aforethought, it is "murder in first degree."

[Ed. Note.—For other definitions of "Murder in First Degree," see Words and Phrases.]

5. Homicide ☞17 — Shooting wrong person — Murder — First degree.

That defendant in discharging shotgun with intent to kill took life of person other than intended victim could not reduce crime from murder in first degree.

6. Criminal law ☞1166½(12) — Trial court's remarks — Prejudice.

In murder case, trial judge's remarks in presence of jury, respecting time to object and effect of rulings thereon, *held* not prejudicial.

7. Criminal law ☞1035(3), 1129(1) — Misconduct of judge — Review — Objection — Assignment of error.

Alleged misconduct by trial judge will not ordinarily be considered on appeal unless aggrieved party called court's attention to impropriety and assigned error.

8. Criminal law ☞1048, 1129(1) — Prejudicial error — Exception — Assignment.

Where error is so serious that prejudicial effect could not be removed by admonishing jury, exception and assignment of error are unnecessary.

9. Criminal law ☞655(5) — Delay — Conduct of judge — Accelerating trial.

Although counsel may create exasperating delays and indulge in repetitious questioning of witnesses, judge should exercise patience in endeavoring to speed up trial.

Appeal from Superior Court, Kern County; Robert B. Lambert, Judge.

Willie Weeks was convicted of murder in the first degree, and he appeals.
Affirmed.

Calvin H. Conron, Jr., of Taft, and Frederick E. Hoar, of Bakersfield, for appellant.

U. S. Webb, Atty. Gen., and John D. Richer, Deputy Atty. Gen., for the People.

MARKS, Acting P. J.

Appellant was charged with the crime of murder in the first degree, alleged to have been committed on the 5th day of October, 1929, in the county of Kern, state of California. He was charged with killing Isaac Ross, and went to trial upon his plea of not guilty. The jury returned a verdict finding him guilty as charged, and fixed his punishment at confinement for life in the state penitentiary.

The evidence offered by the people shows that defendant and his family, consisting of himself, his wife, and her brother, lived in a shack a short distance from the city of Bakersfield in Kern county. On the night of October 5, 1929, defendant, who was colored, with J. I. Fuller, Henry C. Lorendo, and another white man, were engaged in playing a game of stud poker at Weeks' residence. Shortly after midnight another party arrived at the house. It was composed of Maceo Daniels, Arthur Humphreys and his wife, Walter Brite, and a man name White. After the arrival of this party, Joe Johnson and Isaac Ross reached the house. Both of these parties were colored.

Of the first party, Daniels, Humphreys, and Brite entered Weeks' home, and the first two joined the poker game, taking the place of two of the white men. Of the second party, Ross alone entered the house.

Shortly after Daniels and Humphreys started to play poker, a controversy arose between them, and, as all of the witnesses for the people testified defendant started cursing the other two negroes, calling them vile and indecent names. Daniels tried to quiet Weeks, but, as he was unable to do so, he and Humphreys cashed in their checks and left the game. They passed into the front room of the house, Daniels going out the front door. Weeks also went into the front room and demanded that Humphreys pay him \$3 which he claims was owing him. Weeks armed himself with a shotgun and told Humphreys that, if he did not pay him the money, he would blow his head off. Humphreys pleaded for his life, and told Weeks that he did not have the money, but would get it for him. Weeks continued to curse and threaten Humphreys, who then called upon his friend Daniels for aid. Daniels re-entered the room, and Weeks turned the shotgun on him. Daniels told Weeks that he should not kill a boy for \$3, and, continuing to talk to him advanced until he was close enough to grasp the barrel of the shotgun and force the muzzle down to the floor. He and Weeks struggled for the possession of the gun, and in the struggle Weeks was shoved backwards toward the kitchen, where he grasped a butcher knife, and, drawing it back, threatened to kill Daniels with it. Humphreys ran from the room and house and was followed by Daniels and Ross. Just where Ross had been during the altercation is not entirely clear, but the three men left the room and house in the order named. Just after Ross had disappeared through the front door, Weeks fired the shotgun through a screen and canvas-covered opening in the front wall of the house and slightly to the left of the front door through which the three men had disappeared; the charge of shot from the gun striking Ross and penetrating his back, hip, and thigh, causing his death within a short time.

The evidence for the defendant presents the defense of accidental homicide. He testified that, when Daniels and Humphreys joined the poker game, they were boisterous and used vile and profane language in the hearing of his wife. He remonstrated with them, and, according to his version, Daniels made an assault upon him with a knife. Defendant armed himself with the shotgun against the murderous assault by Daniels. He and Daniels struggled for the possession of the gun, and during the struggle it was unintentionally discharged, the shots passing through the window and hitting Ross. The testimony of both Weeks and his wife, who corroborated this story told by Weeks, was rather thoroughly impeached by contradictory statements made by them the day after the homicide.

Defendant presents but two points on this appeal. He maintains that the evidence was

insufficient to justify the verdict of the jury finding the defendant guilty of murder in the first degree, and that at most it could only support a conviction of murder in the second degree. He also complains of remarks and statements of the trial judge made in the presence of the jury which he maintains constituted prejudicial error.

[1] We cannot agree with appellant that the evidence did not justify the verdict of the jury according to the testimony of the witnesses for the people and in fact, by the almost undisputed evidence in the case according to the testimony of a number of witnesses. Defendant applied the vilest of epithets to both Humphreys and Daniels, and, when they sought to retire from the imminent danger of an attack by him, he detained Humphreys at the muzzle of a loaded shotgun, with threats to blow his head off if he did not pay him \$3. When Daniels interfered and attempted to prevent the murder of his friend, Weeks armed himself with a knife, in addition to the shotgun, and attempted a murderous assault upon Daniels. Daniels and Humphreys sought escape from the attack in flight, and were followed from the house by deceased. Weeks, apparently intent upon carrying out his threats to take the life of either Humphreys or Daniels, fired through a window in the general direction that the fleeing men had taken. He did not hit his antagonists, but killed his friend.

[2-5] Murder is the unlawful killing of a human being with malice aforethought. The malice may be express or implied. It is express when there is manifested a deliberate intention to unlawfully take the life of a human being. The intent must exist in the mind of the killer, but there is no need for an appreciable length of time to elapse between the formation of the intent and the execution of the act. The act may follow the intent as rapidly as thought may pass through the mind, and, if the intent be followed by an act which results in the taking of human life with malice aforethought, it is murder in the first degree. *People v. Mendenhall*, 135 Cal. 344, 67 P. 325. In the case before us we have all the elements of this crime. The malice was express, also the intent to take life, and because the defendant, in carrying out his threats and his felonious intent, took the life of his friend rather than the life of his supposed enemy, cannot excuse his act or reduce the degree of his crime.

[6] Appellant complains of remarks of the trial judge in the presence and hearing of the jury. The only such remarks to which an objection was noted by him occurred during the following colloquy:

"Mr. Bailey: I will call your attention—

"Mr. Hoar (interrupting): Now, Your Honor, at this time we object to any reference to any diagram to be shown this witness

on the ground that the proper foundation has not been laid, and possibly I can ask that witness one question that will lay the foundation.

"Mr. Hoar: Q. You were not present at the time the homicide was committed were you, were you? A. No sir.

"Q. And you made your diagram just a little over a week ago? A. Last Saturday.

"Q. Are you able to state to the court of your own knowledge that the house was in the same condition last Saturday as it was the time the homicide was committed?

"Mr. Bailey: I didn't ask the witness to produce anything yet.

"The Court: No, this is not the time to make any objection. In the first place whether this is in the same condition or whether it is not; I assume the highway is still out there that was there and things like that; he has made a chart; if it is not correct you can show that it is not, but don't start objecting so early.

"Mr. Hoar: Now if your Honor please, I take exception to your Honor's remarks, the law gives us a right to object whenever we want to.

"The Court: Well, I have overruled the objection.

"Mr. Hoar: That is all right.

"The Court: You can just get out of the habit of arguing with me every time I make a ruling, because my ruling is binding on everybody, and we are not going to take up a lot of time arguing about these matters. When we come to a question where there is a vital question asked, then we will have a ruling on it; he has made a map here, and if it is not right you have a chance to show that it is not right.

"Mr. Hoar: I thought Your Honor did make the statement that we were not to make objections so early."

We do not believe that these remarks were sufficient to prejudice the case of appellant before the jury.

[7, 8] It is the well-settled law in this state that the claim of misconduct on the part of the trial judge, under ordinary conditions, will not be considered on appeal, unless the party relying on the alleged misconduct promptly called the attention of the court to

the purported impropriety and assigned misconduct thereon. This is to give the judge an opportunity to correct the error, if any, and prevent any prejudice resulting therefrom by promptly instructing the jury to disregard the statements made. *People v. MacDonald*, 167 Cal. 545, 140 P. 256. It is also the rule that, where the error of the court was so serious that no successful effort could be made to remove its prejudicial effect, an exception and assignment of the remarks as error would not be necessary. *People v. Mahoney*, 201 Cal. 618, 258 P. 607.

[9] The record before us shows that things were said during the trial which might have been omitted. *People v. Osborn*, 12 Cal. App. 148, 106 P. 891. Most of them occurred during the court's numerous efforts to speed up the trial, which was unduly protracted by counsel for appellant. In their cross-examination of witnesses, they repeatedly went over the same ground, until, instead of making progress with the case, they were only marking time. Under such trying circumstances a trial judge should extend his patience to the limit in presiding at the trial. After reading the entire record of the long trial, we are satisfied that remarks of the trial judge did not result either in prejudice to the defendant or in a miscarriage of justice. The evidence showed that the defendant was guilty of murder in the first degree. The verdict was the most favorable to him that could be expected. The jury did not exact the extreme penalty for the crime which it might have done under all of the circumstances of the case. When measured by the final results, as disclosed by the verdict, the defendant was not prejudiced by any action of either the court or counsel during the trial.

The defendant having failed to assign the remarks of the trial court as error, and these remarks not having been of such a nature that their prejudicial effect, if any, could not have been cured by prompt instructions to the jury to disregard them, we must follow the well-settled rule that we will not review them here. *People v. MacDonald*, supra; *People v. Marsiglia*, 52 Cal. App. 385, 198 P. 1007; *People v. Walker*, 15 Cal. App. 400, 114 P. 1009.

Judgment affirmed.

We concur: BARNARD, J.; STROTHER, Justice pro tem.

209 Cal. 231

McDONALD v. SMOKE CREEK LIVE STOCK CO. et al.

Sac. 4233.

Supreme Court of California.

March 29, 1930.

1. Mortgages ⇨333 — Trust Indenture — Default — Dual remedies — Effect — Equitable mortgage.

That trust indenture authorized upon default trustee's sale or foreclosure action did not render instrument equitable mortgage requiring statutory foreclosure (Code Civ. Proc. § 726 et seq.)

2. Mortgages ⇨337 — Trust Indenture — Foreclosure action — Trustee's sale.

That action was commenced and still pending to foreclose trust indenture did not prevent subsequent trustee's sale authorized by instrument.

3. Judgment ⇨570(12) — Dismissal — Want of prosecution — Effect.

Dismissal for no prosecution of action to foreclose trust indenture was not judgment on merits binding plaintiff.

4. Judgment ⇨682(3) — Former judgment — Res judicata.

Judgment not appealed from, authorizing trustee of trust indenture to sell property acquired by defendants sued to quiet title, *held* res judicata of rights of plaintiff claiming through subsequent conveyance from debtor.

5. Judgment ⇨829(3) — Former judgment — Res judicata.

Judgment in federal courts, wherein certiorari was denied by Supreme Court, deciding predecessors in interest of plaintiffs suing to quiet title had no title to land, *held* res judicata.

In Bank.

Appeal from Superior Court, Lassen County; H. D. Burroughs, Judge.

Action to quiet title by H. A. McDonald against the Smoke Creek Live Stock Company and others. From an adverse judgment, the plaintiff appeals.

Affirmed.

W. T. Plunkett, of San Francisco (H. C. Symonds, of San Francisco, of counsel), for appellant.

Hawkins, Mayotte & Hawkins and Prince A. Hawkins, all of Reno, Nev., for respondents Smoke Creek Live Stock Co. and Madeline Water Co.

McCutchen, Olney, Mannon & Greene and John F. Cassell, all of San Francisco, for re-

spondents Old Colony Trust Co. and First Nat. Bank of Boston.

Thatcher & Woodburn, of Reno, Nev., for respondent Reno Nat. Bank.

RICHARDS, J.

This action was instituted by the plaintiff for the purpose of having his title quieted as against the defendants to a certain large tract of land, embracing about 12,000 acres, lying and being in the county of Lassen, and also as to certain water rights and contractual rights having their origin in certain uses made of the waters which have their source in a large lake upon said land, and which water and contract rights are embraced in a property known as the Madeline Irrigation Project. The plaintiff alleges that the defendants claim to have some right or title in or to or some lien upon said lands and properties, but which claim of right or title has no foundation in law or fact. The defendants appeared in said action, and by their several answers not only denied any right or title in or to said lands and properties, or any portion thereof, to be in the plaintiff, but also set forth their and each of their respective ownership or interest in said properties and in the whole thereof. The cause came to trial upon the issues as thus framed before the court sitting without a jury and resulted in a judgment in favor of the defendants and each of them, based upon a finding of the trial court that the plaintiff had no right, title, or interest in said premises or any portion thereof, and that the defendants had both record title and title by adverse possession in and to their respectively asserted interests in said properties. This is an appeal from such judgment.

The plaintiff and defendants each claim title from a common source. On and prior to November 1, 1910, the foregoing properties were owned by a corporation known as Madeline Meadows Land & Irrigation Company, which corporation on said last-named date borrowed from Farwell Trust Company of Chicago, Ill., the sum of \$250,000, evidenced by certain interest-bearing promissory notes, to secure which it executed and delivered a certain instrument in the form of a trust indenture to the Mercantile Trust Company, a California corporation, as trustee, for its aforesaid creditor, Farwell Trust Company. The Madeline Meadows Land & Irrigation Company having later defaulted in certain payments of principal and interest falling due upon said promissory notes, the properties covered by said instrument were attempted to be sold under the trust provisions thereof, and were by such trustee transferred to the purchaser at said sale, who by certain mesne conveyances transferred certain portions of said properties to the defendants herein, who now claim to own and hold the

same by virtue of the title thereto thus acquired. The plaintiff's asserted claim of title to said property is based upon a conveyance executed on January 3, 1918, by Madeline Meadows Land & Irrigation Company to W. K. Ephraim and wife, and by a subsequent conveyance thereof made by the latter grantees to plaintiff on June 20, 1925.

The primary and in fact the controlling contention made by the plaintiff upon the trial of this action and urged as his chief ground of reversal upon this appeal is that the aforesaid instrument executed by the Madeline Meadows Land & Irrigation Company as security for its indebtedness to the Farwell Trust Company, and which forms the foundation of the defendants' claim of title to the lands and properties involved in this action, was not in law or fact such an instrument that the trustee named therein was entitled to claim to be a trust deed so as to justify the foreclosure thereof by means of the trustee's sale undertaken to be made by said trustee, by means of which the defendants allege themselves to have become respectively the owners of the entire title of, in, and to said properties and the whole thereof. The instrument in question was dated November 1, 1910, and, after reciting the execution of certain promissory notes made and executed of even date therewith evidencing the then existing indebtedness of Madeline Meadows Land & Irrigation Company to Farwell Trust Company, in an amount aggregating the said promissory notes, proceeds to set forth that the Madeline Meadows Land & Irrigation Company for the purpose of securing the payment of the principal and interest to become due upon said promissory notes "does hereby grant, bargain, sell, assign and transfer unto said party of the second part [Mercantile Trust Company], its successors and assigns forever, as trustee of the trust herein and hereby created and declared, all and singular the property, both real and personal, which is hereinafter particularly described [describing it] * * * to have and to hold all and singular the property herein granted or intended to be granted, and every part and parcel thereof, with the appurtenances thereunto belonging, unto said trustee, its successors and assigns forever, for the purpose of securing the payment of both the principal and interest to grow due upon the said promissory notes unto the owners and holders thereof without any preference or priority of any note over any other note, and for the purpose of securing the performance of the covenants and promises of the party of the first part herein contained, in accordance with the terms and provisions of said promissory notes and of this indenture, upon trust to sell as an entirety or in parcels as it may elect, free and clear of any right of redemption on the part of the party of the first part and its successors and assigns all and singular the property then subject to the charge of this

indenture, and to apply and dispose of the proceeds as hereinafter provided, if and only if default shall be made by the party of the first part in the payment of either the principal or interest to grow due upon any of said promissory notes." The instrument further proceeds to set forth the terms and conditions attending said sale and form and content of the notices to be given, as preliminary thereto by said trustee. The instrument further provides that "whenever conditions shall occur which shall give rise to the right or duty upon the part of the trustee to exercise the power of sale hereinbefore conferred upon it, then the trustee may forthwith proceed to protect and enforce the rights of the holders of said promissory notes under this indenture by commencing and prosecuting in any court of competent jurisdiction a suit or suits in equity or at law for the foreclosure of this indenture, or for the purpose of obtaining the aid and direction of such court in the execution of the trusts hereby created and the powers hereby granted, or for the purpose of obtaining any other appropriate legal or equitable remedy, * * * No remedy herein provided for the benefit of the holders of said promissory notes is intended to be exclusive of any other remedy, but every such remedy shall be deemed to be in addition to any other remedy given hereunder, or now or hereafter provided by law, and may be availed of by the trustee from time to time as often as the latter deem expedient. No failure or omission on the part of the trustee, or of any holder of any of said promissory notes, to exercise any right or power hereby conferred, shall impair any such right or power, or shall be construed a waiver of the right to exercise the same."

It is the contention of the appellant that the foregoing instrument, by virtue of the dual nature of the remedies provided therein for the enforcement thereof, as well as by the nature of the properties, real and personal, to which its descriptions related, was such an instrument as could not be construed to possess the characteristics of a deed of trust so as to entitle the trustee to undertake to carry into effect a foreclosure thereof in the form and manner which gave rise to the title which the defendants now claim to own and hold respectively in said properties; but that such an instrument was and is in legal effect none other than an equitable mortgage, requiring foreclosure proceedings in an appropriate action, and which proceedings, though commenced by said trustee, never having been consummated, the defendants have no right, title, or interest in said properties or any portion thereof. In support of this contention, the appellant upon the trial of this action undertook to show, and in fact did show, that in the year 1913 the Madeline Meadows Land & Irrigation Company being in default of its payments upon the principal and interest of said promissory notes, the

Mercantile Trust Company commenced an action for the foreclosure of said instrument in the superior court in and for the county of Lassen. On November 13, 1914, the defendants in that action filed their answer and cross-complaint. Said action was not brought to trial within five years thereafter, and was for that reason, on February 21, 1920, dismissed upon motion of the defendant Madeline Meadows Land & Irrigation Company, for want of prosecution. The record herein further discloses, however, that on September 24, 1917, after due notices given thereof and while said foreclosure suit was still pending, the Mercantile Trust Company as trustee, under the terms of said instrument and pursuant thereto, proceeded to hold and conduct a trustee's sale of the properties described therein, at which sale R. M. Sims and Paul McDonald were the bidders for and the purchasers of said properties, and to whom as such purchasers and on September 25, 1917, the Mercantile Trust Company made and executed its deed to the whole of said properties under and pursuant to the terms and conditions of said instrument and of such sale, and that the aforesaid Sims and McDonald have by mesne conveyances transferred unto the defendants herein all of the right, title, and interest respectively which they and each of them acquired by virtue of such sale.

[1-3] As to the foregoing contention of the appellant to the effect that the instrument in question amounted to nothing more than an equitable mortgage, requiring foreclosure in the ordinary course of a legal proceeding, we are of the opinion that this contention has no merit. This court at an early date decided that, notwithstanding the statutory proceeding embodied in section 726 et seq. of the Code of Civil Procedure, providing for the foreclosure of mortgages, there was nothing therein which prevented the making and execution of trust deeds as security for obligations, by the terms of which the creditor or his trustee might be empowered to sell the premises therein described upon default in the payment of the debt secured thereby, and that, upon the conduct of a sale in accordance with the terms of the power thus conferred, the title to the premises granted by way of security in that form passed to the purchaser upon the execution of a deed by such trustee. *Grant v. Burr*, 54 Cal. 298; *Bateman v. Burr*, 57 Cal. 480; *Bell Silver, etc., Mining Co. v. First National Bank*, 156 U. S. 470, 15 S. Ct. 440, 443, 39 L. Ed. 497. The law affecting the validity of trust deeds, having been thus early established, has continued to be the law of this state with relation to that form of security, and many thousands of trust deeds have been executed and enforced and the title to innumerable pieces and vast areas of property passed thereunder; and it has been long customary in the form and content of such trust deeds to provide for the foreclo-

sure thereof either by an action of foreclosure in the courts or by a trustee's sale, at the option of the trustee or beneficiary thereunder. In the case of *Bell Silver, etc., Mining Co. v. First National Bank*, supra, it was decided by the Supreme Court of the United States, Mr. Justice Field writing the opinion, that "the power of sale in the indenture, whether we call it a deed of trust or a mortgage, does not change its character as an instrument for the security of the indebtedness designated, but it is an additional authority to the grantee or mortgagee, and, if he does not choose to foreclose the mortgage by any of the ordinary methods provided by law, he can proceed under the power added for the sale of the property to obtain payment of the indebtedness. The insertion of a power of sale does not affect the mortgagor's right to redeem so long as the power remains unexecuted and the mortgage is not, as it may be, foreclosed in the ordinary manner, but when a sale is made of the interest of the mortgagor his right is wholly divested, embracing his equity of redemption." It follows from the well-established law as set forth in the foregoing decisions and from long-established custom in conformity therewith that the fact that the instrument here in question invests the creditor or his trustee with the dual forms of remedy provided therein does not render such instrument subject to the appellant's contention that it amounts to no more than an equitable mortgage, requiring foreclosure in the form of an action provided for in section 726 et seq. of the Code of Civil Procedure.

The appellant, however, makes the further contention that the creditor or his trustee having, as above stated, commenced an action for the foreclosure of said instrument in the courts of law, an election to pursue that form of remedy had thus been made, which prevented the creditor or his trustee from thereafter undertaking to foreclose the instrument through the form and procedure of a trustee's sale. We are constrained to hold that this contention is also without merit, in view of the decision of this court in the case of *Mayhall v. Eppinger*, 137 Cal. 5, 69 P. 489, 490, wherein this court not only upheld the validity of a trust deed containing the foregoing dual provisions, but further upheld the rights of the creditor or his trustee to conduct a trustee's sale, even though he had previously commenced a foreclosure action which was still pending and undetermined. In discussing this situation, the court said: "It is quite probable that Eppinger discovered after he had filed his complaint that he had misconceived the meaning of the deed and his rights under it, and thereupon concluded to go no further with his action, but proceed, rather, to sell as trustee under his deed. This we think he could do without having first dismissed the action, and his proceeding to act as trustee is an acceptance of

the trust." The fact that the trustee under the instrument here in question undertook the foreclosure of said instrument through the form and conduct of the trustee's sale, upon which the title of the respondents to the several properties affected by the instrument is founded, while the action theretofore instituted in the courts for the foreclosure of the instrument was pending, brings the instant case directly within the holding of this court in *Mayhall v. Eppinger*, supra; and the further fact that said legal action was subsequently dismissed for want of prosecution in accordance with the statutory provisions providing for and requiring such dismissal cannot be held to have given the appellant any further right in the premises, since it is well settled that the dismissal of action for that cause in the manner which the statute provides does not amount to a judgment upon the merits by which the plaintiff in such action is bound.

[4] It follows from the foregoing considerations that the trial court was correct in its findings of fact and conclusions of law and in the decree based thereon, determining that the plaintiff, by virtue of the conveyance to him of said premises, having for its foundation the series of conveyances following the deed made on January 3, 1918, by Madeline Meadows Land & Irrigation Company to W. K. Ephraim and wife, obtained no title to the premises and properties in question, and was hence entitled to no relief in this action. It would seem to be sufficient to rest the decision of this cause upon this conclusion. But there have been certain other proceedings heretofore undertaken by the parties to this immediate controversy or their forbears, in various other tribunals, which it would seem should be referred to as enforcing our foregoing conclusions. In the year 1914, when the Mercantile Trust Company of San Francisco was threatening to institute a proceeding for the foreclosure of the foregoing trust instrument through a trustee's sale thereunder, the Madeline Meadows Land & Irrigation Company commenced an action in the superior court in and for the county of Lassen against the Mercantile Trust Company of San Francisco and Farwell Trust Company of Chicago et al., to enjoin said defendants from selling or attempting to sell the aforesaid lands and properties of the Madeline Meadows Land & Irrigation Company, or any portion thereof, under the provisions of said deed of trust as threatened by said defendants. This action, after the appearances of the defendants named therein in the form of answers fully setting forth the rights of them and each of them to proceed to sell said properties under the power contained in said trust instrument, came to trial before said court, with the result that on December 8, 1914, a judgment was duly entered therein, declaring and decreeing "that the Mercantile Trust Company of

San Francisco is entitled to proceed under the power contained in the trust deed already alleged and set forth in the plaintiff's complaint to sell, and sell, the property therein described and referred to, in accordance with said trust deed," and that the plaintiff take nothing by said action. This judgment, not having been appealed from, in due course became final, and must be held to have been *res judicata* as to the issue thus directly decided therein, and, being thus binding upon the plaintiff in said action, must also be held to have been binding upon the plaintiff herein holding, as he does, by mesne conveyances from the Madeline Meadows Land & Irrigation Company made subsequent to said decision.

[5] It further appears herein that on July 12, 1919, W. K. Ephraim and A. F. Ephraim, his wife, the immediate grantees from the Madeline Meadows Land & Irrigation Company, as above set forth, commenced an action in the federal District Court for the Northern District of California against the Madeline Water Company, one of the defendants in the present action, and also against the Nevada & California Land & Live Stock Company, the predecessor in interest of the main defendant herein, Smoke Creek Live Stock Company, the purpose of which was to quiet the title of the plaintiffs in that federal action to the properties involved herein. Said action came before said court upon the direct issue as to the right of the plaintiffs therein by virtue of their conveyance from the Madeline Meadows Land & Irrigation Company to maintain the same, and was decided upon that issue after a trial upon the merits before Judge Rudkin, who on November 13, 1920, made and entered a decree expressly adjudicating that the plaintiffs in said action had no title to the properties involved therein and which were the same properties as those involved in the present action. The plaintiffs in that action appealed to the Circuit Court of Appeals for the Ninth Federal District, which court on August 7, 1922, affirmed the decree of the District Court, Judge Gilbert writing the opinion, concurred in by Justices Ross and Hunt, wherein that court decided not only that the decision of the superior court above referred to was *res judicata* as to its interpretation of the trust deed in question, but that the judgment of dismissal of the foreclosure action above referred to "is in no sense *res judicata* of any question involved herein." *Ephraim et ux. v. Nevada & California Land & Live Stock Co. et al.*, 282 F. 610, 612. A writ of certiorari sought by the plaintiffs to the Supreme Court of the United States was denied by that tribunal on January 8, 1923, 260 U. S. 748, 43 S. Ct. 248, 67 L. Ed. 494. It would seem also that this action on the part of the predecessors in interest of the plaintiff herein, which thus became a finality, was also *res judicata* as to the

rights and interests of the plaintiff in the present action to the properties involved in both.

We might go further in this decision to determine the other issues presented upon this appeal and which relate to the finding of the trial court in favor of the respondents upon the issue of adverse possession; but, since the determination of that question involves a review of the evidence presented thereon before the trial court, we do not deem it necessary to pass upon such issue, in view of the fact that the questions already herein considered are fully and finally determinative of the rights of the parties to this appeal.

The judgment is affirmed.

We concur: WASTE, C. J.; SHENK, J.; SEAWELL, J.; PRESTON, J.; CURTIS, J.; LANGDON, J.

209 Cal. 199

PEOPLE v. LOWE.

Cr. 3261.

Supreme Court of California.

March 28, 1930.

1. Indictment and information $\S$ 159(2) — Sufficiency of indictment — Amendment.

Indictment stating sufficiently, but imperfectly, matter indicating commission of crime charged, *held* susceptible of amendment upon district attorney's motion under Code (Pen. Code, $\S$ 1008).

2. Criminal law $\S$ 308 — Conduct of accused — Interpretation.

Whenever reasonably possible, acts and conduct of accused are to be given innocent interpretation.

3. Criminal law $\S$ 427(5) — Guilt — Sufficiency of evidence — Admitting coconspirator's confession.

Evidence of defendant's guilt of presenting false claim to insurer for robbery *held* insufficient to authorize admission of alleged coconspirator's confession implicating defendant in robbery (Pen. Code, $\S$ 549; Code Civ. Proc. $\S$ 1870, subd. 6).

In Bank.

Appeal from Superior Court, Los Angeles County; William T. Aggeler, Judge.

Ollie Lowe was convicted of a violation of the Penal Code, $\S$ 549, and she appeals.

Reversed.

W. Joseph Ford, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., L. G. Campbell, Deputy Atty. Gen., and Buron Fitts, Dist.

Atty., and A. H. Van Cott, Deputy Dist. Atty., both of Los Angeles, for the People.

RICHARDS, J.

On September 13, 1928, the grand jury of the county of Los Angeles presented to the superior court thereof an indictment wherein Evan B. Seitz and Ollie Lowe were jointly charged with the commission of several crimes as set forth in the five separate counts of said indictment. The several crimes of which the defendants were thus accused embraced that of robbery and also of attempted robbery of several persons occurring at the same time as set forth in the first three counts of the indictment, and also of the crime consisting in the violation of section 548 of the Penal Code of the state of California as set forth in count 4 of the indictment, and of the further crime consisting in the violation of section 549 of the Penal Code of the state of California as set forth in the 5th count of the indictment. The defendants, when arrested upon the warrants issued pursuant to said indictment, appeared separately with demurrers thereto, and the defendant Ollie Lowe separately moved to set aside the indictment, and particularly count 4 thereof as subsequently amended upon motion of the district attorney. The demurrers were overruled and the motion of the defendant Ollie Lowe to set aside the indictment as amended was denied, and thereafter she was separately brought to trial upon the amended indictment, and was thereupon acquitted of the offenses of robbery and attempted robbery as set forth in the earlier counts of said indictment, but was found guilty of the offense charged in the fourth count thereof, which consisted of the alleged violation of section 549 of the Penal Code. A motion for a new trial having been made by the defendant Ollie Lowe and denied, she took her appeal from the judgment of conviction based upon said verdict and from the order denying her motion for a new trial. Her appeal was taken to the District Court of Appeal in and for the Second Appellate District, Division 2, wherein said judgment was reversed. A petition for hearing in this court made on behalf of the Attorney General was granted and the cause has been submitted to this court for decision.

The primary and undisputed facts which formed the basis of the several counts contained in the indictment of these defendants by the grand jury were these: On the afternoon of the 12th of April, 1927, the defendant Ollie Lowe, with a friend of hers named Mrs. Brown, was visiting at the home of a friend of the former, named Mrs. Cummins, together with several other women who had also met at the same place. Mrs. Lowe had brought liquor and was engaged in making concoctions thereof for the party when the doorbell rang and two men appeared, claiming to be federal

officers, who had reason, as they stated, to believe that illicit liquor was on the premises. The leader and spokesman of the pair was one Schaeffer, who, as it later appeared at the trial, was a man of many aliases and the possessor of a long criminal record, and who among his associates in the criminal world was known as the "Iron Duke." The two men when thus admitted upon the former pretense proceeded to despoil the women present of their jewelry and also to possess themselves of certain money belonging to Mrs. Cummins, after which they departed with their loot. Suspicion having been directed against said Schaeffer and his companion and also against said Evan B. Seitz for his alleged participation in the conspiracy which led up to the commission of these several crimes, these two men were on or about April 27, 1927, subjected to arrest upon a railroad train which they had boarded separately and upon which they were apparently proceeding toward San Francisco for the purpose of disposing of the jewelry which had been taken from the several women at the aforesaid place and time, and a considerable portion of which was found to be in their possession at the time of their arrest. The "Iron Duke" when thus arrested and incarcerated presently made a confession to the officers of the law as to the part which he had played in the conception and commission of said several crimes, and in which confession he implicated both the defendant Seitz and the appellant herein, Ollie Lowe, in forming and carrying into effect the conspiracy to commit and the commission of said crimes. It was upon receipt of this confession that the indictment by the grand jury followed. Upon the separate trial of defendant Lowe, held after her demurrer had been overruled and her motion to dismiss the indictment against her, particularly as to count 4 thereof as amended, had been denied, and after a jury for the purposes of said trial had been sworn, the prosecution undertook to offer in evidence the confession of the "Iron Duke"; but upon the objection that no proper foundation had been laid for its introduction, and that the same was therefore inadmissible under the provisions of section 1870, subdivision 6, of the Code of Civil Procedure, having relation to proof of a conspiracy, the witness was withdrawn and the prosecution proceeded with the introduction of evidence which it was claimed upon said trial, and is insisted here, sufficiently laid the foundation for the admission of the confession of the "Iron Duke," and having proceeded with the introduction of such evidence the prosecution again offered in evidence said confession; whereupon the same objection was made to its introduction, but which objection was by the trial court overruled; whereupon said confession being admitted in evidence fully and directly connected said Seitz with the conception of the plan to despoil the women guests of Mrs. Cummins of their jewelry;

and, if the statements of Seitz made to the "Iron Duke" during the preliminary stages of the conspiracy as to the connection already established between Seitz and Mrs. Lowe and as to the part which each of these was to play in the carrying into effect of the aforesaid criminal design were believed, also fully and directly implicated Mrs. Lowe in the formation and carrying out of the details of the conspiracy. It was doubtless upon the circumstantial confession of the "Iron Duke" that the jury found no difficulty in convicting the defendant and appellant herein of the violation of section 549 of the Penal Code and of the commission of the acts set forth in count 4 of the indictment.

Upon this appeal the defendant Lowe makes two main contentions, the first of which is that the trial court was in error in permitting the amendment of count 4 of the indictment after the presentation thereof and at the instance of the district attorney; and the second is that the evidence was insufficient under the provisions of section 1870, subdivision 6, of the Code of Civil Procedure, as forming a foundation for the admission in evidence of the confession of the "Iron Duke."

[1] As to the first of these two contentions, we are not disposed to spend much time or space in its consideration, for the reason that upon an examination of the indictment in its original form we are satisfied that there was stated therein matter which sufficiently, but perhaps imperfectly, indicated the commission of the particular crime intended to be covered by the terms of section 549 of the Penal Code, and that this being so the indictment as to that count thereof was susceptible of amendment upon motion of the district attorney under the provisions of section 1008 of the Penal Code, and under the authority of *Chrisman v. Superior Court*, 59 Cal. App. 305, 210 P. 632, and of *People v. Thal*, 61 Cal. App. 48, 214 P. 296.

[2, 3] This leaves for our consideration the second and most vital contention urged by the appellant upon this appeal, and in the course of such consideration such a review of the evidence offered by the prosecution as, independently of the confession of the "Iron Duke," would satisfy the aforesaid statute requiring a sufficiency of proof of a guilty connection on the part of the defendant Ollie Lowe with the conception and carrying forward of the alleged conspiracy to justify the admission in evidence of said confession. We have given to the record herein embracing such evidence a most careful perusal, and as a result of such examination we are fully satisfied that the evidence educed by the prosecution for the purpose of laying the proper foundation for the introduction of the testimony of the "Iron Duke," in so far as the same related to the complicity of Mrs. Lowe in the undoubted conspiracy between himself and Seitz to commit the several crimes enu-

merated in the indictment herein, was entirely insufficient to form the foundation for the admission as against her of the testimony of the "Iron Duke." We shall not review that evidence in detail further than to state its content in brief, showing that Mrs. Lowe was at the time of the commission of said offenses a married woman who had for a considerable period of years resided in or in the vicinity of the city of Los Angeles; that upon the trial of this action she was not content to rest her reputation for truth, honesty, and integrity upon the presumption with which the law, at the inception of a trial, enfolds a person charged with crime, but offered in evidence the affirmative testimony of a considerable number of witnesses who had known her for many years, and who testified that her reputation in the communities wherein she had resided for truth, honesty, and integrity was good; to which testimony the prosecution offered no rebuttal; that at the time of these alleged offenses she was the owner in her own right of properties in the form of real estate in and about the city of Los Angeles of the aggregate value of several hundred thousand dollars, upon which the incumbrances were comparatively inconsequential; and that her husband was also the owner of an orange orchard in Tulare county, Cal., consisting approximately of a hundred acres of the estimated value of \$100,000, and in which she had the community interest of a married woman; that she was also the owner of a considerable quantity of valuable jewelry which she was wont to wear, and which was insured at the valuation placed upon it by the appraisal of the insurer, but which consisted of a number of individual pieces which she had received as gifts or had possessed for a number of years, and which had, by reason of these facts, a sentimental value to her much in excess of their appraised valuation; that her only acquaintance with her codefendant Seitz had arisen out of the fact that for a time several years before, he was a tenant of hers in an apartment house of which she was the owner; that the latter was a bootlegger who had occasionally, up to a year before the commission of the robberies in question, sold her liquor. The only connection between herself and Seitz at any near time prior to the commission of the offenses in question was that furnished by the testimony of the "Iron Duke" and which rested wholly upon the hearsay statements of Seitz himself. There is not a particle of evidence to be found in the record, either in or out of the confession of the "Iron Duke," that he had ever seen or known or had any direct connection with this defendant prior to the moment when he despoiled her of her jewelry in the home of Mrs. Cummins. There is no evidence whatever that the party of ladies who met at the home of Mrs. Cummins upon that fateful afternoon were brought together through any preconcert or connivance of Mrs. Lowe, with the single

exception of the fact that she and her friend Mrs. Brown had planned paying a visit to Mrs. Cummins' apartment and had persuaded the latter to remain at home for the purposes of such a visit; but that as to the other ladies who also called upon that afternoon, their coming was casual and was not the result of any prearrangement on the part of Mrs. Lowe. The fact that the latter brought to the home of Mrs. Cummins a small quantity of gin, which was being served to the ladies at the time the robberies occurred, has no possible connection with any existing conspiracy to commit said crimes; nor is the fact that Mrs. Lowe, after she had been despoiled, in common with the other ladies, of her jewelry, regarded the situation more calmly than the rest, a circumstance of any particular significance, in view of the showing that she was a rather unemotional and self-possessed woman. As to the evidence regarding Mrs. Lowe's application to the insurance company for reimbursement of her losses, and as to her willingness, at the instance of his wife, to furnish such bond as would be required for the release of Seitz upon bail following his arrest, the imputations of guilt arising therefrom are matters of the vaguest surmise. Apart from these considerations there was not in the evidence offered by the prosecution, even including that supplied by the confession of the "Iron Duke," any sufficient rational or even believable showing of an adequate motive in the defendant for engaging in a conspiracy to commit this particular series of crimes. There is no showing that her codefendant Seitz was other than a casual acquaintance, or that he occupied such a relation toward her as would enable him to exert any controlling or sinister influence over her life and conduct. The pitiful percentage which was, according to the evidence of the "Iron Duke," to constitute her share in the loot, which was to consist mainly of her own jewels, could be of no consequence to a person of her means, and even that percentage, if swelled by the recovery of her entire insurance, would not restore to her the actual, not to say sentimental, value of her lost jewelry. From every viewpoint of the evidence in this record the absence of motive is so apparent that the prosecution does not venture to argue, or even to suggest, that such motive was even remotely shown to exist. Taken all in all and viewed from the aspect that, whenever reasonably possible, they are to be given an innocent interpretation, we are constrained to hold that the acts and conduct of the defendant, relied upon by the prosecution as furnishing sufficient basis for the introduction as against her, of the testimony of the "Iron Duke," are entirely insufficient to measure up to the requirements of such proof under any reasonable application of the provisions of subdivision 6 of section 1870 of the Code of Civil Procedure. It is not necessary to amplify authorities to sustain this position.

It follows from the foregoing considerations that the trial court was in error in permitting the introduction in evidence of the confession of the "Iron Duke," in so far as the same related to any guilty connection of the defendant and appellant herein with the crimes in question in the way of being a co-conspirator with her codefendant Seitz and with the "Iron Duke" and his confederates in the commission of said offenses.

The judgment and order are reversed.

We concur: WASTE, C. J.; SEAWELL, J.; SHENK, J.; CURTIS, J.; PRESTON, J.; LANGDON, J.

104 Cal. App. 693

HENNESSEY et al. v. ROBINETT et ux.★
Civ. 6889.

District Court of Appeal, First District, Division 1, California.

March 27, 1930.

Rehearing Denied April 26, 1930. Hearing Denied by Supreme Court May 26, 1930.

1. Estoppel §118 — Encroaching building — Sufficiency of evidence.

Evidence in suit in ejectment sustained finding that plaintiffs were not estopped from objecting to encroachment of defendants' house on plaintiffs' land.

The evidence showed that plaintiffs and defendants were adjoining lot owners and that, although plaintiffs knew defendants were building an addition to their house near boundary line, plaintiffs were not aware that defendants were overlapping division line previously established and agreed upon, until more than a year after completion of defendants' house.

2. Ejectment §94 — Surveys — Accuracy — Sufficiency of evidence.

Evidence in ejectment action established that surveys of property were accurately made.

3. Adverse possession §57 — Sufficiency of evidence.

Evidence in ejectment action *held* insufficient to show defendants were in adverse possession of disputed land for more than twenty years.

The evidence showed without conflict that defendants never were in possession of the disputed strip of land of plaintiffs' adjoining lot until they commenced construction of an addition to their house in 1921, and that the action of ejectment was instituted in January, 1923.

4. Adverse possession §51 — Duration — Decrees of title — Claim to disputed strip.

Decrees of title to lots could not support defendants' claim to strip of land, where

both decrees were obtained while strip claimed was inclosed as part of plaintiffs' property (McEnerney Act).

5. Appeal and error §173(2) — Issue not raised on trial — Review.

In absence of issue and evidence on feasibility of removing defendants' structure from overlapping strip of plaintiffs' land, enforceability of judgment could not be considered on appeal.

The judgment directed that the defendants surrender the possession of plaintiffs' land on which defendants' building encroached.

6. Ejectment §93 — Requiring removal of encroachment — Damage — Evidence — Sufficiency.

Contention encroachment did not justify decree requiring defendants to remove it *held* untenable, where evidence showed loss to plaintiffs would be substantial.

Evidence was introduced to show that the loss to plaintiffs of strip of land on which defendants' building encroached would not only substantially diminish the value of plaintiffs' lot, but would also affect its salability.

Appeal from Superior Court, City and County of San Francisco; Edmund P. Mogan, Judge.

Action by Ellen Hennessey and another against Thomas Robinett and another. Judgment for plaintiffs, and defendants appeal.

Affirmed.

A. M. More, of San Francisco (E. B. Mering, of San Francisco, of counsel), for appellants.

Fabius T. Finch and Paul F. Fratessa, both of San Francisco, for respondents.

PER CURIAM.

This is an action in ejectment wherein judgment was given for plaintiffs and defendants appeal. A previous trial of the action resulted in a judgment in favor of defendants, but on appeal the judgment was reversed *Hennessey et al. v. Robinett et al.*, 198 Cal. 645, 246 P. 1043.

The essential facts established at each trial, as they are set forth in the opinion rendered on the former appeal, and as disclosed by the record on the present appeal, are substantially the same, and briefly stated, are as follows: For a number of years immediately preceding, and at the time of the commencement of the action, plaintiffs and defendants owned adjoining lots fronting on the westerly side of Eighth avenue between Moraga and Noriega streets in San Francisco. Plaintiffs' lot had a frontage of 25 feet and defendants' lot, which adjoined plaintiffs' on the south,

★For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

★Rehearing denied. Hearing denied by Supreme Court.

had a frontage of 50 feet; and both lots were 120 feet deep. During the year 1900, which was more than 20 years before the action was instituted defendants inclosed their lot with a fence. The northerly line thereof was built along what they believed was the true boundary between the two lots, but it appears that the front portion of the fence was set on their own property six to eight inches south of the division line, and the rear portion was built on plaintiffs' property approximately $1\frac{1}{4}$ inches north of the division line. Eventually the fence fell into a dilapidated condition, and in 1919 plaintiffs proposed to defendants that they replace it with a new one at their joint expense. Defendants refused to enter into such an arrangement, and thereupon plaintiffs proceeded to replace the front 60 feet thereof at their own expense. Before doing so, however, and while the old fence was being removed, defendants came upon the ground and, after considerable argument, pointed out what they stated was the true division line between the lots, and which had been theretofore established by a survey and was at that time marked by a cut in the curb. After the true boundary had been thus designated and agreed upon, plaintiffs stated to defendants that they would set that portion of the fence they were about to rebuild two inches to the north of the division line, so that it would stand entirely on their own property. Defendants told them "to go ahead," that they were entirely satisfied; and the fence was constructed accordingly. A year or two thereafter defendants built an addition to their house along said division line. It was under construction for several months, and was completed during August, 1921. About November, 1922, plaintiffs, having made arrangements to remodel their house nearest said line, were informed by the contractor that there was a shortage in the width of their lot. Thereupon they employed an engineer to check the measurements and it was definitely ascertained that defendants had built the addition to their house flush with the new fence line, thereby overlapping a strip of plaintiffs' property for a width of between $1\frac{1}{2}$ and $1\frac{5}{8}$ inches. Plaintiffs then brought this action in ejectment.

As will be observed from the decision rendered on the former appeal, at the first trial, which took place before a different judge, defendants' answers merely denied the allegations of the complaint relating to plaintiffs' title to the lot therein described, and that defendants were encroaching upon the same; and, although the trial court found that plaintiffs were the owners of the land described in the complaint, it further found " * * * that defendants had maintained a fence between the northerly boundary of defendants' land and the southerly boundary of plaintiffs' land for more than 20 years last past; and that, at all times in the com-

plaint mentioned, plaintiffs and their predecessors in interest acquiesced in the boundary line marked by said fence, as said boundary line had been established for more than 20 years last past; that during the month of September, 1921, defendants erected a dwelling house upon the parcel of land so owned by them; that at all times during the construction of said dwelling house plaintiffs saw said dwelling house being constructed, made no objection thereto, but, on the contrary consented to the erection of said dwelling house, and had a complete knowledge thereof; that said dwelling house is upon the land marked by said fence as hereinbefore set forth for a period of more than 20 years their lot to be made in response to the aforesaid past and is upon the land owned and occupied by the defendants." It was in pursuance of the foregoing findings that judgment at the first trial was entered in favor of defendants.

On appeal, the Supreme Court reversed the judgment upon the grounds that the findings above quoted were neither supported by the evidence nor responsive to any issue raised by the pleadings or the evidence. In this regard the court said: "It appears, from the evidence, beyond question that the defendants are encroaching upon the plaintiffs' land to the extent of said overlap. The finding above quoted is not responsive to any issue raised by the pleadings. All question as to the location of the old fence on an agreed boundary line was eliminated, at least so far as the front 60 feet of said fence was concerned, by the construction of the new fence. The fact that the old fence encroached on the defendants' property and established an agreed boundary line by long acquiescence might have been available to the plaintiffs as a basis for the contention that the old fence line was the division line, but they are not so contending. The removal of the old fence and the construction of the new fence entirely on the plaintiffs' land removed all controversy as to the old fence line. No issue as to the estoppel of the plaintiffs by reason of consent to the construction of the defendants' building at its present location or by failure to object thereto was raised by the pleadings, nor does it appear that such an issue was raised by the evidence. There was also no evidence that the defendants' building conforms to the line marked by the old fence."

[1] Before the action came on for trial a second time, defendants amended their answers so as to plead as a defense the facts set forth in the above-quoted finding; but on the second trial the court made a negative finding as to the facts alleged in said defense, and accordingly entered judgment in favor of plaintiffs. It would seem, therefore, that since it was adjudicated on the former appeal upon substantially the same facts, that

defendants are beyond question, encroaching upon plaintiffs' land to the extent of said overlap, the main question to be considered and determined on the present appeal is whether the evidence adduced at the second trial is legally sufficient to sustain said negative finding upon the issue of estoppel; and we are of the opinion that it is, for in this regard the record discloses testimony to show that, although plaintiffs knew defendants were building an addition to their house near said boundary line, they were not aware that defendants were overlapping the division line previously established and agreed upon, until more than a year after the completion of the structure, namely, about December, 1922, when they caused a survey of section of their contractor that there was a shortage in the width of their lot; and within a month thereafter this action in ejectment was instituted.

[2] As stated, the true boundary line was evidenced by a cut in the curb, and was pointed out on the ground and agreed to by defendants; but, in addition thereto, the correctness of said line was clearly confirmed by four separate surveys made at different times by different engineers. Three of the surveys were received at plaintiffs' request, and the fourth at the request of defendants. Defendants now challenge the accuracy of all these surveys, but after an examination of the evidence we are convinced that defendants' grounds of attack thereon are not well founded. With reference thereto, the evidence shows that the surveys were made by competent engineers, one of whom was the assistant city engineer, and he testified that the city engineer's office had made a thorough study of the property lines within that block and that the division line between plaintiffs' and defendants' lots as shown by his survey had been definitely fixed by running lines from old established monuments and taking actual measurements on the ground, and that his survey had been checked and rechecked with the official records in the city engineer's office and with the surveys previously made. Moreover, all of said surveys show beyond doubt that defendants' building overlaps plaintiffs' lot to the extent above mentioned.

[3] The answers alleged also and defendants contend that they have been in the actual and adverse possession of the disputed strip of land for more than 20 years; but it is evident from the facts above stated, as well as from the determination on the former appeal, that there is no merit whatever in this contention, because the evidence shows without conflict that defendants never were in possession of the disputed strip of land until they commenced the construction of the addition to their house in 1921, and this action was instituted in January, 1923.

[4] Evidence was also introduced on behalf of defendants to show that in 1909 plaintiffs obtained a decree of title to their lot in conformity with the terms of the McEnerney Act (St. 1906, Ex. Sess., p. 78), and that in 1918 defendants obtained a similar decree of title to their lot. It is manifest, however, that neither of those decrees can serve to support defendants' claim to the strip of land in dispute because, as will be noted, both decrees were obtained while the old fence was still standing and, therefore, said decrees could establish in the respective parties title only to such areas of land as were then inclosed and actually occupied by them; and admittedly the strip of land now in dispute, as well as an additional six or eight inches lying between the old fence line and the true boundary, were, at the time the decrees were obtained, inclosed as part of plaintiffs' and not as part of defendants' property.

[5] Besides adjudging that plaintiffs are the owners of the land described in the complaint and that defendants are encroaching thereon to the extent of said overlap, the judgment directs that defendants forthwith surrender possession thereof, "and that a writ of execution issue * * * commanding the sheriff * * * to place and maintain plaintiffs in the exclusive possession" thereof; and defendants contend that the foregoing terms of the judgment are unenforceable, because plaintiffs, in remodeling their house, constructed the southerly wall thereof within two inches of the northerly wall of defendants' house, thereby making it impossible, as defendants claim, for them to remove their structure from the overlap above mentioned. And it is further urged that in any event the encroachment is so slight that it does not warrant the equitable relief granted.

[6] The question of the feasibility of the removal of defendants' structure from the overlapping strip was not made an issue by the pleadings, nor was any evidence introduced upon that subject; and, in opposition to defendants' contention, plaintiffs assert that such removal is clearly practicable. We are of the opinion that in the absence of such issue and evidence the question of the enforceability of the judgment is not a matter which can be properly considered or determined on this appeal. And in answer to the remaining point urged, it may be stated that evidence was introduced to show that the loss to plaintiffs of the strip of land in question will not only substantially diminish the value of their lot, but will seriously affect its salability.

After a review of the entire record, and full consideration of the points defendants urge in support of their appeal, we are unable to find any reasonable ground for reversal. The judgment is, therefore, affirmed.

105 Cal. App. 1

PEOPLE v. LASKER. ★

Cr. 1799.

District Court of Appeal, Second District, Division 2. California.

March 31, 1930.

Rehearing Denied April 28, 1930.

1. Corporations ⇨324 — Corporate books — False entries — Evidence — Sufficiency.

Evidence *held* to support finding that entry on corporate books representing furniture and fixtures was fictitious, notwithstanding absence of testimony fixing definite value (Pen. Code, § 563).

2. Corporations ⇨324 — Corporate books — False entries — Intent — Evidence — Sufficiency.

Evidence in prosecution for making false entry on corporate books *held* to show intent to defraud, warranting conviction (Pen. Code, § 563).

3. Corporations ⇨324 — Corporate books — False entry — Evidence — Admissibility.

Admitting exhibits, in prosecution for making false entries on corporate books, showing manner in which accounts were tampered with, *held* not error (Pen. Code, § 563).

4. Witnesses ⇨268(1) — Cross-examination — Corporate books — False entries.

Excluding testimony on cross-examination of state's witness, in prosecution for making false entries on corporate books, regarding embezzlement and confiscation account, *held* not erroneous (Pen. Code, § 563).

Corporation of which defendant was officer had taken over insurance agency plant and carried account therefor on its books, and such account was one on which alleged false entry was made. Excluded testimony related to profit, if any, made from embezzlement and confiscation of insurance agency plant.

5. Corporations ⇨324 — Books of account — False entries.

Entries in books of account, if entries of actual events, cannot be termed false, no matter what may be their nature (Pen. Code, § 563).

6. Corporations ⇨324 — Corporate books — False entries — Actual transactions — Evidence — Sufficiency.

Evidence, in prosecution for making false entries, *held* to show that entries involving discount on certain note did not represent actual transaction (Pen. Code, § 563).

Appeal from Superior Court, Los Angeles County; Emmet Wilson, Judge.

A. I. Lasker was convicted of making false entries in books of a corporation, and he appeals.

Affirmed.

Dudley Robinson and C. Morton Booth, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and John L. Flynn, Deputy Atty. Gen., for the People.

WORKS, P. J.

Defendant was convicted, upon five counts, of making false entries in the books of Lasker Finance Corporation. This crime is denounced by section 563 of the Penal Code. Defendant appeals from the judgment of conviction and from the order of the trial court denying his motion for a new trial.

Appellant contends that the evidence was insufficient to support the verdict returned against him under the first count of the indictment. It was charged in this count that appellant was a director and the president of the Lasker Finance Corporation, and that as such, with intent to defraud the corporation of a certain sum, he did make, and concur in making, on a certain date, a false entry in its books, thus:

Furniture and fixtures.....	\$46,462.79
Insurance Agency plant.....	\$175,000.00

It was further alleged that these items meant, and were intended to mean, that, when they were entered, the sum of \$46,462.79 of the money of the corporation had been invested in furniture and fixtures, and that \$175,000 of its assets was represented in insurance agency plant. Then followed allegations, in appropriate form, that the items were false and that appellant knew they were false.

Appellant contends that the evidence was insufficient, for the reason that no testimony was adduced to show the value of the corporation's furniture and fixtures and insurance agency plant. Respondent admits that there is no direct evidence of the value of these assets, but insists that certain features of the evidence show that the two items were excessive and that appellant was aware of that fact. The Lasker Finance Corporation was organized for the purpose of taking over the properties of the A. I. Lasker Corporation, of which older institution appellant was the president as well as of the newer one. These two organizations will henceforth be referred to, respectively, as Finance and A. I. L. It became necessary for Finance to procure from the corporation commissioner a permit to issue to the stockholders of A. I. L. the shares of stock which, by the arrangement between the two corporations, were to go to them for the purpose of consummating the contemplated swallowing up of A. I. L. by Finance. The

item "furniture and fixtures" was carried on the books of A. I. L. at \$16,187.39, while the item "insurance agency plant" was there shown at \$75,000. According to the testimony of one Warshaw, auditor of A. I. L., he was by appellant called into the latter's office before Finance was incorporated, and took with him certain of the books and papers of A. I. L. Appellant then told him that he was intending to "organize or reorganize the corporation" and to ask the corporation commissioner "for a new issue of stock." Appellant also said that he "had intended to increase the amount of furniture and fixtures in the sum of \$30,000.00 and to increase the amount of insurance agency plant to \$175,000.00," and asked Warshaw what he thought of the idea. The auditor responded that he did not think it was proper to increase the item of furniture and fixtures, as "it was a fixed asset," and the books reflected the true cost of all the furniture and fixtures that "we had in the office," but that he saw no reason why the item of insurance agency plant should not be increased, "in so far as that being an intangible asset, * * * because who is going to determine whether our insurance agency plant is worth this much or that much?" but that "the thing that mattered most was that it would reflect an increase in the surplus account, in the statement that was going to the commissioner." To this appellant replied that he did not see why A. I. L. could not increase the value of both items "at that time." During the conversation Warshaw said to appellant, according to the former, "that in so far as the commissioner of corporations laid so much stress on earned surplus accounts that if they received this statement showing such a large increase in the earned surplus account that they may get the wrong idea as to what our actual surplus was."

On the next day after this conversation Warshaw took to appellant, at the latter's request, a paper containing various matters, among them the items of furniture and fixtures and insurance agency plant as carried on the books of A. I. L. This paper was then left with appellant, who returned it to Warshaw some three months later. It was by the latter destroyed. He testified that, when appellant returned the paper to him, the figures opposite the item "furniture and fixtures" had been canceled in pencil and an amount \$30,000 larger inserted in their place in pencil. The figures opposite the item insurance agency plant had been increased by \$100,000 by the same method. Warshaw thus testified to what occurred when appellant handed him the paper containing these pencil corrections: "He [appellant] told me that the commissioner of corporations' office had refused to take the statement that they originally sent in with their application; that statement had been marked 'Appraised,' and

that the office of the commissioner wanted an actual financial statement of the corporation instead of an appraised statement. He told me to have the stenographer typewrite this statement he returned to me showing effect to the pencil corrections." The typewritten statement was prepared as requested by appellant and was by Warshaw returned to him. Later the commissioner issued his permit to Finance. Following this Warshaw was instructed to open the books of Finance. These books showed a journal entry reflecting a transfer from A. I. L. to Finance of the two items of assets here in question, in amounts as they appear in the first count of the indictment, and a posting of the amounts to appropriate accounts in the ledger. The items were entered in the journal at the direction of appellant.

It is this chain of evidence, with other evidence cumulative of it, upon which respondent relies as a support for the verdict of guilty under the first count, but, before we may determine the contention of appellant that the evidence was insufficient, it becomes necessary to state a chronology of events. The first conversation between appellant and Warshaw occurred after September 15, 1925, but before Finance was incorporated. The next day after this conversation Warshaw gave to appellant the paper containing, among other things, the items of furniture and fixtures and insurance agency plant as carried on the books of A. I. L. On or about September 25, 1925, Finance was incorporated. In December, 1925, appellant returned to Warshaw the paper the latter had given him, but with the pencil changes concerning which Warshaw testified. The first count of the indictment charges that the two items specified in it were entered in the books of Finance on March 1, 1926. The items, as shown by the journal and ledger of Finance, bear that date.

[1] We think the evidence justified the jury in drawing the inference that the increase on the books of the amount representing furniture and fixtures in the sum of \$30,000 was fictitious, without testimony fixing a definite value for the furniture and fixtures. Warshaw testified that he said to appellant, during their first conversation, that the item of \$16,000, in round numbers, in the books of A. I. L., represented the true value of the personalty in question. The conversation as detailed by him shows no challenge by appellant of the truth of this statement, a challenge which must surely have come from him if the increase he proposed was about to be made for the reason that the books of A. I. L. showed a figure \$30,000 less than the real value of the furniture and fixtures. The jury had the right to take appellant's silence here exhibited as a circumstance proving that the increase was made for the purpose of showing on the books an inflated and excessive value for the furniture and fixtures. We

doubt whether, in the particular now under discussion, the evidence was sufficient to justify a verdict of guilt as to the increase of the amount opposite the item "insurance agency plant" from \$75,000 to \$175,000, but it is unnecessary for us so to determine. Both that item and "furniture and fixtures" are included as a single false "entry" in the first count of the indictment, and proof that either of them was false suffices to uphold the verdict on that count.

[2] The next point made by appellant is that the verdict under the first count is not supported by the evidence, for the reason that no intent to defraud was shown by the entry of the two items in the books of Finance. It is said that the harm was done, if any harm there was, by the alterations made in the books of A. I. L. With this contention we cannot agree. The jury could have determined very justly, from the evidence of the prosecution, that the deception sought to have been practiced by appellant would have been incomplete, wholly futile, in truth, but for the entry in the books of Finance. If those books had not agreed, in the matter of the items in question, with the entry in the books of A. I. L., that which the jury had the right to infer it was the purpose of appellant to conceal would at once have stood revealed. At least, if the books of Finance had spoken truth, those of A. I. L. must have been viewed with suspicion, even by the casual observer, with an immediate investigation as the necessary result. We think the evidence clearly established the fact that an improper showing upon both sets of books was necessary to even a temporary and apparent success in appellant's effort to defraud, and that under it the jury properly concluded that appellant had committed a crime in causing the two items to be entered in the accounts of Finance.

[3] At the trial appellant moved to strike out certain exhibits mentioned in the testimony of Warshaw, as above detailed, and showing the manner in which the accounts of A. I. L. were tampered with in the matter of the two raised items above mentioned by us. The motion was denied, and the ruling is assigned as error. We think it was not. The papers fitted nicely with the testimony of Warshaw to the effect that the value of the furniture and fixtures was properly shown on the books of A. I. L., before the items relating thereto were altered, and they were a necessary part of the entire story as to the general scheme to defraud to which we have already referred. In brief, they were necessary to a showing that the items as entered in the books of Finance were false. The entry in those books was false because it was but a repetition of items in the books of A. I. L. which some of the evidence clearly showed were false.

[4] The record shows the following, during the cross-examination of the witness Warshaw by appellant's counsel:

"Q. * * * Was there any profit from the embezzlement and confiscation in that insurance agency plant? A. There is a profit on embezzlement and confiscation, but that has nothing to do with the insurance agency plant.

"Q. Wasn't that carried as a part of the insurance agency plant? A. No, sir, that arises in a different way. It has nothing to do with our agencies, if I may answer that way."

Warshaw also answered a moment later that the profit shown by the embezzlement and confiscation account of A. I. L., to which he referred in the part of the record just quoted, related to insurance, but that it had "nothing to do with any agencies that we had." The counsel then asked several other questions, designed to show what the embezzlement and confiscation account "related to," how the items of the account "were carried," and other interrogations of a similar nature. Objection to all these questions was made on the ground that they were immaterial, and the objections were sustained. In making the rulings, the trial judge remarked that the questions would not be proper, unless it were first made to appear that any profits shown by the embezzlement and confiscation account came from the insurance agency plant of the company, and that it made no difference what earnings were shown by the account, unless it appeared that they came from the agency plant. Further, he observed that the desired cross-examination would be allowed whenever the missing proof was supplied. In view of the answers of Warshaw to the effect that the profit shown by the embezzlement and confiscation account had "nothing to do with the insurance agency plant," that it was not "carried as a part of the insurance agency plant," and that it had nothing to do with any agencies, we think the rulings of the court were correct. Warshaw was a witness early in the trial, and at the time he took the stand there was nothing in the record to controvert his assertion that the profits in question had nothing to do with the insurance agency plant. Appellant says: "The court erroneously took the position that when an adverse witness has given a categorical answer, that that terminates the right to cross-examine further." Appellant, of course, could have cross-examined Warshaw without stint in a reasonable endeavor to shake his statement that the profits referred to bore no relation to the insurance agency plant, but that is far from saying that he could conduct the cross-examination upon which he sought to embark. It seems patent that, if a witness swears that he was not present at the happening of a certain event, and there is nothing elsewhere in the record to show that he was present, it would be improper to allow the

cross-examiner to ask him what occurred on the alleged occasion. The imagined situation is somewhat different from the one before us, but it is enough like it to furnish an example at which to point. We think that *People v. Degnen*, 70 Cal. App. 567, 234 P. 129, and *People v. Baldwin*, 117 Cal. 244, 49 P. 186, cited by appellant, have no bearing upon the question here presented.

Appellant argues that the evidence was insufficient to support the verdict under the second, third, fourth, and fifth counts of the indictment, thus presenting a question of some complexity. The false entries charged in these counts are related to, or interwoven with, each other. The items referred to in the second count are these:

Credit Gallos Note.....	\$3,000
Charge W. H. Kemble Account.....	3,000

Those pleaded in the third count are:

Credit W. H. Kemble.....	\$3,000
Charge Pacific Service Corporation....	3,000

The fourth count relates to this item:

Accounts Receivable, Commercial	
Credit	\$3,300

These two items are specified in the fifth count:

Charge Bond Account.....	\$3,300
Credit Commercial Credit of California.....	3,300

[5] Not only does appellant insist that the prosecution introduced no evidence that these various items were false, but he contends vigorously that the evidence affirmatively shows that they represent actual transactions of Finance. It is well settled that items in books of account cannot be termed false if they are a history of actual events, no matter what may be the nature of those events. *Coffin v. U. S.*, 156 U. S. 432, 15 S. Ct. 394, 39 L. Ed. 481; *Twining v. U. S. (C. C. A.)* 141 F. 41. It therefore becomes necessary for us to scan the evidence in an endeavor to ascertain whether the entries here complained of truthfully represent actual transactions, and the labor is one of some magnitude.

The first item mentioned in the second count of the indictment relates to one Gallos, although the name is spelled Gollos in the transcript of the testimony. This individual—and all the witnesses to whom we shall refer in discussing this point were called by the prosecution—testified that he called on one Kemble concerning a loan of \$47,500, which he was desirous of procuring. Kemble introduced him to appellant, and the two told Gollos that he might have the loan if he could procure a concern called the Blue Diamond Company as an indorser on the promissory note he was to give as evidence of it. On the

next day he returned with the note, indorsed as requested. He saw Kemble and appellant, and they told him he could have the loan if he would discount the note to the extent of \$3,000 and would buy \$20,000 worth of stock. This proposition being acceptable to Gollos, appellant gave him a check of Finance for \$47,500 and Gollos, Kemble, and a representative of the Blue Diamond Company took it to a bank for deposit. The bank, however, would not receive it, and asked for a cashier's check. The check was left with the institution, and the party returned to appellant, who promised Gollos that he should have a cashier's check the next day. This promise was kept, and the cashier's check was forthwith lodged with the bank for deposit, the institution returning the check of Finance first tendered to it. Gollos then handed to Kemble a cashier's check for \$2,500 and his promissory note for \$500. Gollos testified that these two items of paper were to cover "this bonus," evidently referring to what is above called a discount on the loan for which he had asked. He also testified that he signed a contract for the purchase of \$20,000 worth of the stock which he was to buy, at the suggestion of appellant, as a condition for the making of the loan to him. Some time later, according to Gollos, he again saw appellant and Kemble, at the request of the latter, and appellant told him that the Blue Diamond Company had claimed that the payment of the \$2,500 as a bonus was a usurious transaction, and asked if Gollos were willing to have the amount applied upon the "\$20,000 purchase of stock," to which proposition Gollos assented. Gollos also said that after this understanding he issued to appellant a trust deed for \$25,000 "for the" contract, by which he had agreed to purchase \$20,000 worth of stock. He testified also that, because of the attitude said to have been assumed by the Blue Diamond Company, appellant was to give him a credit of \$3,000, that as far as he knew he was allowed that credit on the books of Finance, and that he was told by Kemble and appellant that the credit had been given him.

Kemble took the witness stand immediately after Gollos had left it. He testified that the latter had come to him for the purpose of discounting a note signed by the Blue Diamond Company and indorsed by Gollos, and not for the purpose of borrowing money; that Gollos neither applied for nor received a loan of money from appellant; that the note was discounted by the Discount Corporation of California; that Finance indorsed the paper below the indorsement of Gollos, whereupon the Discount Corporation issued its check payable to Finance, for \$47,500, and Finance made its check in the same amount, payable to the Blue Diamond Company; that this check was then taken to a bank, which held some escrow in which Gollos was interested, but the bank declined to receive it, asking for a cashier's

check in the same amount, and that Finance later supplied it; that the bank required the cashier's check because Gollos was immediately to receive some money out of the escrow and the bank would not pay against any check other than a cashier's check; that, when "this check" (the record does not show which) was taken to the bank, the party which went there consisted of Kemble, Gollos, and a representative of the Blue Diamond Company; that before Gollos received his money from the bank there was a conversation in appellant's office to the effect that Gollos was to buy a certain number of shares of the stock of Finance; that "inasmuch as the transaction was between Mr. Gollos and the Lasker Finance Company and the Discount Corporation of California, and that the discount paid by Mr. Gollos was to go in its entirety to the Discount Corporation of California, there was no consideration for the handling of that note, so it was suggested to Mr. Gollos that if he would purchase \$20,000 worth of stock in the Lasker Finance Corporation he would endeavor to have this note discounted by another finance company, which Mr. Gollos agreed to do, but stated that the only way that we could pay for it was by issuing his note in the amount of \$20,000 and to pay the note out of funds which he had coming to him within the next 30 or 60 or 90 days, I forget just the time"; that Gollos then agreed to purchase the \$20,000 worth of stock, the stock to be delivered when Gollos paid his note for that amount; that Gollos gave Kemble a check for \$2,500, which the latter delivered to the Discount Corporation; that Kemble was not present when Gollos gave any note for \$500, but that appellant told Kemble, after the giving of the \$2,500 check, that he had given Gollos a credit of \$3,000 on the note executed for the purpose of buying the stock, saying the credit was given because "there was some talk about usurious interest charge in connection with the note," and that an objection to that effect was made by the Blue Diamond Company in the form of a refusal to pay the Discount Corporation; that he (Kemble) never authorized appellant to charge his account with \$3,000 and give credit to Gollos for that amount, but that appellant "told me that he was going to hold my commission in the transaction for the \$3,000," and that he never got any commission; that it first came to his attention five or six months after the discounting of "this note" that his account on Finance's books was charged \$3,000, and that he then made objection to the charge to appellant; that thereupon appellant said that he had arranged to credit Kemble's account \$3,000, and that he (Kemble) understood that this credit had been entered.

The record also shows the following while Kemble was on the witness stand:

"[Q.] I will ask you to state what you said to Mr. Lasker when you first approached him

on the subject of charging your account \$3,000? * * * A. I asked Mr. Lasker why he had charged my account with \$3,000. * * * He stated that there was some claim made in connection with a usury charge and that he had charged my account \$3,000, and credited Mr. Gollos' account on his note \$3,000.

"Q. Did he say anything about the Discount Corporation, to whom you paid the \$2,500? A. I don't recall that he did."

The witness was then shown a statement which he had made to the district attorney, after which the record shows:

"[Q.] Now, * * * does that refresh your recollection as to what he wished to show by your charge of \$3,000? A. Yes, sir.

Q. State what it was? A. \$2,500 was the discount paid to the Discount Corporation of California; \$500 was a note given by Gollos to me, I believe it was—I am not sure of that—which the Discount Corporation also was to get that note of \$500, which they turned back to me in lieu of a commission on the transaction. So the \$2,500 and the \$500 made up the \$3,000 which was ultimately charged to my account."

Kemble further testified that he indorsed the \$500 note, turned it over to appellant, and "told him at that time that the broker who brought Mr. Gollos into the office * * * was due a commission on the transaction, and that I had been given the note to take care of those things, and turned the note over to Mr. Lasker," that appellant insisted upon having the note, and that he reminded appellant three or four times about his being charged with \$3,000 on the books of Finance.

"[Q.] What did he say to you the second time that you reminded him of that fact, that you wished to be credited or have the books straightened out in regard to your account? A. He said it would be done.

"Q. Well, it wasn't done, was it? A. Well. I don't know just when it was done. I understand it has been done."

Kemble also testified that he again called appellant's attention to the matter some days afterward, and appellant said, "I would get credit for the \$3,000." Turning to another matter, he testified, in response to a question as to how he came to meet Gollos: "I believe Mr. Lanfield came into the office, and Mr. Lasker introduced me to Mr. Gollos through Mr. Lanfield"; that after his first interview with Gollos he "told Mr. Lasker that Mr. Gollos had a note of \$47,500 which he wished to discount, and as he offered to discount it for \$3,000, and Mr. Lasker instructed me to say to Mr. Gollos that we could not handle it ourselves as a company, but we would endeavor to have it discounted elsewhere; that later appellant told him that, if Gollos would purchase \$20,000 worth of the stock of Finance,

"we would" arrange the discounting of the note; that, the Discount Company having required it, he (appellant) would guarantee the note; that appellant told him to convey this information to Gollos, and that he did so. Kemble testified on recross-examination that he was to have a commission of \$3,000 for the sale of the \$20,000 worth of stock to Gollos, but that the commission was not payable until the stock was paid for, and that it never was paid for.

The witness Warshaw testified that soon after the Gollos affair appellant told him "that he was afraid something would be started by the Blue Diamond Company regarding the Gollos original transaction due to usury and it would be best that something be done about it. The result of it was he told me to credit the Gollos contract, the Gollos note, with the amount of \$3,000 and charge that amount to W. H. Kemble," and that accordingly he (the witness) made out the journal entry to cover the matter, and it was copied in the books by a bookkeeper. Some time later, according to Warshaw, he asked appellant whether Kemble "intended to pay this amount of money," and respondent answered that he didn't think so, that "it would be charged off later," and that it was finally charged off "to an account called Commercial Credit of California"; that the concern so named "was a corporation that acted as a fiscal agency for" Finance; that there was no record of the amount ever having been paid, either by Kemble or by the corporation named; that the stock sold to Gollos was appellant's personal stock; that the note evidencing the sale was sold by appellant to Finance; and that he received a credit of \$20,500 for it. Warshaw also testified that, as Gollos never paid for the stock he had purchased, it was later sold to some one else, and the amount that had been charged to Gollos was later charged off. Warshaw further testified: "When Mr. Lasker requested that Mr. Kemble's account be credited with \$3,000 a charge had to be made somewhere for that amount and * * * it was made in a sum total of \$10,000 to the Pacific Service Corporation bond account. * * * The \$3,000 was included in this large charge of \$10,000 * * * and the explanation is [on the books]: 'To charge the Pacific Service Corporation bond account with losses sustained by Commercial Credit of California and on W. H. Kemble'; that appellant directed the entries to be made; that Pacific Service Corporation "is a corporation the entire issue of which was owned by" Finance; that the bond account of that corporation "was an account where we charged all interest charged on loans over and above 12 per cent. interest," and "if we had losses on contracts we would ultimately charge it to" that bond account; that he believed there "was some sort of an agreement" between the Pa-

cific Service Corporation and Finance whereby the former insured Finance "against loss on collection on its contracts"; that he had "seen the letter that was written in that regard"; that "this item was only one of a great number of items whereby the Pacific Service Corporation was charged by losses sustained by" Finance; and that wherever possible "all losses on all contracts" of Finance "were charged to the bond account" of the other corporation.

Warshaw also testified without objection that there was no transaction between Kemble and appellant when the former was charged with \$3,000 and none when he was given credit for that amount; that "it" was just a book entry. He testified further: "When the Pacific Service Corporation was formed they made up a form of a bond, and every time we would make a loan, and let us say the interest was \$25 and the charge was \$50, we would take in \$25 of the interest into our interest account and \$25 we would credit to the Pacific Service Corporation bond account. In time, of course, there would be an accumulation of moneys there. And if we sustained a loss on automobiles" Finance "would charge the Pacific Service Corporation bond account."

We have now concluded our examination of the more than five hundred pages of the record to which appellant directs our attention in his presentation of the point that the evidence is insufficient to support the verdict under the second, third, fourth, and fifth counts of the indictment. We have stated all the evidence directly bearing upon the question except items of it which are merely cumulative.

[6] We are satisfied that the evidence was sufficient to support the verdict under the second count of the indictment. We need not tarry to state the conclusion we have tentatively reached—nor the views which seem to sustain it—as to the truth or falsity of the item showing a credit of \$3,000 on the note of Gollos, for the reason that the testimony on that matter is complex and somewhat varied, and requires both time and space for its discussion. The necessity for the labor is obviated by the fact that there can be no dispute that the charge against Kemble in a like amount was utterly false. The entry was made upon the basis of no transaction whatever with him. This circumstance is ample to support the verdict, without reference to the status of the item showing the credit upon the Gollos note.

The question as to the sanctity of the verdict under the third, fourth, and fifth counts requires no extended treatment, and those counts may be disposed of together. The items referred to in them were all entered for the purpose of clearing up and closing out

DUNN v. FARROW et al.

Civ. 6231.

District Court of Appeal, Second District, Division 1, California.

March 24, 1930.

Appeal and error — 1011(1) — Review — Findings — Conflicting testimony — Adverse possession.

Judgment, supported by fact findings as to adverse possession on conflicting testimony sufficient to support them, will be affirmed (Code Civ. Proc. §§ 323, 325).

Appeal from Superior Court, Los Angeles County; William Hazlett, Judge.

Action by James T. Dunn against William J. Farrow and others. From a judgment for plaintiff, named defendant and certain other defendants appeal.

Affirmed.

See, also, 281 P. 506.

Charles H. Adkins, of Los Angeles, for appellants Farrow, Peairs, and Robinson.

Rupert B. Turnbull, of Los Angeles, for appellant Bates.

William T. Kendrick and Victor H. Kendrick, both of Los Angeles, for respondent.

CRAIG, Justice pro tem.

This is an appeal from a judgment in favor of respondent in an action to quiet title to certain real property. Respondent (the plaintiff) claimed title both by deed and by adverse possession. Appellants Helen T. Peairs and C. S. Bates have not filed any brief. The other appellants have presented an opening brief containing 332 pages, but nowhere therein is any point directly stated or set out for our consideration as a point presented for reversal of the judgment. No attempt has been made to comply with rule VIII of this court, which rule is, in part, as follows: "The briefs must present each point separately, under an appropriate heading, showing the nature of the question to be presented." We assume, however, that appellants have intended throughout said 332 pages to contend that the evidence is insufficient to support the findings or the judgment based on said findings, but their contentions are without specifying any particular or particulars in which the evidence is insufficient.

Respondent went into possession of the land in 1892, under a quitclaim deed executed and recorded after the execution, but before the recordation of a deed under which (by mesne conveyances) appellants claim. About 1912 appellant William J. Farrow purchased the property from the grantee of the

the chimerical Kemble transaction. As that transaction had no existence, the latter items were false entries. It may be, under the arrangement existing between Finance and Pacific Service Corporation and Commercial Credit of California, although we do not so decide, that in a sense there was a transaction behind those items. The books showed a charge against Kemble, whether just or unjust, and it was known that the item would never be paid by him. If this state of affairs, as a showing on the books, allowed mere entries under the arrangement mentioned, as a matter of bookkeeping, appellant is not protected by the cases we have cited at the inception of the treatment of these questions. As to those later entries, that is, the ones made to clear away the illicit Kemble charge, the assertion of appellant that there was no evidence to prove that the items referred to in the second, third, fourth, and fifth counts were false cannot be justified. The evidence shows, without dispute, whatever may appear merely upon the pages of the books cast up under the arrangement in question, that the items specified in the third, fourth, and fifth counts were wholly false. Kemble never owed Finance \$3,000. Therefore he was not bound to pay it. Finance lost nothing when he did not pay it. There was, therefore, of course, no loss which could be charged successively against Pacific Service Corporation and Commercial Credit of California. After a reading of the evidence, these points seem too clear for further argument.

Appellant assails certain instructions given by the trial judge to the jury. After the review of the evidence which we have presented, these questions may be treated with brevity. It is said, whether correctly or not we do not pause to consider, that some of the instructions assumed that the entries set forth in the indictment were false. If that be true, the matter is of no moment, for the jury could not possibly have found that they were not false, nor that appellant was not aware of their falsity, nor that he did not participate in making them. Considering the discussion appearing in earlier portions of this opinion, it is unnecessary to mention other minor points made against the instructions. It is to be understood that in nothing we have said do we condemn the instructions as actually given by the judge.

One or two other points are made by appellant, but they do not appear to be of sufficient merit to require a specific consideration.

Judgment and order affirmed.

We concur: CRAIG, J.; IRA F. THOMPSON, J.

deed above mentioned as having been executed before and recorded after the execution of the quitclaim deed under which respondent claims.

The testimony is conflicting, but is sufficient to support the findings of fact as made by the trial court relating to adverse possession by the plaintiff.

The findings are sufficient to support the judgment on adverse possession by the plaintiff under both sections 323 and 325 of the Code of Civil Procedure.

The judgment is affirmed.

We concur: CONREY, P. J.; HOUSER, J.

104 Cal. App. 630

**PEOPLE'S FINANCE & THRIFT CO. OF
POMONA VALLEY v. MATTHEWS
FRUIT CO. et al.**

Civ. 5864.

District Court of Appeal, Second District, Division 2, California.

March 21, 1930.

1. Payment Ⓒ21 — Check — Sufficiency.

Check does not extinguish debt in absence of agreement.

2. Bills and notes Ⓒ334 — Holder — Notice of infirmity — Time of notice.

Transferee of check who agreed to cancel payee's debt if check was paid was not holder in due course as to amount of such debt where payment of check was refused and transferee received notice of fraud (Civ. Code, § 3135).

Civ. Code, § 3135, provides transferee receiving notice of any infirmity in instrument before he has paid the full amount agreed to be paid therefor will be deemed a holder in due course only to the extent of the amount theretofore paid.

3. Bills and notes Ⓒ452(4) — Holder — Notice of infirmity — Evidence of fraud.

Evidence of fraud *held* admissible in action on check by transferee who received notice of infirmity before paying full consideration (Civ. Code, § 3135).

Appeal from Superior Court, Los Angeles County; Stanley Murray, Judge.

Action by the People's Finance & Thrift Company of Pomona Valley against the Matthews Fruit Company, and George P. Matthews and another. Judgment for plaintiff, and defendants named appeal.

Reversed.

Le Roy M. Edwards and O. C. Sattinger, both of Los Angeles, for appellants.

Nichols, Cooper & Hickson, of Pomona, for respondent.

NORTON, Justice pro tem.

This is an action to recover the amount of a check made by the appellant and delivered to the defendant Oakes, who transferred it the same day to the respondent. The defendant pleaded fraud and want of consideration as a defense to the action, and that the respondent took with notice of his equities. Oakes, the assignee of the check, was owing respondent the sum of \$805.75, which was evidenced by two promissory notes and secured by a chattel mortgage of Oakes to one Caplan and assigned to respondent. The check given by appellant was for \$1,500, and represented partial payment for the crop of oranges then growing on Oakes' ranch. The same day that Oakes received the check from appellant he transferred it to respondent. The respondent paid him the sum of \$694.25, being the difference between what Oakes then owed the respondent and the principal amount of the check, and agreed that if the check was paid by the bank upon which it was drawn respondent would cancel Oakes' debt to it. The check was duly presented to the bank, and payment was refused. Upon the same day that payment of the check was stopped, appellant notified the respondent of the fraud, and that the Stewart Fruit Company had a mortgage on the crop, and that he received no consideration for the check. At the time of the trial Oakes' note and security were still in the possession of respondent, and had not been canceled by it.

[1] The weight of authority supports the rule that where a note is taken for a pre-existing debt it does not operate as payment unless there is an express agreement to that effect, and, where there is no such agreement, the original debt is not discharged and the creditor may sue upon it. *Merchants' National Bank v. Bentel*, 166 Cal. 473, 137 P. 25; *Phoenix Ins. Co. v. Church*, 81 N. Y. 218, 37 Am. Rep. 494; *Dresser v. Mo. & Iowa Ry. Con. Co.*, 93 U. S. 92, 23 L. Ed. 815. This rule applies where a check is taken and unless it is agreed at the time the check is indorsed it shall constitute payment it does not operate as such, and the debt for which it is given is not extinguished. *Pacific Acceptance Corp. v. Goodman*, 72 Cal. App. 147, 236 P. 964.

[2] In this case, the facts disclose no such agreement between Oakes and respondents upon the transfer of the check, and the conduct of the indorsee indicates that the understanding was otherwise. The purchase price was the payment of the money received by Oakes upon the transfer to the respondent.

and the cancellation of his debt to it, which last portion of the agreement remained unperformed. Upon principle, the respondent is no different from an indorsee who has agreed to pay the consideration for a note in partial payments.

It follows from what has been said that the respondent, having received notice of infirmities in the check before the performance of the residue of his contract of purchase, was not a holder in due course as to the amount of the pre-existing debt due it from Oakes at the time it received the check involved (Civ. Code, § 3135), and the finding of the trial court to this effect is not supported by the evidence.

[3] Appellant upon the trial sought to show that the check was obtained by Oakes from it through fraud, and that it received no consideration for it. Objections to this evidence upon the ground it was immaterial were sustained. The appellant under the state of the case should have been permitted to introduce the evidence. It appeared from plaintiff's evidence that, at the time it was notified that payment of the check had been refused, it was notified by appellant that Oakes had a defective title to the check, and at that time part of the consideration had not passed from it and, as to this residue of its contract, respondent was not a holder in due course and the burden was upon appellant to show fraud in the inception of the check.

Judgment reversed.

We concur: CRAIG, Acting P. J.; IRA F. THOMPSON, J.



104 Cal. App. 662

PEOPLE v. WASHBURN.

Cr. 1909.

District Court of Appeal, Second District, Division 2, California.

March 24, 1930.

1. Witnesses ⇨372(2) — Cross-examination — Interest of witness — Bias or prejudice.

Cross-examination of defense witness preliminary to showing of interest and relation to other parties and bias or prejudice, if any, was proper.

The witness testifying in a prosecution for bribery was cross-examined relative to how long he had known the person alleged to have bribed defendant, and as to having ever visited a bathhouse run by such person, after previous testimony that such bathhouse was a blind for bootlegging business.

2. Criminal law ⇨1036(2) — Objections — Cross-examination — Availability on appeal.

Objection to cross-examination in order to be available on appeal must be urged in trial court.

3. Witnesses ⇨372(2) — Cross-examination — Acceptance of ring.

Cross-examination of defense witness in prosecution for bribery as to his having received ring from person claimed to have given bribe, was proper.

4. Witnesses ⇨363(2) — Witnesses — Cross-examination.

District attorney's cross-examination of witness for prosecution to show prejudice against district attorney's office held erroneous.

5. Criminal law ⇨369(1) — Separate offense — Evidence.

Admission in evidence of another offense in prosecution for bribery held erroneous.

Appeal from Superior Court, Los Angeles County; Emmet Wilson, Judge.

Thomas E. Washburn was convicted of bribery, and he appeals.

Reversed.

Joseph L. Fainer, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and W. R. Augustine, Deputy Atty. Gen., for the People.

THOMPSON, J.

The defendant was indicted for bribery; tried and convicted of the offense, and appeals from the judgment pronounced upon the verdict and from the order denying his motion for a new trial.

[1] The first reason assigned by the appellant for a reversal of the judgment is that the court erred in permitting certain cross-examination of a police officer. The defense endeavored to establish an alibi, and evidence was introduced to show that appellant had been working in another part of the city of Los Angeles on the evening in question; that about 11 o'clock in the evening, according to his own testimony, he made an arrest, returned to the station and dictated a report. The bribery is supposed to have occurred before midnight. When the officer was called by defense counsel he was asked to identify the report, which he did, testifying that he remembered its being dictated by the appellant. On cross-examination the witness was asked how long he had known McDonald, the person alleged to have bribed the appellant by giving him between \$600 and \$700. An objection to this question was properly overruled for the reason that it was preliminary

to a showing of the interest and relation of the witness to the other parties, and his bias or prejudice, if any. He was likewise asked if he had ever visited a bathhouse run by McDonald, it having been previously testified that this particular bathhouse was a "blind" for "bootlegging" business. A similar objection was for the same reason properly disallowed. The witness then answered that he had been at the bathhouse three or four times. Thereupon the following occurred:

(A deputy district attorney): "Q. Mr. McDonald made you a present of the ring that you have on your left hand, didn't he?"

"A. He did.

"Q. When?"

"A. I don't know when it was; a year or two ago.

"Q. What was his business then?"

"A. I couldn't say. He had this bathhouse.

"Q. Is that the ring you have on your left hand now?"

"A. Yes sir."

(Deputy district attorney): "Q. May that be offered in evidence, if your Honor please?"

"The court: Very well.

"Defense counsel: If your Honor please, what?"

"Deputy district attorney: 'The ring.'"

"Defense counsel: We will object to it, as incompetent, irrelevant and immaterial, and having nothing to do with the issues of this case.

"Deputy district attorney: Shows the interest of this witness.

"Defense counsel: I can't see where it could possibly have any connection with this case.

"The court: Well, possibly it might show interest, Mr. ——. Don't you think counsel have a right to show interest of the witness in any case?"

"Defense counsel: Well, I can't see it, your Honor. That is all right, though.

"The court: Overruled."

The ring was received as an exhibit with the statement by the court that it would be returned later to the witness.

[2, 3] It is earnestly urged by appellant that the examination we have just quoted exceeded the bonds of legitimate cross-examination. It is to be observed, however, at the outset, that counsel failed to object on the ground that it was not proper cross-examination. The books abound with declarations to the effect that the objection must be urged in the trial court before it may be availed of on appeal. Again, it is to be noticed that the evidence, with the exception of the ring itself, was all introduced without objection of any kind. The ring could hardly add any injury to what had preceded its physical introduc-

tion. Aside from these two factors, however, it is a fundamental rule of cross-examination that the motive of a witness arising from interest, relationship, bias or prejudice may be shown. It can hardly be doubted that if the witness had accepted a ring from a known "bootlegger" he would unconsciously, perhaps, be inclined to excuse another who had accepted money. At least it was proper for the trial judge in the exercise of his discretion to permit the jury to consider the relationship for the purpose of determining the weight to be given his testimony. *People v. Wong Toy*, 189 Cal. 587, 209 P. 543; 27 Cal. Jur. § 97.

[4] The next assault upon the judgment can best be stated by saying that the district attorney was permitted by the court to cross-examine one of the witnesses for the prosecution. McDonald testified on his direct examination that on the night of October 5, 1926, one David Morgan, his next door neighbor, drove him from his home at 129 West Fifty-Second street to 4119 Woodlawn avenue, the place where he said the bribery took place. David Morgan was called to the stand, apparently for the purpose of corroborating the accusing witness. In response to a query concerning his whereabouts on the night in question, the witness stated that he had no recollection. Thereupon the district attorney asked him if he knew a Mr. Ledbetter, which was answered in the affirmative without an objection being interposed by defense counsel. Without objection he also testified that he had talked with Mr. Ledbetter in the courtroom on the day he was called to the stand. He was then asked to relate the subject of the talk. Over a general objection that it was incompetent, irrelevant, and immaterial, he was obliged to state that he asked Ledbetter if the district attorney had a right to send for him that day and the day before. The district attorney then queried "you refused to come down and talk with us," to which the witness replied "Yes sir." The witness was next asked "was that because Mr. Ledbetter told you not to." To the general objection defense counsel added the ground that it was "cross-examination of his" (district attorney's) "own witness." The objection was overruled. The witness answered "No." Then there follows further cross-examination along the same line. The district attorney was undoubtedly able to create the impression before the jury that the reason the witness did not corroborate the testimony of McDonald was because he was for some reason prejudiced against the district attorney's office. True, defense counsel did not at first interpose the proper objection, but, in view of the fact that he finally succeeded, the court should have recognized the error and sustained the objection. The district attorney was, very patently, cross-examining his own witness without any showing to indicate a right to so proceed. Whether there

was prejudicial error in the action will be considered in a later paragraph.

[5] We now come to the most serious question in the case. It is insisted by appellant that the court erred in receiving evidence of another offense separate from the one for which the appellant was being tried. While the witness McDonald was being cross-examined with reference to what the appellant did with the money at the time it was handed to him, and where he went immediately thereafter, he was asked the question: "Where did you see him the last time you saw him?" It is apparent from the questions immediately preceding and following the one asked that the examiner intended to direct his query to the night in question. The witness, however, replied: "The last time I saw him I paid him for guarding my plant. He worked for me." Counsel immediately disclaimed a desire to inquire about any other time than the occasion of the alleged bribery. On redirect examination, the district attorney was permitted, over the objection of the defense, to establish that in December, 1928, or more than two years subsequent to the commission of the offense for which the appellant was on trial, he had been paid \$200 for guarding the liquor of the witness for a period of ten days, or, in other words, that the appellant had assisted him in carrying on an illicit trade in liquor. The testimony was permitted on the theory, and as the jury were instructed, for the sole purpose of tending to prove guilty intent, motive, identity of plan, or guilty knowledge on the part of the appellant. It must be remembered that on the evening of October 5, 1926, the appellant, according to the testimony of McDonald, asked the latter if his plant was worth \$750; that after receiving between \$600 and \$700 he departed, and on the following day the liquor was moved from 4119 Woodlawn avenue to a new location. It should also be assumed that while the appellant was guarding the liquor in 1928 he was doing so as an officer, i. e., clothed in the garb and with the apparent authority of a policeman. He was at the time a member of the police department. We now inquire what the second offense proved. Did it prove motive or guilty knowledge? Can there be any doubt concerning the motive of an officer of the law who accepts \$600 or more from a "bootlegger"? The acceptance of such a sum from such a source can hardly be said to be an equivocal act. In *People v. Cook*, 148 Cal. 334, 83 P. 43, 46, we read: "When some distinct offense is so connected with the crime charged in the indictment that proof of the former, in connection with other evidence, would sustain a probable inference of guilt as to the latter, such distinct offense may be proved, as, for instance, to show a motive on the part of defendant to commit the crime charged, or the intent with which an equivocal act has been done, such as passing a coun-

terfeit bill, or receiving stolen goods. The general rule and its exceptions are very elaborately discussed in the opinion of Justice Werner in the celebrated case of *People v. Molineux*, 168 N. Y. 290, 61 N. E. 286, 62 L. R. A. 193, where many of the principal authorities are cited. The result of the discussion, I think, may be summed up in the proposition that evidence which is relevant to any material fact in issue in a criminal case cannot be excluded because it may prejudice the defendant by proving him guilty of other crimes than that for which he is on trial." (Italics ours.) Can it be said that the testimony was relevant to the issue of guilty knowledge, i. e., whether the payor was in fact a "bootlegger"? In the opening statement of counsel for the defense, he said that he intended to prove that as early as January 7, 1926, the appellant and other officers had raided McDonald's plant at 6021 South San Pedro street. While this statement is not evidence, nevertheless it indicated that counsel did not intend to rely upon the fact that appellant did not know the business of his accuser, but rather upon proof tending to establish that he did not accept the money. In appellant's own examination he confessed his knowledge of the reputation of McDonald. Guilty knowledge, as we have used that term, was, therefore, not in issue, and it cannot be said that evidence of a separate offense was relevant thereto.

Nor do we perceive how, aside from the fact that the recital of the facts constituting the separate offense would tend to create the impression that appellant was possessed of a corruptible mind, the testimony tended in any degree to prove design or plan. We may observe, as was done in *People v. Glass*, 158 Cal. 650, 112 P. 281, 294, that "in the everyday affairs of life, if it should be established to the satisfaction of a jury that upon another and distinct occasion a defendant had offered or solicited a bribe, it would have great weight with a jury in determining whether in the instance charged he had been guilty of the offense. It would establish, at least, that he was the sort of man who would be willing to do this criminal act. Such was the line of reason and argument here employed. Yet such matters are never legal evidence. In discussing precisely such a case, where evidence had been admitted against the defendant charged with bribery, of a former act of like character, the court of appeals of New York says: 'The mental ability and disposition of the defendant to commit a crime of this sort, while it might persuade a jury, raises no legal presumption. * * * Yet the inference drawn by the prosecuting officer, and permitted by the court, left it for the jury to say that the desire of Sharp, manifested by the offer of a bribe in one instance, was the same desire which led to the actual giving of a bribe in the other; hence that the

two crimes had the same origin. * * * It was put in near the beginning of the trial, and the impression then made must have continued with the jury, and in their minds colored and deepened, if it did not distort, the subsequent evidence. It did indeed cast a dark shadow upon the defendant's character. It not only tended very strongly to prove the defendant guilty; it was absolute proof, but it was of a different crime from that charged. It was offered and received directly on the main issue, and was of great and persuasive force against him. Such evidence is uniformly condemned, as tending to draw away the minds of the jurors from the real point on which their verdict is sought, and to excite prejudice, and to mislead them. It was improperly received, and the exception to its admission well taken.' *People v. Sharp*, 107 N. Y. 427, 1 Am. St. Rep. 851, 14 N. E. 319."

There is another reason, which, when taken into consideration for the purpose of determining the admissibility of this testimony, makes it apparent that the court committed error. The testimony relating to the offense in 1928 was related by the same witness who testified to the bribery in 1926. McDonald was the only witness to the second episode—with the possible exception that the woman from whom McDonald rented the property on Compton avenue stated that McDonald came to her house with two "tall, heavy, broad shouldered men" in plain clothes and that the appellant in his size resembled one of the men, but that she didn't "remember his face exactly." On account of the unsatisfactory identification, if it can be called identification, and the fact that no incriminating circumstances are connected with her testimony, makes it entirely proper for us to say that McDonald was the sole witness to the evidence complained of. What possible weight could it lend to his other testimony? Its only effect was to arouse and influence the mind of the jury against appellant. An almost identical situation, in this regard, was before the court of appeals of New York, in *People v. Harvey*, 235 N. Y. 282, 139 N. E. 268, 273, and it was there said: "It is difficult to see how witnesses who have testified to paying money as a bribe could add credence to their story by stating that they had later sold to the defendant a stolen car. One story of crime is not strengthened by relating another when both come from the mouth of the same witness. * * * The influence which such testimony would have upon the minds of a jury would be to lead them to think that, if Harvey had committed all these offenses, or agreed to commit them, he must have been guilty of the crime charged. This is not a legitimate use of such evidence, as a man cannot be found guilty of one crime by proving that he has committed others." Nor was the error cured by the attempt of the trial

judge to confine its effect to certain issues. Not being relevant to any issue it should not have been admitted at all.

We deem it unnecessary to go to a lengthy résumé of the testimony adduced to determine whether the errors found to have been committed require a reversal of the judgment under section 4½ of article 6 of the Constitution. The appellant relied, as has been indicated, upon his denial that he accepted any money, plus the establishment by a number of witnesses of an alibi. To say the least, the state of the evidence, as we read it, renders the case a doubtful one. Indeed, the testimony improperly admitted may well have been the cause for the verdict of the jury in this case.

Judgment and order reversed.

We concur: CRAIG, Acting P. J.; NORTON, Justice pro tem.

104 Cal. App. 504

DENOVAN v. GOLDEN STATE WOOLEN MILLS et al.★
Civ. 7274.

District Court of Appeal, First District, Division 2, California.

March 15, 1930.

Rehearing Denied April 14, 1930. Hearing Denied by Supreme Court May 12, 1930.

1. Corporations ⇨80(11) — Stock purchase — Misrepresentations — Rescission.

Evidence sustained finding of fraud inducing plaintiff to purchase corporate stock under contract sought to be rescinded.

Plaintiff claiming to have been defrauded in stock purchase was authorized representative of Australian firm to sell wool in America. The president of defendant corporation engaged in operating woolen mill represented to plaintiff that, if plaintiff would purchase block of stock in corporation, it would be in position to consider purchasing wool from plaintiff. He further stated that corporation was in act of floating bond issue and preferred stock issue, and that purchase moneys were to go into corporate treasury. The corporation did not receive the money and was in no better position to buy wool from plaintiff than it was before plaintiff purchased the stock.

2. Cancellation of instruments ⇨45 — Injury — Rescission — Extent of injury.

Plaintiff, if proving material injury, is entitled to rescind contract without proving extent of injury.

3. Cancellation of instruments ⇨47 — Rescission — Material injury — Misrepresentations.

Plaintiff purchasing stock on misrepresentation that other stock was paid for in cash, and that corporation would buy plaintiff's wool, showed material injury necessary to rescission.

4. Corporations ⇨80(9) — Stock purchaser — Examination of account — Misrepresentations.

Prospective purchaser of stock in corporation need not make expert examination of corporate accounts to determine misrepresentations.

5. Corporations ⇨80(10) — Stock purchase — Rescission — Fraud — Laches.

Plaintiff suing to rescind stock purchase, two months after discovering fraud and less than month after giving notice of rescission, *held* not guilty of laches.

The evidence to show laches disclosed that the plaintiff purchased the stock September 22, 1922, and the court found that he discovered the alleged fraud on April 14, 1925, and gave notice of rescission on May 8, 1925, and brought action to rescind June 28, 1925. Plaintiff alleged that he discovered the fraud by reason of report of an expert who examined the books of the corporation, and that the evidence claimed to show that plaintiff discovered facts which put him on inquiry was addressed to fact that business of corporation did not prosper, and not to issue when plaintiff made, or by exercise of ordinary care should have made, discovery that he had been defrauded.

6. Assignments ⇨22 — Stock purchase — Rescission — Notice — Assignment.

After notice of rescission by purchasers of stock, each had complete cause of action which was assignable under statute (Civ. Code §§ 953, 954).

7. Assignments ⇨119 — Stock purchased — Assignment — Rescission by assignee.

Plaintiff purchasing stock for himself and members of family under contract made by himself, and receiving assignments from members of family, could sue for rescission.

8. Fraud ⇨28 — Misrepresentation — Stock purchased — Cash sale.

Misrepresentation that stock theretofore issued had been paid for in cash at 90 per cent. of par value, inducing purchase, *held* actionable fraud.

9. Corporations ⇨80(2) — Misrepresentation — Joint liability — Acts of president.

Corporation participating in all transactions in manner directed by its president *held*

jointly and severally liable with president for misrepresentation of president.

10. Contracts ⇨94(3) — Misrepresentations — Intent — Issue.

Intent is issue in action to rescind contract for misrepresentation under statute (Civ. Code § 1689, subd. 1 and § 1572, subd. 1).

11. Appeal and error ⇨1050(2) — Harmless error — Immaterial evidence — Laches.

Rights of defendants *held* not prejudiced by admission of immaterial evidence on issue of laches, otherwise supported by evidence.

Appeal from Superior Court, Los Angeles County; William Hazlett, Judge.

Action by Alexander Denovan against the Golden State Woolen Mills and another. Judgment for plaintiff, and defendants appeal. Affirmed.

Newby & Newby, of Los Angeles (Dee Holder, of Los Angeles, of counsel), for appellants.

Hewlings Mumper and Meserve, Mumper, Hughes & Robertson, all of Los Angeles, for respondent.

STURTEVANT, J.

The plaintiff commenced an action against the defendants to obtain a decree rescinding a contract of purchase of 3,333 shares of the capital stock of the defendant corporation. The defendants answered, and a trial was had before the court sitting without a jury. The court made findings in favor of the plaintiff, and, from a judgment entered thereon, the defendants have appealed and have brought up a bill of exceptions.

[1] 1. The defendants claim that the material findings on the allegations of fraud were not sustained by the evidence. Among other things, the following facts stand out prominently: Prior to the time the plaintiff made his purchase the defendant corporation was a going concern operating a woolen mill near Los Angeles and had been operating the mill for some time. The plaintiff had recently left Australia and had taken up a residence at Riverside. He was the authorized representative of certain firms in Australia to sell wool in this country. He met Mr. C. B. Eyer, president of the defendant corporation. They had talks about the plaintiff selling to the defendant some Australian wools. At first Mr. Eyer stated that the corporation had a full supply. Later he stated that the corporation needed moneys and suggested that if the plaintiff would purchase a block of stock, that then and in that event the corporation would be in a position to consider purchasing wool from the plaintiff. Furthermore, he stated that the corporation was in the act of floating a bond issue of \$300,000 and a block of preferred

stock in the sum of \$150,000. Mr. Eyer and the plaintiff had many talks on these subjects. Counsel have indulged in much argument as to whether Mr. Eyer represented that he was selling *treasury* stock. However, it is admitted that he stated the purchase moneys were to go into the corporate treasury. In this connection the defendants assert with vigor that the moneys did go into the treasury, and therefore there was no misrepresentation. The plaintiff replies such act was a mere subterfuge to make it appear on the face of the books that the terms of plaintiff's contract had been complied with. In this connection he shows that the defendants caused a number of entries regarding those moneys to be made in the books of the corporation, but the plaintiff's payments did not stop until the moneys so paid were in the pockets of Mr. Eyer, and that the corporation was not a dollar richer after the transaction had been completed. Continuing, the plaintiff argues that thereafter the corporation was in no better position to buy wool from the plaintiff than it was before the plaintiff purchased the stock, and that the very object of the plaintiff's purchase was defeated. He shows that he was placed in the position of having purchased shares in a failing concern without even obtaining the benefit of his contributions. In this connection, the defendants frankly state in their brief that the stock which was actually sold to the plaintiff was some of the stock which had been sold to Mr. Eyer and his associates before the plaintiff became a stockholder. While it may be conceded that the evidence is conflicting, it is certain that there is an abundance of evidence in the record to sustain the findings made by the trial court on the allegations of fraud.

[2, 3] 2. The defendants next assert that it is neither alleged nor proved that the plaintiff suffered any damage by reason of the defendants' purported fraud. The plaintiff makes two replies, either of which is sufficient. Drawing attention to the fact that this is an action in rescission, he asserts that he was not bound to allege nor prove specific damages. *Munson v. Fishburn*, 183 Cal. 206, 216, 217, 190 P. 808. If he proved material injury he was entitled to rescind. That the facts which we have recited, if true, showed material injury to the plaintiff is patent. In an action for rescission he was not bound to prove the extent of the injury. 12 Cal. Jur. 766.

[4, 5] 3. The defendants claim the plaintiff was guilty of laches; in other words, he should have discovered, and in fact did discover, the facts which he now alleges long prior to the commencement of the action. The stock was purchased September 22, 1922. The plaintiff alleges he did not discover the fraud until May 1, 1925, and that the discovery was made at that time by reason of the report of an expert, who examined the books of the de-

fendant corporation. The notice of rescission was given on May 8, 1925. This action was filed June 28, 1925. The trial court made findings that are very full and complete on these particular subjects. It found that the plaintiff discovered the alleged fraud on April 14, 1925. All other facts were found as stated by the plaintiff. As to what the plaintiff should have discovered, the defendants assert that the facts appeared on the face of the books of the corporation, and after the plaintiff became a stockholder he should have examined those books. The claim is not well founded. The transaction was so conducted that it would have taken an expert examination of all the accounts, including the accounts with each individual stockholder, to disclose the facts complained of by the plaintiff. No such duty rested on a prospective purchaser of stock in the corporation.

Turning to the assertion that the plaintiff did make a discovery earlier than as found by the trial court, the defendants quote certain written communications and call our attention to certain declarations of the plaintiff. Thereupon, they assert, that soon after the plaintiff purchased his stock he discovered facts which put him on inquiry. The plaintiff freely concedes the presence in the record of the evidence just adverted to, but contends that no part or portion of that evidence involved fraud or even the purchase of corporate stock. He asserts that all of such evidence was addressed to the fact that the business of the corporation did not prosper, and that the plaintiff was dissatisfied with the business management. None of this evidence was addressed to the issue of when the plaintiff made, or by the exercise of ordinary care should have made, a discovery that he had been defrauded. As stated above, the trial court made findings in favor of the plaintiff. It may be conceded that the evidence was conflicting on the issue under discussion, but we are entirely unable to say that there is not evidence in the record which sustains the findings in favor of the plaintiff on the issue of discovery.

[6, 7] 4. The next point made by the defendants is that the plaintiff cannot, under any view of the case, recover for more than the 33 shares sold to him personally. The stock in suit was bought by the plaintiff acting for himself and the several members of his family. It was issued 1,500 shares to Mary Denovan, 1,500 shares to Marion Denovan, 300 shares to Ronald Denovan, and 33 shares to the plaintiff personally. The notice of rescission was signed by each and every one of them and by their attorney. After the notice of rescission had been given, the other members of the family assigned their interests to the plaintiff and he commenced the action. After the notice of rescission had been duly given, each holder had a complete cause of ac-

tion. Such complete cause of action was assignable (Civ. Code, §§ 953 and 954; *Wikstrom v. Yolo Fliers' Club* [Cal. Sup.] 274 P. 959), and was duly assigned. Moreover, as this plaintiff was the person with whom, and in whose name, the contract of purchase was made for the benefit of himself and the members of his family, above named, he was entitled to maintain the action and to take all steps in the nature of performing all conditions precedent and then to commence and maintain the action. *Lauer v. Williams*, 32 Cal. App. 590, 594, 163 P. 687.

[8] 5. It is claimed by the defendants that the alleged misrepresentation, that all of the stock which had theretofore been issued had been paid for in cash at 90 per cent. of the par value thereof, is not actionable fraud. This contention they argue at length. The same and many additional arguments have been made in the past. However, the decisions are against the contention. 26 C. J. 1228, notes 6-10; *Munson v. Fishburn*, 183 Cal. 206, 212-214, 190 P. 808. No authority to the contrary is cited by defendants.

[9] 6. They assert that it was clearly error for the court to adjudge that the defendant corporation is jointly and severally liable with the defendant Eyer for the purported misrepresentation of the latter. There are many answers to the point. The first one is that the point was never called to the attention of the trial court. The defendants interposed a joint demurrer. It was so framed that, if the complaint contained one good count, then it was properly overruled. It did not purport to charge that there was a misjoinder of parties defendant. In arguing this point the defendants assert that under the doctrine of respondeat superior the defendant corporation was not liable. If the corporation had interposed a separate demurrer, the point could have been placed before the trial court, but the corporation did not do so. Counsel do not cite any part of the record showing that the point under discussion was ever presented to the trial court. However, we think the defendants will not even contend that the corporation was not a proper party, even though it was not a necessary party; furthermore, that they will not contend that a joint and several judgment against a corporation and a natural person is never proper. As appears from what we have said above there is no finding of the trial court that is

not sustained by the evidence. The defendants do not point to a fact that is absent in the proof as against either of the defendants. The point is reduced, therefore, to the question, "Was the liability, several or joint and several?" By his complaint the plaintiff charged the corporation and C. B. Eyer jointly. The allegation which he used throughout was that "the defendants" did the acts alleged. There was evidence supporting that allegation in that form, in other words, that they acted together. The evidence showed that the corporation did all things in the manner directed by, and in the interest of, the defendant Eyer and fully participated with him in all transactions. The artificial person and the natural person under such facts were jointly and severally liable. 14a C. J., p. 775, note 67; 27 C. J., p. 27, notes 43-45; 20 Cal. Jur. 510, § 20; 38 Cyc. 488.

[10] 7. The trial court admitted, over the objection of the defendants, evidence of a similar sale to Utters. The defendants concede that such evidence is admissible to prove intent. But they say intent is not material in an action as for rescission, and they cite *Giovannoni v. Bartmann*, 59 Cal. App. 651, 657, 658, 211 P. 844. That case does not so hold. It but follows section 1568 of the Civil Code. The case of the plaintiff rested on Civil Code, § 1689, subd. 1, and section 1572, subd. 1. It is statutory law that intent is an issue in such a case.

[11] 8. The plaintiff was formerly a resident of Australia and came to California a few months before the negotiations arose which gave rise to this action. While on the stand, over the objection of the defendants, he was allowed to state that under the law of Australia when stock is transferred the signature of the transferee must be placed on the old certificate. The plaintiff argues that such fact was admissible on the issue of laches. If it was not, the most that can be said is that it was immaterial. But, if there was material evidence supporting the court's finding on that issue (and we have shown there was), the rights of the defendants were not prejudiced by the admission of some immaterial evidence addressed to that same subject. We find no error in the record.

The judgment is affirmed.

We concur: NOURSE, Acting P. J.; BURGHS, Justice pro tem.

334 Cal. App. 753

**GUNDRY et al. v. ATCHISON, T. & S. F.
RY. CO.
Civ. 95.**

District Court of Appeal, Fourth District,
California.

March 28, 1930.

**1. Railroads ⚡327(7) — Truck — Contributory
negligence — Evidence.**

Driver of heavily loaded truck and trailer hit by train at crossing held contributorily negligent for failing to stop though he saw approaching train.

Truck driver before crossing tracks saw train and was able to stop before reaching tracks but did not; his truck was heavily loaded and it was difficult to increase speed. Engineer did not see truck until train was a few feet away and, according to driver's testimony, it was impossible to see truck.

2. Railroads ⚡327(1) — Crossing — Automobile — Duty — Stop — Look — Listen.

Automobilist approaching railroad tracks has duty not only to look and listen and, if necessary to stop, but to heed what he sees.

3. Railroads ⚡330(2) — Contributory negligence — Crossing — Watchman — Absence — Apparent danger.

That watchman was absent from crossing held not to relieve truck driver, who knew watchman was usually there, from duty of looking for approaching trains.

4. Negligence ⚡119(6) — Contributory negligence — Pleading — Answer — Complaint — Evidence.

Defense of contributory negligence was available though not pleaded in answer where contributory negligence appeared from allegations of complaint or from plaintiff's evidence.

5. Railroads ⚡335(3) — Warning — Crossing — Necessity — Apparent danger.

That train did not ring bell was immaterial where truck driver approaching crossing saw train.

6. Railroads ⚡312(13) — Crossing — Engineer — Failure to see truck — Inference — Negligence.

Negligence held not inferable from mere fact engineer of train could not see truck approaching crossing.

The evidence disclosed that engineer was seated on right side of engine in cab about twenty-five feet from front of engine, and that he could not see truck until it suddenly appeared in front of him, not over thirteen to fifteen feet away.

7. Railroads ⚡338 — Last clear chance — Actual knowledge.

Last clear chance doctrine required actual knowledge of truck driver's dangerous position on crossing by locomotive engineer.

8. Trial ⚡333 — Verdict — Responsiveness — Amount.

Verdict attempting generally to somewhat equalize financial conditions cannot be sustained.

Appeal from Superior Court, Kern County; Robert B. Lambert, Judge.

Action by F. J. Gundry and another against the Atchison, Topeka and Santa Fé Railway Company. From judgment for plaintiffs, defendant appeals.

Reversed.

Robert Brennan, M. W. Reed, Leo E. Sievert, H. K. Lockwood, and E. T. Lucey, all of Los Angeles, for appellants.

Brittan & Brittan, of Bakersfield, for respondents.

BARNARD, Acting P. J.

This is an appeal from a judgment based upon the verdict of a jury, and from an order denying a new trial.

The action arose out of a collision between a locomotive operated by the defendant and a truck and trailer operated by one McCormac, who was driving the same for the plaintiffs. The collision occurred in the city of Bakersfield on October 31, 1926. Plaintiffs alleged negligence in the following language:

"That at said time and place, as aforesaid, the defendants did negligently, carelessly, and without due regard for the safety of others, operate, propel, and drive an engine into, and so as to collide with the trailer operated by these plaintiffs, thereby destroying, breaking and damaging said trailer to the extent of and to the plaintiffs' damage in the sum of \$553.60."

The complaint also demanded \$35 as the reasonable rental value of the trailer for fourteen days. The answer of the defendant denied all of the material allegations of the complaint.

[1] The undisputed facts are: That the defendant has three standard gauge railroad tracks across F street, in the city of Bakersfield; that F street is paved, is about fifty-five or sixty feet wide from curb to curb, with ten additional feet on each side for sidewalks, and the crossing is level; that at the time of the collision the weather was clear, the sun shining, the street dry, and the truck was in good condition and functioning properly; that the truck driver was approaching the railroad tracks from the north; that the en-

gine pulling one car was west of F street and moving easterly on the third or most southerly track; that when the truck driver was at a point ten feet or so north of the north track, and from sixty to seventy feet from the point of collision, he saw the locomotive approaching from the west, being then about three hundred feet away; that the truck driver proceeded across the track, increasing his speed as he went; and that he succeeded in clearing the last track with his truck, but the rear end of the trailer was hit by the engine and damaged. The driver of the truck testified as follows:

"I came into town with a truck, a twelve or twelve and a half ton truck and I turned off Sixteenth street to the left down to the south on F street toward the Santa Fé railroad and I made the boulevard stop, and it is necessary to shift down into low gear, and I proceeded down F street to the tracks and as I approached the tracks I was going rather slow and as I came upon the tracks there was no sign of any train coming from either direction or any watchman out there as I was accustomed to seeing; that is the way I always go home; I have lived out that way for a long time; and as I got close to the north track there I saw a switch engine with one car behind it coming from the west approximately a block away and there was no signal and no watchman out there on duty. I glanced over at the little house where the watchman stays and I noticed the stop signal standing down there where it always stands when he is in the house, and the bell was not ringing, and I had been accustomed to seeing the switch engine come down there and stop there and stop and switch on to another track, and I supposed that is what they were going to do at this time.

"Mr. Lucey: I object, your Honor, to what he supposed, and ask that that portion of his answer may go out.

"The Court: What he supposed can go out.

"A. (Continuing): I started on the track and the engine just kept coming and I shifted into second gear; after I was out on the tracks I had to go ahead, and I went into second gear and got up as much speed as I could and just as I crossed,— the front end of my truck cleared the last tracks, so I could look down and see the engineer, why I noticed he jumped like he was going to apply the brakes, and then he was far enough away so he could see my trailer and then he settled back in his comfortable position like he thought everything was all clear, and my trailer at that time was now on the last track and he just kept coming and just before he struck the trailer, why he appeared to apply the brakes but he could not stop. He hit the back end of the trailer and pushed it off the track. I guess he went about ten feet after he struck it."

This witness also testified that he was proceeding near the center of F street, and that as he crossed the last track so he could see the engineer, the front part of the engine was approximately fifty or sixty feet away. In reference to this time, he gave the following testimony:

"Q. And he was about that distance when you saw him jump forward in his cab of the engine? A. Yes.

"Q. Now at that point could you have speeded up the speed of your truck and trailer? A. No more than I did, no sir, because I had a big load and you can't pick up a load of that size very fast."

He further testified that when he first saw the engine it was about three hundred feet away, near a switch which was located at that point, and that he did not hear any whistle or bell; that after the accident he talked to the watchman, who stated he had gone into the depot at the time of the accident; that he had been acquainted with this particular crossing and railroad tracks since 1919, and had lived out that way since 1921, and crossed at that point sometimes five or six times a day; that he could have seen the locomotive a few yards north of the point where he did see it; that he was traveling in low gear when he first saw the engine, at the rate of between four and seven miles an hour; that he had a load of nine tons; and that traveling at that rate of speed he could stop his truck and trailer in from five to ten feet. He also testified: "Q. How close were you to the south track on which the engine moved across 'F' street when you increased your speed of your truck? A. Well, I increased all the way across, that is I tried to as much as I could; as soon as I got on the tracks"; that he traveled probably sixty or seventy feet from the time he first saw the engine until it hit the trailer; and that he increased the speed of his truck from low to second gear when he was about on the first or north track, and the truck was going possibly eight or ten miles an hour when it was hit. Also, "Q. If you had wanted to stop your truck instead of speeding up you could have stopped your truck could you not before you got to the southerly track? A. I would have had to stop on another track." And also: "Q. What caused you to look to see what the engineer was doing? A. I was wondering why he did not stop."

The plaintiffs called the engineer who was in charge of the locomotive in question, who testified that he was going from eight to ten miles an hour and that he could stop the engine in probably fifty or sixty feet, at that rate of speed; that he first saw the truck when it came across in front of him, at which time he was from eight to ten feet away. Plaintiffs also called as a witness a lady who came up to the same crossing in an automo-

bile driven by her husband, just prior to the accident. She testified that as they came up to the tracks on the north side, she saw an engine about fifty feet west of the crossing, which she thought was standing still; that they were going to cross the track, but just as they got almost to the north track, she saw the engine steam up and start forward, and she told her husband to stop, which he did; that the first time she saw the truck and trailer, the front part of the truck was on the south rail of the south track; that the trailer did not clear the track and the engine hit it, stopping just after the impact; that she did not hear any bell or whistle or other warning; and that she thought the engine was going not to exceed ten miles an hour. She admitted having made a previous statement to the effect that she could not say whether or not the engine bell was ringing. In talking about the truck and trailer, she testified as follows:

"Q. You did not follow it down F street? A. No I did not see it until it was on the tracks.

"Q. And that happened in a flash of a second? A. It seemed to me it was more than second because I sat there and hoped the truck would get across before the engine hit it.

"Q. Would you say it was four or five seconds? A. It was not very long, but it seemed a long time."

At the close of the plaintiffs' case, the defendant moved for a nonsuit, which motion was denied. We think this motion should have been granted, as the evidence for the plaintiffs, taken in its most favorable light, shows contributory negligence on the part of the driver of the truck, as a matter of law. In *Chrissinger v. Southern Pacific Company*, 169 Cal. at page 624, 149 P. 175, 177, the court says:

"A person approaching a railway track, which is itself a warning of danger, must take advantage of every reasonable opportunity to look and listen. Undoubtedly the question of contributory negligence or freedom from it is ordinarily one for the jury, but where, as here, the standard of conduct is so obvious as to be applicable to all persons, and the plaintiff has failed to measure up to that standard under the circumstances shown, he is not entitled to have his case go to the jury. *Hamlin v. Pacific Electric Co.*, 150 Cal. 779, 89 P. 1169."

In that case, the court held that the plaintiff's testimony that he looked and listened, but did not see or hear, is not enough to support a verdict in his favor, where the circumstances and conditions were such as to make it plain that by looking and listening he must have observed the approach of the train. The circumstances of the present case are even stronger, since the truck driver actually saw

the approach of the engine and car and disregarded the same. The truck driver testified that he was familiar with the crossing in question; that after he saw the engine approaching he speeded up his heavily loaded truck as much as he could; that he could have stopped within five or ten feet, although this would have compelled him to stop upon other tracks, there being no evidence that any other engines or trains were approaching; that he looked up at the last moment because he wondered why the engineer did not stop the engine; and he also testified as follows:

"Q. Did you keep your eye on the engine all the time up to the time of the collision?

A. Why, no, I guess I watched my truck part of the time.

"Q. Well, where was the engine the second time you noticed it? A. I don't suppose my eye was off it more than a fraction of a second at a time."

[2] The plaintiffs' evidence indicates that the truck driver tried to beat the locomotive over the crossing, but, whether or not this was his original purpose, the law places upon him a very definite duty to look and listen and to stop, if necessary, in order to make sure that he may proceed on his way with safety. Not only is it his duty to look and listen, as has been held in countless cases, but where one actually sees the approaching danger, thus close at hand, it is incumbent upon him to take warning from what he does see. A traveler is bound to look and listen, and, if necessary, to stop, and that obligation is increased rather than diminished by his knowledge that a train is approaching. *Young v. Southern Pacific Co.*, 182 Cal. at page 378, 190 P. 36. This would seem to be especially true in this case, where the great weight of his load and the slow speed possible with the truck in low and intermediate gears made such a contest particularly dangerous. The fact that from the beginning he increased his speed, and as he says, "got up as much speed as I could," shows that he realized the danger. It would be little short of ridiculous to hold that the law requires a traveler to look and listen, and even to stop, if necessary, at a railroad crossing, in order to ascertain if a train is approaching, but does not require such a traveler to refrain from attempting to cross in front of the train, when he actually sees it approaching. The United States Supreme Court, in the case of *Baltimore & Ohio R. R. Co. v. Goodman*, 275 U. S. 66, 48 S. Ct. 24, 25, 72 L. Ed. 167, 56 A. L. R. 645, said:

"When a man goes upon a railroad track he knows that he goes to a place where he will be killed if a train comes upon him before he is clear of the track. He knows that he must stop for the train not the train stop for him."

Respondents argue as follows:

"If it were possible, * * * that the truck driver could have seen the engine coming, to the crossing, it is just as sure that the engineer and fireman could see the truck driver going across the crossing. In other words, each of them stand on the same footing as to their seeing the other cross the tracks."

While there may be some difference in the rules of law and their application to the operation of railroads outside of cities, and those covering their operation across city streets, no such rule as is here contended for exists anywhere. The duty was upon the driver of this truck, not only to look and listen, but to heed what he saw. *Billig v. Southern Pacific Co.*, 192 Cal. 357, 219 P. 992; *Chrissinger v. Southern Pacific Co.* supra. In paying no attention to what he saw, the driver of the truck was guilty of contributory negligence. *Young v. Southern Pacific Co.*, 189 Cal. 746, 210 P. 259; *Griffin v. San Pedro, etc., Co.*, 170 Cal. 772, 151 P. 282, L. R. A. 1916A, 842; *Jones v. Southern Pacific Co.*, 34 Cal. App. 629, 168 P. 586; *Thompson v. Southern Pacific Co.*, 31 Cal. App. 567, 161 P. 21. In *Murray v. Southern Pacific Co.*, 177 Cal. at page 6, 169 P. 675, 676, the court says:

"The general rule applicable to negligence cases may be stated to be: That, even when there is no conflict in the evidence, negligence is a question of fact for the jury, if different conclusions upon the matter can rationally be drawn from the evidence (*Fernandes v. Sacramento, etc., R. R. Co.*, 52 Cal. 45; *McKeever v. Market St. R. R. Co.*, 59 Cal. 294; *Chidester v. Consolidated D. Co.*, 59 Cal. 197; *House v. Meyer*, 100 Cal. 592, 35 P. 308); but, if but one conclusion can reasonably be reached from the evidence, it is a question of law for the court."

[3] The respondents contend that no negligence may be charged to the driver of the truck, because he was familiar with the crossing, knew that a watchman was usually there, and that he was justified in assuming from the absence of the watchman that no train was approaching. They rely upon the following quotation from *Gregg v. Western Pacific R. R. Co.*, 193 Cal. 212, 223 P. 553, 557:

"It is true, as has often been stated, that a railroad crossing is itself a place of danger and is an effectual warning of danger which must always be heeded, and the exercise of ordinary care in traveling over such place is not excused by the negligent omission of the railroad company itself to exercise reasonable care. But it is also true that a railway company will not be permitted to encourage the public to relax its vigil as to the dangers that lurk in railroad crossings by assurances that the danger has been removed or minimized by the adoption of safety devices and measures and at the same time hold a person to the

same quantum of care as if no such safety measures had been provided."

The answer to this is that no matter what he might otherwise have been entitled to assume, he actually saw the engine and car approaching, and, while constantly watching it, attempted to cross in front of it. In the case just quoted from, the Supreme Court uses this language:

"We do not here hold that one who blindly attempts to cross a steam railroad track, whether the crossing be guarded or unguarded, and by reason of such negligence is injured by being hit by a passing train, has a cause of action against the railroad company. The law casts upon every one the duty of exercising such care as is commensurate with the situation."

The driver of the truck had neither the right to assume that the engine would not cross the street, nor the right to attempt to cross directly in front of and while watching the approaching train. A very brief pause, after seeing the danger, would have avoided the injury complained of.

[4] The respondents insist that, whether or not the driver of the truck was guilty of contributory negligence, the matter is immaterial, and is not available as a defense, for the reason that contributory negligence was not alleged in the answer of defendant. In the case of *Hoffman v. Southern Pacific Co.*, 84 Cal. App. at page 346, 258 P. 397, 400, the court says:

"As a general rule the contributory negligence of the plaintiff must be specially pleaded by the defendant in order that he may rely upon this defense. 19 Cal. Jur. 681, § 104. But where plaintiff's contributory negligence appears from the allegations of his complaint or from the evidence introduced in his behalf, this plea is available to the defense, although it is not pleaded in the answer. 19 Cal. Jur., p. 681, § 104, p. 697, § 119; 20 R. O. L. 182, § 151; 20 Standard Enc. of Proc. 317; *Green v. Southern Pacific Co.*, 132 Cal. 254, 64 P. 255; *Kenny v. Kennedy*, 9 Cal. App. 350, 99 P. 384."

We think that contributory negligence on the part of the plaintiffs conclusively appears from their own evidence, and that this prevents a recovery by them, even though the same was not specially pleaded. In this connection, it may be observed that the record shows that considerable evidence was introduced by the defendant, without objection, going to the fact that the driver of the truck was negligent. If it be assumed that the case should have gone to the jury, the court correctly instructed the jury on the subject of contributory negligence. *Hoffman v. Southern Pacific Co.*, supra. We think, however, the evidence does not sustain the jury's finding that plaintiffs were free from such negligence.

[5, 6] The only claim of negligence on the part of the defendant is that no warning was given, with perhaps an inference of negligence from the fact that the engineer did not sooner see the truck. The evidence is conflicting as to whether any warning was given by bell or whistle. For the purpose of this decision, we must assume that no such warning was given. This is entirely immaterial, however, since the only possible purpose in giving such a warning would be to attract the attention of the driver of the truck. That he actually saw the engine approaching makes the failure to give such a warning immaterial. The evidence shows the engineer was seated on the right side of the engine; that his seat in the cab was about twenty-five feet from the front of the engine, and that he could not see the truck until it suddenly appeared in front of him, not over thirteen to fifteen feet away. That the engineer could not see the truck is borne out by the testimony of the driver of the truck, who says, he himself, although he was watching the engine all of the time, was not able to see the engineer until just as his truck cleared the south track. Under such circumstances, negligence could not be inferred from the mere fact that the engineer did not see the approaching truck. Nor did the fact that a watchman was not on duty at the crossing at that particular moment relieve the plaintiff from his duty to look and to be governed by what he saw. *Hutson v. Southern California Ry. Co.*, 150 Cal. 701, 89 P. 1093; *Herbert v. Southern Pacific Co.*, 121 Cal. 227, 53 P. 651; *Koch v. Southern California Ry. Co.*, 148 Cal. 677, 84 P. 176, 4 L. R. A. (N. S.) 521, 113 Am. St. Rep. 332, 7 Ann. Cas. 795; *Heitman v. Pacific Electric Ry. Co.*, 10 Cal. App. 397, 102 P. 15.

[7] Appellant contends that the court committed prejudicial error in giving the jury instructions on the last clear chance doctrine. The court instructed the jury as follows:

"You are instructed that if you find in this case that the plaintiffs' agent had been negligent and the plaintiffs' trailer was, as alleged in the complaint, in front of the train driven by the defendant and the plaintiffs' agent

could not extricate himself therefrom by the exercise of reasonable care, *and the defendant had actual knowledge of the plaintiffs' dangerous position*, under the last clear chance doctrine heretofore defined to you, it is the duty of the defendant, if you find it was able by the use of ordinary care to avoid the accident, and if by the use of the ordinary care it failed to avoid said accident and you find this to be true in accordance with the other instructions heretofore given and by a preponderance of the evidence, I instruct you that your verdict should be for the plaintiffs." (Italics ours.)

There was absolutely no evidence in the record under which the jury could have found that the defendant had actual knowledge of the plaintiff's dangerous position in time to have avoided the accident. If the jury's verdict is based upon the instructions as to this doctrine, it is not supported by the evidence. In the case of *Bagwill v. Pacific Electric Company*, 90 Cal. App. 114, 265 P. 517, 519, the court says in reference to this doctrine: "The words mean exactly as they indicate, namely, last *clear* chance, not possible chance."

[8] The only evidence as to the amount of damages shows that the trailer was damaged to the amount of \$553.60, and that the loss of the use of the trailer amounted to \$35, or a total of \$588.60. The jury brought in a verdict for \$500. While the defendant cannot ordinarily complain that the verdict is for an amount less than it might have been, if there is any evidence at all to sustain the verdict, a verdict may not be sustained which attempts generally to somewhat equalize financial conditions. *Driscoll v. Market Street Railway Co.*, 97 Cal. 553, 32 P. 591, 33 Am. St. Rep. 203. That would appear to have been the purpose of the jury, in this case, as the record contains no evidence to justify placing the damages at such an amount.

For the reasons herein set forth, the judgment is reversed.

We concur: MARKS, J.; STROTHER, Justice pro tem.

104 Cal. App. 635

286 P.

**SCHAEFER v. UNITED BANK & TRUST CO.
OF CALIFORNIA et al.★**

Civ. 4025.

District Court of Appeal, Third District, California.

March 21, 1930.

Rehearing Denied April 19, 1930. Hearing Denied by Supreme Court May 19, 1930.

1. Specific performance ⇨1 — Equitable cognizance.

Specific performance actions are wholly of equitable cognizance.

2. Jury ⇨14(13) — Specific performance — Right to jury.

Where main purpose of action was to compel performance of agreement relating to issue of stock in corporation, jury trial was properly denied.

The main purpose of the action was to compel specific performance of agreement of stockholders of corporations made upon their merger authorizing new corporation formed, upon delivery to it of stock of old corporation, to issue to holders thereof certain stock of new corporation and grant them the right to purchase additional stock, and this brought the action within equitable jurisdiction of court. The plaintiff contended, however, that answer raising a question as to whether or not there had been sale of part of stock to third party raised question of law which should have been tried by jury.

3. Jury ⇨12(1) — Right to jury — Common law.

It is not error to deny jury in case where such right is not granted at common law.

4. Jury ⇨13(1) — Right to jury trial — Equity.

Where case as made by pleadings involves application of doctrines of equity and granting of relief obtainable only in equity, parties are not entitled to jury trial.

5. Jury ⇨13(5) — Right to jury — Legal issues incidental.

There is no right to trial by jury, where legal issues are merely incidental to relief sought in suit in equity.

6. Jury ⇨13(1) — Equity — Trial of issues.

Where court of equity has jurisdiction of main action, general jury trial of all issues cannot be demanded.

7. Specific performance ⇨12(3)—Issue of stock — Sufficiency of evidence.

In suit to compel performance of agreement for issue of stock of new corporation for

stock of old corporation, evidence *held* sufficient to support finding plaintiff had sold his stock.

8. Corporations ⇨116 — Sale of stock — Validity.

Stockholder having sold stock, and price having been paid to agent, fact he did not sign draft drawn on buyer did not affect validity of sale.

9. Frauds, statute of ⇨89(1) — Parol contract — Statute of frauds — Acceptance by purchaser — Effect.

Acceptance of goods under parol contract within statute of frauds, when made, relates back to and operates upon contract so as to validate it as of date entered into (Code Civ. Proc. § 1973, subd. 4).

10. Frauds, statute of ⇨139(1) — Executed oral agreement.

Statute of frauds has no application to executed oral agreement of sale (Code Civ. Proc. § 1973, subd. 4).

11. Specific performance ⇨134 — Costs — Against plaintiff.

Where plaintiff was denied relief in action to compel specific performance of agreement relating to issuance of stock, court properly awarded costs against plaintiff (Code Civ. Proc. § 1025).

Appeal from Superior Court, Sacramento County; James W. Bartlett, Judge.

Action by Henry Schaefer against the United Bank & Trust Company of California and others. From a judgment for defendants, plaintiff appeals.

Affirmed.

Busick & Leeper, of Sacramento, for appellant.

Butler, Van Dyke & Desmond, of Sacramento, for respondents.

JAMISON, Justice pro tem.

This case was tried by the court without a jury, the court denying appellant's request for a jury. Judgment was rendered in favor of respondents, and from the judgment appellant has appealed.

In substance the facts are as follows: In the spring of 1927, two corporations, the United Bank & Trust Company of California and the French-American Bank were merged under the name of United Bank & Trust Company. At the time of this merger it was agreed by the stockholders of the two corporations first named that upon the surrender to the United Bank & Trust Company of the stock of the United Bank & Trust Company of California the stockholders so surrendering

their stock should receive from the new corporation 1.6 shares of its shares of stock for each share of stock so surrendered with the additional right to purchase for \$87.50 one share of the stock of the new corporation for each 4 shares of stock so surrendered, the right to make this purchase expiring on October 10, 1927. Appellant owned two blocks of the stock of the United Bank & Trust Company of California, one block being for 67½ shares, and the other being for 202½ shares, the latter block not being involved in this litigation. On August 29, 1927, appellant deposited with the Sacramento branch of the United Bank & Trust Company certificate No. 1677 for said block of 67½ shares of said stock for the purpose of having reissued to him shares of stock of said last-named corporation to which he was entitled, upon the surrender of this certificate as aforesaid, and thereupon the said bank delivered to appellant its receipt for said certificate, and this certificate was forwarded to its San Francisco branch.

At this time respondent Peck was the vice president of the Sacramento branch of said United Bank & Trust Company, and he testified that on August 30, 1927, he telephoned appellant that he had received an offer of \$170 a share from Brandenburg & Co., a San Francisco brokerage firm, for said 67½ shares of stock; that on August 31, 1927, appellant called on Peck at the bank and asked him what the market price of said stock was on that day. Peck replied that he did not know, but at appellant's request he called up Brandenburg & Co. over the long-distance telephone and was informed by a Mr. Upton, a member of said firm, that \$170 per share was the best the market afforded. Peck repeated this information to appellant and appellant then said, "Tell him he can have it for \$175 per share," and in response to this Upton said "all right it is sold." And Peck thereupon informed appellant of the acceptance of this offer. The following day Peck received a letter from Brandenburg & Co. confirming the sale, and directing that the delivery of the stock be made through the Pacific National Bank of San Francisco, the purchase price of said stock to be paid upon the receipt by that bank of the receipt delivered to appellant by the United Bank & Trust Company, when he deposited with it his said stock.

On September 8th appellant brought the said receipt to Peck at the bank and delivered the same to him, signing an indorsement thereon to the effect that he thereby sold, assigned, and set over unto the Pacific National Bank of San Francisco all his right, title, and interest in the certificate for the 67½ shares of stock, and authorized the new stock to be issued per its order. This receipt so indorsed was attached to a draft for \$11,812.50 and forwarded by the said Sacramento branch of the United Bank & Trust Company to the Pacific Na-

tional Bank, with instructions to deliver it to Brandenburg & Co. upon receipt of said sum of \$11,812.50.

The Pacific National Bank, upon receiving the said receipt, draft, and instructions, notified Brandenburg & Co. that it held this collection. Mr. Upton of Brandenburg & Co. called on said bank and informed it that he desired the certificate for the 67½ shares before paying the draft. He and Mr. Kellman, who represented this bank, then called on the United Bank & Trust Company at San Francisco and requested of Mr. Everard, who was in charge of the stock transfers of this bank, the delivery of the said certificate. This Everard refused to do, without further order from Peck. He thereupon called Peck on the telephone and requested authority for so doing. Peck assured him that appellant would give the authority and Everard then delivered the said certificate of stock to Kellman, who, in turn, upon payment of the said sum of \$11,812.50, delivered the said certificate to Upton. On this same date Peck mailed to the Pacific National Bank written authorization from appellant to the United Bank & Trust Company, at San Francisco, to deliver said certificate to the Pacific National Bank. This last-mentioned bank remitted the said sum of \$11,812.50, received by it upon the surrender of said certificate, as aforesaid, to the United Bank & Trust Company at Sacramento, and said last-named bank deposited it to the credit of appellant and so informed him.

Appellant contends that the trial court erred in refusing him the right to have the case tried by a jury.

Summarized, the complaint alleges that appellant was the owner of a certificate of stock covering 67½ shares, that the corporation which had issued the stock had been merged with another corporation and a new corporation formed, that by reason of this merger, upon surrendering this certificate to the new corporation, he became, by agreement of the stockholders of said corporation, entitled to have stock of the new corporation issued to him in the ratio of 1.6 of the stock of the new corporation for each share of the old corporation so surrendered, and, in addition, was given the privilege of buying at \$87.50 per share, one share of the new corporation for each four shares of the old corporation surrendered; that he surrendered his said certificate for 67½ shares in the old corporation to the new corporation for the purpose of having the new corporation issue its said stock to him and to enable him to purchase shares of the new corporation, as aforesaid, but that respondents Peck and Yates, who were the vice presidents of the new corporation, conspired with two unknown persons to confiscate appellant's said certificate, and by means of said conspiracy caused the new corporation to deliver the said certificate to them; that ap-

pellant has demanded of respondents the return to him of said certificate, but that they have refused to do so, and that he has demanded of both the old and the new corporation that they issue and deliver to him 108 shares of the stock of the new corporation, with the right to purchase 27 additional shares of said stock at \$87.50 per share, which they have also refused to do; that since the surrender of said certificate, the value of the stock in both of said corporations has greatly increased, so that a money judgment would not adequately compensate appellant for the injuries and damages he has received, and that it is necessary to fully compensate him that he have specific performance of said agreement. He asks judgment that he be declared to be the owner of said certificate of stock for the 67½ shares, and that none of respondents have any right, title, or interest therein, that he is entitled to have 108 shares of the stock of the new corporation issued to him and have the right to purchase an additional 27 shares at \$87.50 per share, and that the court direct each of said respondents to issue to appellant said stock in said new corporation and permit him to purchase 27 additional shares of stock at \$87.50 per share in lieu of the old stock.

Respondent Pacific National Bank answered denying, on information and belief, all the allegations of the complaint, except that the United Bank & Trust Company was a corporation and disclaimed any interest in the subject matter of the action. The other respondents answered, in substance, that appellant had sold and assigned the certificate of stock involved in this action to Brandenburg & Co., and that prior to the commencement of this action, and subsequent to the sale of same, the United Bank & Trust Company had issued to the purchaser a new certificate therefor, and also denied the alleged conspiracy and fraud alleged in the complaint.

Section 592 of the Code of Civil Procedure provides that actions for the recovery of specific real or personal property, with or without damages, or for money claimed as due upon contract, or as damages for breach of contract, or for injuries, must be tried by a jury. In other cases issues of fact must be tried by the court.

This is not an action for the recovery of specific personal property, nor is it an action for damages, growing out of any breach of contract, or for injuries sustained by appellant. It appears from an examination of the complaint, and of the relief therein sought, that it is an action for specific performance.

[1] Actions to enforce specific performance were not recognized at common law. 23 Cal. Jur. 413. Such actions are wholly of equitable cognizance. *Glock v. Howard & Wilson Colony Co.*, 123 Cal. 1, 55 P. 713, 43 L. R. A. 199, 69 Am. St. Rep. 17; *Rockhill v. Parker*,

22 Cal. App. 367, 134 P. 720. *Pomeroy* in his work on Equity Jurisprudence, vol. 4, § 1412, says: "Cases frequently arise where corporations refuse to recognize the rights of assignees of stock, and make the transfers on their books, and issue new certificates in place of the old ones presented, or where certificates have been presented to the company without the owner's consent and negligence, and new certificates have been issued instead thereof to others purporting to be entitled thereto. In such cases it is well settled that although the law may give some remedy, as that of damages, for the refusal, equity has jurisdiction to compel the corporation to make the transfer and issue new certificates in the one case, to the lawful assignee, and in the other, to decree that the corporation replace the stock upon its books and issue new certificates to the original owner, or if it is unable to do this by reason of its not having or being able to procure any shares, to pay the value of the stock."

[2] Appellant maintains that the answer of respondents, other than that of Pacific National Bank, raised a question of law which should have been tried by a jury, that is to say, the question as to whether or not there had been a sale of said stock by appellant to Brandenburg & Co.

The main purpose of this action was to compel the specific performance of the agreement of the stockholders of the United Bank & Trust Company of California and the French-American Bank, made upon their merger, authorizing the new corporation formed by such merger, to wit, the United Bank & Trust Company, upon delivery to it of stock of the United Bank & Trust Company of California, to issue to the holders thereof certain stock of said new corporation and grant them the right to purchase additional stock, as hereinbefore set forth. This clearly brought the action within the equitable jurisdiction of the court.

[3-5] It is well settled in this state that it is not error to deny a jury in any case, where such right is not granted at common law. *Pomeroy v. Collins*, 198 Cal. 46, 243 P. 657. Where the case, as made by the pleadings, involves the application of the doctrines of equity and the granting of relief which can be obtained in a court of equity, and not elsewhere, the parties are not entitled to a jury trial. *Fish v. Benson*, 71 Cal. 428, 12 P. 454; *Ballou v. Avery*, 175 Cal. 642, 166 P. 1003. There is no right to a trial by jury, where the legal issues are merely incidental to the relief sought. 15 Cal. Jur. 337. The case of *Reiner v. Schroeder*, 146 Cal. 411, 80 P. 517, relied upon by appellant, is not in point. In that case, the only essential controversy was whether or not defendant had wrongfully ousted plaintiff from possession of certain mining property, and therefore the ac-

tion was one for the recovery of specific real property. *Holland v. Kelly*, 177 Cal. 43, 169 P. 1000.

[6] Where the court, as a court of equity, has jurisdiction of the main action, a general jury trial of all the issues cannot be demanded. *Mesenburg v. Dunn*, 125 Cal. 222, 57 P. 887.

We are of the opinion that the court did not err in denying the appellant a trial by jury.

Appellant says that the main point for decision in this case is whether or not appellant sold the stock in controversy. The trial court found that on or about September 1, 1927, appellant sold to Brandenburg & Co. the shares of stock in controversy, and that, pursuant to instructions from Brandenburg & Co. to close the sale of said stock through the Pacific National Bank, appellant executed a written assignment and transfer of said stock to said Pacific National Bank, and as part of the transaction of September 12, 1927, the appellant, in writing, authorized and directed the United Bank & Trust Company, having possession of said certificate of stock, to deliver the same to the Pacific National Bank, and that, pursuant thereto, the United Bank & Trust Company did deliver it to the Pacific National Bank, for the use and benefit of Brandenburg & Co., the purchaser of said stock, and did collect and receive for the benefit of plaintiff the purchase price thereof, to wit, \$11,812.50, which sum the United Bank & Trust Company, prior to the commencement of this action, offered to pay to appellant and renewed such offer in open court at the trial of this case.

[7] Appellant contends that the evidence does not support the finding that there was a sale of the stock. Peck testified that on August 30, 1927, he had a conversation with appellant over the telephone in which he informed appellant that he had received an offer from Brandenburg & Co., offering \$170 a share for appellant's small block of stock, the one for 67½ shares, and to think the offer over, and decide what he would do and to let him know the next day. The next day appellant called on Peck. He asked Peck how the market was. Peck told him he did not know. Appellant then asked Peck to call up and find out. Peck then called up Brandenburg & Co. over the long-distance telephone and talked with Upton, a member of that company. Upton told Peck that the top price for the stock was \$170 per share, which information Peck communicated to appellant. Appellant then said to Peck, "You tell him he can have it for \$175.00 a share." Peck then said to Upton, "You can have the stock for \$175.00 a share." And thereupon Upton said, "Alright, it is a sale. We will take the stock." Peck then said to appellant, "Your stock is sold, they will accept your offer." At that

time Peck told appellant that he was talking to Brandenburg & Co. Peck then told appellant to bring in his receipt for the stock, and he would forward it and use it to collect his money for him. Appellant brought the receipt to Peck at the bank on September 8, 1927. During the interval between August 31 and September 8 Peck called appellant on the telephone two or three times and requested him to bring in the receipt, as Brandenburg & Co. were anxious to get the stock to close up their business transactions.

On September 8 appellant brought his receipt to Peck. Becker, an employee of the Sacramento branch of the United Bank & Trust Company, testified that, when appellant brought the said receipt to the bank on September 8, he and Peck had some conversation, then appellant and Peck came to his desk and Peck dictated the assignment that was placed on the back of the receipt. Appellant signed this, and Becker then drew a draft on Brandenburg & Co. for the purchase price of the stock and told appellant to sign it. Becker was then called to another part of the bank and left the receipt and draft on his desk and did not return for an hour. When he returned to his desk appellant was gone. He did not notice whether or not appellant's name appeared on the draft. He took the receipt and draft to another employee of the bank named Sullivan and directed him to send the receipt and draft to the Pacific National Bank through the mail, and this Sullivan did. Sullivan testified that appellant's name was signed to the draft when it was delivered to him. With the draft and receipt Sullivan inclosed a collection letter with instruction to deliver document only on payment of the draft. The court found that said draft had not been signed by appellant. Peck testified that he never at any time told appellant that the Pacific National Bank had purchased the stock, and he further testified that the reason why the indorsement on the receipt was in favor of that bank was because Brandenburg & Co. had, in their letter of August 31 confirming the sale of the stock, requested that the matter be closed through this bank.

On September 20, 1927, appellant wrote a letter to the United Bank & Trust Company at San Francisco, in which he said: "On September 8, 1927, I endorsed this receipt to the Pacific National Bank of San Francisco and left with the United Bank and Trust Company of Sacramento with instructions to deliver same upon receipt for me of the sum of \$175.00 for each of the 67½ shares. It is my understanding of the transaction that you were to act as my agent in the selling of the stock and that no actual sale took place. I did not intend to make any sale of the stock to you. You were not to make delivery until you received the money. However, if any sale did take place, I hereby rescind same on the ground of your failure to pay me for the

stock and there was no consideration at all for my endorsing the receipt for the stock to you. I hereby revoke your agency to sell said stock and demand that you return the receipt for the stock to me."

While there is a conflict in the evidence, nevertheless there was substantial evidence that appellant knew that Brandenburg & Co. had made the offer to purchase his said stock, that they accepted his offer to sell the same, and that between the 31st day of August and the 8th of September they were insisting that the sale be completed by the surrender of the receipt.

There is no evidence that the Pacific National Bank made any offer for or negotiated for the stock, or desired at any time to purchase the same. On the contrary, it appears that the only connection this bank had with the transaction was to receive the receipt from the United Bank & Trust Company and deliver it upon payment of the purchase price. That this was the extent of the interest which the Pacific National Bank had in this matter is strengthened by the statement in appellant's letter of September 21, in which he stated that he endorsed the receipt to this bank with instructions to deliver the same upon receipt for him of the \$175 for each of the 67½ shares.

We are of the opinion that there was substantial evidence supporting the finding of the court that there was a sale of the stock, and that the firm of Brandenburg & Co. was the purchaser.

[8] Appellant, having made a sale of his stock, and the purchase price having been paid to his agent, it appears to the court that the fact that he did not sign the aforesaid draft drawn upon Brandenburg & Co. did not in any wise affect the validity of said sale.

[9, 10] Appellant claims that the agreement entered into between appellant and Brandenburg & Co. on August 31, 1927, not being in writing, was invalid under the provisions of subdivision 4 of section 1973 of the Code of Civil Procedure, which requires an agreement for the sale of goods and chattels and things in action, at a price of not less than \$200, to be in writing, unless the buyer receives part of the goods or things or pays at the time some part of the purchase money. In this case, however, the buyer did receive the property sold, and did pay the purchase price. The delivery to and acceptance by the purchaser of goods under a parol contract of purchase and sale, which was within the statute of frauds when made, relates back to and operates upon the contract so as to validate it as of the date it was originally entered into. *Coulter Dry Goods Co. v. Wentworth*, 171 Cal. 500, 153 P. 939. Then again this parol sale of August 31, 1927, was fully executed by appellant and Brandenburg & Co.

The statute of frauds has no application to an executed oral agreement. *Central Bank of Oakland v. Lake*, 201 Cal. 438, 257 P. 521; *James v. Hall*, 88 Cal. App. 528, 264 P. 516. See, also, 12 Cal. Jur. 926.

[11] In the matter of costs, we are of the opinion that, in awarding costs against appellant, the trial court was within its rights.

The judgment in this case as to this matter of costs did not come under the provisions of section 1022 of the Code of Civil Procedure, but rather under the provisions of section 1025 of said Code.

We cannot say that the court abused its discretion in awarding costs against appellant. The judgment is affirmed.

We concur: FINCH, P. J.; R. L. THOMPSON, J.

KLINGER v. MODESTO FRUIT CO., Inc.,
et al.★
Civ. 4027.

District Court of Appeal, Third District,
California.

March 29, 1930.

Rehearing Granted April 28, 1930.

1. Principal and agent ⇨145(4) — Undisclosed principal — Sale — Persons liable.

Under evidence supporting judgment against defendant as undisclosed principal of other defendants in purchase of grapes, seller is not entitled to judgment against both principal and agent.

2. Principal and agent ⇨145(4) — Undisclosed principal — Persons liable — Election.

When agency is established with undisclosed principal, creditor must designate which party he elects to hold responsible.

3. Principal and agent ⇨145(4) — Undisclosed principal — Agent — Liability — Election.

Prosecuting claim to judgment against agent with knowledge of interest of undisclosed principal constitutes election to hold agent, relieving principal from further liability.

4. Principal and agent ⇨188 — Undisclosed principal — Relationship — Action — Party — Joinder.

Both agent and alleged undisclosed principal may properly be joined in action for purpose of determining relationship.

Appeal from Superior Court, Stanislaus County; L. W. Fulkerth, Judge.

Action by Belle Klinger against the Modesto Fruit Company, Inc., and others. Judg-

ment for plaintiff, and named defendant appeals.

Reversed.

T. B. Scott, of Modesto, for appellant.

Frank B. Collier and J. M. Cross, both of Modesto, for respondent.

L. J. Maddux, of Modesto, for defendants.

R. L. THOMPSON, J.

This is an appeal from a joint and several judgment against agents and their undisclosed principal for the purchase price of grapes. The plaintiff is not entitled to judgment against both parties under such circumstances, and the judgment is therefore erroneous.

The complaint alleges that the defendants Horton and Gibson, as the agents of the Modesto Fruit Company, a corporation, purchased on consignment 17 carloads of black grapes from the respondent which were sold by the fruit company for the net sum of \$7,102.43, no part of which was paid plaintiff, except the sum of \$4,849.46, leaving a balance of \$2,252.97 of the purchase price unpaid. It was specifically alleged that the defendants Horton and Gibson acted as the employees of the fruit company in that transaction without disclosing their agency. The liability of an undisclosed principal is clearly alleged.

The Modesto Fruit Company answered separately, setting up their written contract with the defendant Horton and denying his agency in the transaction. Each of the individual defendants answered separately. At the trial the court adopted findings to the effect that on May 12, 1926, the defendants Horton and Gibson entered into written contracts with the plaintiff to purchase the grapes in the name of B. W. Horton; that the Modesto Fruit Company "took over and assumed the contracts" on May 15, 1926, and that in the purchase of the grapes the defendants Horton and Gibson acted as the agents for the fruit company. The complaint and findings will support no other theory of the liability of the appellant. A joint and several judgment was thereupon entered against the defendants for the sum of \$2,476.41.

This appeal was perfected by the Modesto Fruit Company only. Neither of the individual defendants appealed, and the judgment has become final against them.

[1-4] Clearly the allegations of the complaint, the findings, and the judgment are based upon the theory that the Modesto Fruit Company is liable upon these contracts for the purchase of grapes as the undisclosed principal of Horton and Gibson. There are no findings to support the existence of a joint venture or a partnership between the several defendants in this transaction. Assuming that the evidence will support a judgment against the Modesto Fruit Company as

the undisclosed principal of the other codefendants, the law is well settled that under such circumstances the vendor is not entitled to a judgment against both the principal and agent. When the agency is established, the creditor must designate which party he elects to hold responsible for the obligation. *McDevitt v. Corriea*, 70 Cal. App. 245, 254, 233 P. 381; *Ewing v. Hayward*, 50 Cal. App. 708, 718, 195 P. 970; 1 Cal. Jur. 858, § 134; 2 C. J. 843, § 526; 2 *Mechem on Agency* (2d Ed.) 1312, §§ 1729-1759. Prosecuting a claim to judgment against an agent after securing knowledge of the interest of an undisclosed principal will be deemed to constitute an election to hold the agent on the part of the creditor and will relieve the principal from further liability. 2 *Mechem on Agency* (2d Ed.), 1338, § 1759; 2 C. J. 846, § 529; 21 R. C. L. 894, § 68; *Murphy v. Hutchinson*, 93 Miss. 643, 48 So. 178, 21 L. R. A. (N. S.) 785, note 788, 17 Ann. Cas. 611; *Gay v. Kelley*, 109 Minn. 101, 123 N. W. 295, 26 L. R. A. (N. S.) 742, note. When there is an issue as to the existence of the agency, both the agent and the alleged principal may properly be joined in the action for the purpose of determining their relationship. But since a creditor is not entitled to a judgment against both, a choice as to which party he elects to hold liable for the obligation should be made before the judgment is rendered. *Tew v. Wolfsohn* (N. Y.) 77 App. Div. 454, 79 N. Y. S. 286, affirmed 174 N. Y. 272, 66 N. E. 934. The reason which is assigned for the necessity of requiring an election on the part of the creditor before the claim is reduced to a judgment is that the obligation rests upon a contract which by its terms binds only the agent who procures it, and the undisclosed principal is bound only because he is the real party for whose benefit the contract is procured. If the principal, under such circumstances, is liable, then the agent is not also liable, except for fraud in procuring the contract, which fraud was not alleged in the present case. There is but one contract and one obligation. It is not a joint or several obligation but rather an alternative one. Both parties may not be held, and the creditor must therefore choose before the entry of judgment which he will elect to hold. 2 *Mechem on Agency* (2d Ed.) 1331, § 1750. In the concurring opinion of Mr. Justice Finlayson in the case of *Ewing v. Hayward*, 50 Cal. App. at page 718, 195 P. 970, 975, it is aptly said:

"It seems that if, as in the instant case, the alleged undisclosed principal denies the existence of the relation of principal and agent, the party seeking to recover on the contract may commence the action against both the alleged undisclosed principal and his agent, in order to ascertain the facts. But though the plaintiff may bring the action against both, the rule, as I understand it, is that the plaintiff in such an action cannot have judgment against both the undisclosed principal and

his agent, but, before the close of the case, must elect whether he will take a judgment against one or the other. See Sessions v. Block, 40 Mo. App. 569; Pittsburg Plate Glass Co. v. Roquemore (Tex. Civ. App.) 88 S. W. 449; Weil v. Raymond, 142 Mass. 206, 7 N. E. 860; Tuthill v. Wilson, 90 N. Y. 423; Mattlage v. Poole, 15 Hun (N. Y.) 556. * * * The lower court, instead of requiring plaintiff to make an election at the close of the case * * * entered judgment against both. This, I think, is ground for reversal."

The case of McDevitt v. Corriea, 70 Cal. App. 245, 233 P. 381, on principle is squarely in point and is decisive of this appeal. In that case the appellant Corriea & Bros. was a produce marketing corporation of San Francisco. It employed one Biggerstaff of Yuba county to purchase turkeys for the market season of 1922. Biggerstaff hired a man by the name of Corey to assist him. They bought the turkeys of plaintiff in their own names without disclosing their principal. The turkeys were not paid for. Suit was brought jointly against the produce marketing company and the individuals who contracted for the turkeys, for their contract price. Biggerstaff suffered judgment by default to be entered against him. Corriea & Bros. answered, denying the agency and alleging that the turkeys were shipped to them on consignment. The court found that the agency existed, but entered a joint and several judgment against all the defendants. Corriea & Bros. was the only defendant that appealed. In a well-considered opinion written by the late Justice Hart, the judgment in that case was reversed on the ground that the owner of the turkeys was not entitled to a judgment against both the agent and the principal, and that a choice as to which party the creditor elected to hold responsible should have been required.

For the foregoing reasons it becomes necessary to reverse the judgment in the present case so far as it applies to this appellant. It is so ordered.

We concur: FINCH, P. J.; PLUMMER, J.

104 Cal. App. 671

PONCINO v. SIERRA NEVADA LIFE & CASUALTY CO.

Civ. 6923.

District Court of Appeal, First District, Division 1, California.

March 25, 1930.

4. Insurance ⚡452 — Accident policy — Vehicles — Character — Passenger — Freight.

Manner in which vehicle is used, as well as construction, are important factors in de-

termining its character as passenger or freight vehicle under accident policy.

The policy insured against death resulting from accident occasioned by "the wrecking of any private passenger motor-driven car (motorcycle not included) in which the insured is riding, or driving or by being accidentally thrown from such wrecked motor-driven car.

2. Insurance ⚡452 — Accident policy — Passenger car — Character — Incidental uses — Main use.

That automobile was used for other purposes incidental to transporting driver did not keep it from being passenger automobile under accident policy.

3. Insurance ⚡668(11) — Accident policy — Character of vehicle — Question for jury.

Whether automobile owned by insured's employer and fitted for carrying tools and used by insured for transportation was passenger car within accident policy was for jury.

4. Trial ⚡285 — Instructions — Construction with evidence.

Evidence must be considered in connection with instructions to determine whether they correctly state law of case.

5. Insurance ⚡669(11) — Instructions — "Passenger automobile" — Within accident policy — Evidence.

Instruction to consider vehicle "passenger automobile" within accident policy if customarily used for carriage of insured held proper under evidence.

Insurer contended that by instruction jury was told in effect that, though automobile was a truck in fact, they might nevertheless find for beneficiary under policy. The evidence showed that car was customarily used for carriage of driver, insured, and that carriage of other passengers or their tools was merely incidental.

6. Appeal and error ⚡930(2) — Presumption — Instructions understood.

Jurors are presumed to be persons of common intelligence and to understand charge as same was understood by court.

7. Trial ⚡256(1) — Instructions — Greater particularity — Duty — To request.

If party deemed it necessary that jury be instructed with greater particularity, it was his duty to request further instructions.

8. Trial ⚡296(2) — Instructions — Rule of construction — Prejudicial error.

Instruction stating rule of construction of insurance contracts held not prejudicial,

where jury was elsewhere instructed as to meaning of policy and instructions were followed.

9. Insurance — 665(5) — Accident policy — Passenger automobile — Sufficiency of evidence.

Evidence sustained finding insured was killed while driving passenger automobile within accident policy, though incidentally car was used for other purposes.

Insured was employed as superintendent by a contractor who furnished the automobile. The car was fitted with body similar to those used on delivery wagons. Insured used it in going to and from work and sometimes carried other workmen and their tools, and also at times tools of his employer. Automobile was registered as a commercial motor vehicle.

Appeal from Superior Court, Alameda County; Leon E. Gray, Judge.

Action by Alinda Poncino, administratrix of the estate of Eugeno Poncino, deceased, against the Sierra Nevada Life & Casualty Company. From a judgment for plaintiff, defendant appeals.

Affirmed.

See, also, 279 P. 1035.

J. Hampton Hoge, of San Francisco, for appellant.

Edwin H. Williams, of San Jose, for respondent.

PER CURIAM.

This is an action upon a policy of insurance insuring the life of Eugeno Poncino against death resulting from accident occasioned by "the wrecking of any private passenger motor-driven car (motorcycle not included) in which the insured is riding or driving, or by being accidentally thrown from such wrecked motor-driven car." The policy was payable to the estate of the insured. While it was in force, his death was caused by injuries due to his having been thrown to the pavement in a collision between an automobile which he was driving and another car and in which his car was wrecked.

The complaint alleged that the automobile driven by the insured was "a private passenger motor-driven car." The allegation was denied by the defendant, and this was the only issue litigated at the trial. A jury returned a verdict for the plaintiff, and, from the judgment entered thereon, the defendant has appealed.

As grounds for reversal it is urged that the implied finding that the automobile in question was "a private passenger motor-driven car" is unsupported, and that the trial court erred in denying defendant's motion for a

nonsuit and in certain of its instructions to the jury.

It was testified that the deceased was employed as superintendent by a contractor engaged in erecting concrete buildings and other structures. It was his duty each day to go from place to place where work was being carried on and direct the men employed. In so doing he used the automobile in question, which he kept at his residence, but which was owned by his employer. The car was a Ford runabout, upon the rear of which the owner had attached a short box or body similar to those used on ordinary delivery wagons. The insured occasionally transported to and from their places of employment one or more of the workmen, who rode either with the driver or in the rear. These workmen frequently carried with them the tools used in their employment. The insured also from time to time carried thereon empty cement sacks with tools owned by his employer, consisting of shovels and hoes, and at the time of the accident there were in the car three or four bags, described by the witnesses as carpet bags, containing carpenters' tools. The car was registered by the owner with the motor vehicle department as a commercial vehicle.

[1] In support of its contention that the car was not a passenger vehicle, defendant relies upon the following cases: *Travelers' Ins. Co. v. Austin*, 42 S. E. 522, 59 L. R. A. 107, 94 Am. St. Rep. 125; *Bogart v. Standard Life & Accident Ins. Co.* (C. C. Wash.) 187 F. 851; *Wood v. General Accident Ins. Co.* (C. C.) 156 F. 982; *Standard Accident Ins. Co. v. Hite*, 37 Okl. 305, 132 P. 333, 46 L. R. A. (N. S.) 986. In the first case the policy provided for double indemnity in the event injuries were received by the insured "while riding as a passenger, and being actually in or upon any railway passenger car." The insured, who was a paymaster of a railway company, was injured in the course of his duty while riding in his pay car. It was held that he was not in contemplation of the contract a passenger, and that his car, although capable of being used as a vehicle for the transportation of passengers and had formerly been so used, was not a passenger car within the meaning of the policy. In the *Bogart* and *Wood* Cases the policies insured against "injuries from accident while riding as a passenger and being in or on any railway passenger car." It was held that a mail car was not a railway passenger car within the meaning of the policies, and that there could be no recovery. The case last cited involved a policy which exempted the insurer from liability if the insured was injured "while on a locomotive, freight car or caboose used for passenger service." The insured was in charge of a shipment of cattle, and was riding at the time of his death in a caboose from which all persons except drovers and the employees of the railway company were excluded. A recovery was denied on the

ground that the caboose was not being used for passenger service within the common and ordinary acceptance of that term or within the meaning of the policy.

As held in the above cases, the manner in which a vehicle is used, as well as its construction, is an important factor in determining its character, and such was the view of the court in *Wilmarth v. Pacific Mut. Life Ins. Co.*, 168 Cal. 536, 143 P. 780, Ann. Cas. 1915B, 1120, which case involved the question whether an elevator used both for freight and passengers was a "passenger elevator" within the meaning of an accident policy. It was held that the provision in the policy for double indemnity in case of injury to the insured "while in a passenger elevator" had reference not only to elevators used exclusively for passengers, but to elevators customarily used for conveying passengers, though also used for carrying freight.

[2, 3] As stated, there was testimony that the car was sold to the employer of the insured as a passenger car, and that it was primarily used to transport the latter from place to place in the course of his employment. That a body was attached and that the insured at the same time used the car for other purposes incidental to the main purpose would not necessarily alter its character. Under the doctrine of *Wilmarth v. Pacific Mut. Life Ins. Co.*, supra, it would still be a passenger car; and, as in that case, it was in view of the evidence proper to submit its character to the jury with proper instructions.

[4-7] The court charged the jury that a passenger automobile need not be in any particular form or made in any particular way, or with any particular contrivance or device, and that it did not need to be used exclusively for the carriage of passengers; further that "if it is customarily used for the carriage of passengers or for the carriage of the driver that is sufficient to constitute it a passenger automobile within the meaning of the insurance policy." Defendant insists that in the quoted portion of the instruction the jury was told in effect that, though they believed the automobile to be a truck, they might nevertheless find for the plaintiff.

In determining whether instructions state correctly the law of a particular case, they must be considered in connection with the evidence in the case. *Hellman Commercial, etc., Bank v. Southern Pac. Co.*, 190 Cal. 626, 214 P. 46. Here the testimony shows sufficiently that the car was customarily used for the carriage of the driver, namely, the insured; the carriage of other passengers or

their tools being but incidental. This manifestly was the evidential fact to which the instruction referred; and it cannot reasonably be assumed that the jury was misled thereby. Jurors are presumed to be persons of common intelligence and capable of comprehending the ordinary use of language as applied to the particular proposition under consideration and in reference to which it is employed, and the appellate court will not assume that they may not have understood the charge as the same was understood by the court. *Douglas v. Southern Pacific Co.*, 203 Cal. 390, 264 P. 237. The instruction, in view of the evidence, was not erroneous; and, if defendant deemed it necessary that the jury be instructed with greater particularity, it was its duty to request further instructions. *Jacobson v. Lamb*, 91 Cal. App. 405, 267 P. 114; *Putnam v. Pickwick Stages (Cal. App.)* 276 P. 1055.

[8] The jury was instructed that "in cases of uncertainty the language of a contract should be interpreted most strongly against the party who caused the uncertainty to exist"; and also "that the language in an insurance policy is framed and formulated by the insurance company; and if that language is in any respect doubtful in meaning or ambiguous or susceptible of two constructions, then it is the duty of the jury to place the construction upon the language which is most favorable to the plaintiff, and resolve any doubt, uncertainty or ambiguity against the insurance company." Defendant contends that no provision in the policy required construction, and in any case that the question was one for the court and not for the jury. In *Postler v. Travelers' Ins. Co.*, 173 Cal. 1, 158 P. 1022, it was held that an instruction stating the rule of construction of such contracts should not be given to the jury; the question being one for the court. In the present case, however, the jury was elsewhere fully instructed as to the meaning of the material terms of the policy, and it is clear that these instructions were followed. Moreover, it has been held that error in leaving to the jury the interpretation of the provisions of a contract is not prejudicial where the jury followed the law applicable to the case in their consideration of the instrument. *Stewart v. Erskine-Bolst*, 66 Cal. App. 461, 226 P. 644.

[9] The evidence was reasonably sufficient to sustain the verdict of the jury, and no error has been shown which in our opinion justifies the conclusion that the same resulted in a miscarriage of justice.

The judgment is affirmed.

104 Cal. App. 683

**RUCKER et ux. v. SUPERIOR COURT IN
AND FOR LOS ANGELES COUNTY. ★**

Civ. 7023.

District Court of Appeal, Second District, Division 1, California.

March 25, 1930.

Rehearing Denied April 10, 1930. Hearing Denied by Supreme Court May 22, 1930.

1. Appeal and error — Right of appeal.

Right of appeal is right of written law based on Constitution and statutes of state.

2. Costs — Forma pauperis.

Right to sue or defend in forma pauperis, if allowed at all, must be regulated with utmost care.

3. Appeal and error — Clerk's fees.

Motion for leave to perfect appeal in forma pauperis and to require furnishing of clerk's transcript on appeal and reporter's transcript without payment of fees held properly denied under statute (Code Civ. Proc. § 274).

Code Civ. Proc. § 274, declares that no reporter must be required to perform any service in a civil case until his fees therefor have been paid to him or deposited with the clerk of the court.

Application by Tommie C. Rucker and another for writ of mandate prayed to be directed to the Superior Court of Los Angeles County, Elliot Craig, Judge, to compel granting of motion for leave to perfect appeal in forma pauperis and to require the furnishing of clerk's transcript on appeal and reporter's transcript of proceedings without payment of fees.

Writ denied.

M. H. Broyles, of Los Angeles, for petitioners.

Everett W. Mattoon, County Counsel, and Fred M. Cross, Deputy County Counsel, both of Los Angeles, for respondent.

CONREY, P. J.

Petitioners Rucker and wife have appealed to the Supreme Court of California from a judgment rendered against them as defendants in an action for the quieting of title to certain real property. After serving and filing their notice of appeal, petitioners applied to the superior court by motion for an order allowing them to perfect their appeal in forma pauperis, and particularly for an order that the clerk of the superior court furnish to appellants, without cost, the necessary clerk's transcript on appeal, and that the court reporter, who acted as such reporter at the trial of the action, furnish to appellants a re-

porter's transcript of the proceedings of the trial, also without cost to appellant. The motion was supported by affidavits of facts tending to prove that appellants were in a condition of poverty, and were unable to pay in advance the costs on appeal. The judge to whom said application was made denied the motion "upon the ground that the above-entitled cases have been duly and regularly tried in above court, and judgments adverse to defendants (petitioners herein) have been duly filed, docketed and entered therein, and upon the further ground that this court is without jurisdiction to grant the relief prayed for."

[1-3] In *Martin v. Superior Court*, 176 Cal. 289, 168 P. 135, L. R. A. 1918B, 313, the right of a superior court to authorize the prosecution of an action in forma pauperis in that court was sustained. The ruling there made was based upon the rights of the courts of common law to admit to sue in forma pauperis such poor persons as had not ability to pay the expenses incidental to the prosecution of actions to enforce their rights. It is not shown that this right extended to appeals or writs of error. The right of appeal is a creature of written law, and finds its authority in the Constitution and statutes of the state. *Gale v. Tuolumne County Water Co.*, 169 Cal. 46, 52, 145 P. 532. The right to sue or defend in forma pauperis is of such nature that, unless it is carefully guarded, it is most susceptible of abuse. Therefore, if allowed at all, it should be regulated with the utmost care. *Majors v. Superior Court*, 181 Cal. 270, 280, 184 P. 18, 6 A. L. R. 1274. In the present case it appears that, if the official reporter is paid compensation at the rate allowed by law for furnishing the demanded transcript, the estimated cost thereof will exceed \$100. There is no legal mode of requiring payment therefor out of the public treasury. If the reporter can be compelled to perform this service in this case without compensation, he would be under a like compulsory burden at the instance of the next litigant who is unable to pay, even though the value of the service runs to a very much larger sum. And all of this would be in the face of the statute which declares that "no reporter must be required to perform any service in a civil case until his fees therefor have been paid to him or deposited with the clerk of the court." Section 274, Code Civ. Proc.

Apparently there has been no formal expression of opinion on this question, in the decisions of the Supreme Court. In the case of *Brandow v. Superior Court*, L. A. No. 11606, the petitioner, claiming the rights of a pauper litigant, applied to the Supreme Court for writ of mandate to require the superior court to allow the preparation of an appeal with-

out payment of costs by the appellant. This demand included the furnishing of a stenographic reporter's transcript without payment therefor by appellant. The petition for the writ of mandate was denied, by order of date June 10, 1929.¹ We infer from such denial that the justices of the Supreme Court were of the opinion that, in the absence of any other provision by statute for the payment of the expenses of a reporter's transcript as part of the record on appeal, such expenses would have to be paid by the appealing party, and that there is no exception to this rule.

It should be noted in connection with this matter of expenses of the reporter's transcript that appellants were not without an alternative remedy of which they could have availed themselves without a reporter's transcript. The reporter's transcript provided for by section 953a of the Code of Civil Procedure is allowed at the election of the party "in lieu of preparing and settling a bill of exceptions." It is quite possible to prepare a bill of exceptions without the expense of a reporter's transcript. In times past this has often been done.

The alternative writ is discharged, and the petition for peremptory writ is denied.

We concur: HOUSER, J.; YORK, J.

104 Cal. App. 715

EDWARDS v. CALIFORNIA SWEET POTATO CORPORATION et al.
Civ. 6602.

District Court of Appeal, First District, Division 1, California.
March 28, 1930.

1. Trial ☞393(1) — Separate findings — Several causes of action.

Court should make only one finding on matters common to all causes of action, and separate finding on each matter applicable to only one cause.

2. Appeal and error ☞1075 — Restricting discussion to certain count — Abandonment of others.

Statement in brief that all questions, except those affecting third count, were eliminated, was abandonment of objection involving failure to find separately on other counts.

3. Bills and notes ☞489(7) — Immaterial variance.

Variance between allegation that note was executed when money was advanced, and proof that advance preceded note, was immaterial (Code Civ. Proc. § 469).

4. Appeal and error ☞219(2) — Objections in lower court — Findings — Variance.

That variance could have been removed by amendment prevented defendant, failing to object, from successfully attacking findings on appeal.

5. Pleading ☞387 — Immaterial variance — Finding facts on evidence.

Where variance between allegation and proof was immaterial, court properly found facts according to evidence (Code Civ. Proc. § 470).

6. Banks and banking ☞187 — Conflict in evidence — Sufficiency of testimony.

Although bank's records contradicted testimony that money was deposited, same testimony, showing that debtor received money, sustained finding that money was advanced to debtor.

7. Account, action on ☞22 — Book account — Showing charge against debtor.

To recover on book account, book itself must show against whom charge is made; charge against one being ineffective to charge another.

8. Evidence ☞158(18) — Book account — Testimony regarding entries — Admissibility.

Introduction of book as evidence of account did not render inadmissible testimony of party keeping books regarding transactions shown by entries.

9. Corporations ☞83 — Cancellation of sale of stock — Evidence.

Transaction held to amount to mutual cancellation of completed sale of stock, whereby corporation, in consideration of surrender of unpaid stock, canceled buyer's indebtedness.

The buyer's agreement with the corporation evidenced, in apt language, a sale of stock with present transfer of title, but with deposit in escrow to secure payment of balance of purchase price. The board of directors subsequently adopted resolution authorizing president to cancel balance due upon surrender, release, or return of stock.

10. Corporations ☞83 — Stock subscription — Rescission — Unanimous consent.

Subscription for capital stock of corporation may be rescinded or canceled only with unanimous consent of stockholders.

11. Corporations ☞269(3) — Consideration for common stock — No par value — Evidence.

Evidence raising question whether there was consideration for issuance of common

stock with no par value raised no question regarding value of such consideration.

Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

Action by H. Edwards against the California Sweet Potato Corporation, A. G. Col, and others. From the judgment, plaintiff, defendant last named, and others appeal.

Affirmed.

Louis Oneal and Maurice J. Rankin, both of San Jose, for appellants Col and others.

Simeon E. Sheffey, of San Francisco, for appellant Edwards.

GRAY, Justice pro tem.

[1, 2] In this action to enforce stockholders' liability, the complaint briefly stating essential matters, alleged, in three separate causes of action, that plaintiff's assignor, as accommodation indorser of notes of California Sweet Potato Corporation, hereinafter called the corporation, for the sums of \$45,000 and \$4,000, paid thereon, for principal and interest, the sums of \$46,545.61 and \$4,162.24, respectively, and, as accommodation maker of the corporation's note for \$8,000, paid thereon for principal and interest, the sum of \$8,073.24, of which there is a balance due of \$5,878.76, after deducting proceeds from a third party's note, payable to the corporation, which it had deposited as security for payment of assignor's note. The appealing defendants (hereinafter called the defendants) denied these allegations. As to the issues thus raised, the court only found that plaintiff's assignor, after maturity and nonpayment by the corporation, paid on account of the three notes \$14,093.58. In their opening brief, defendants claimed that the court's failure to make a separate and distinct finding as to the amount of payment on each note constituted a failure to find on material issues. Properly the court should have made but one finding as to each matter which was common or applicable to all causes of action, and should have made a separate finding on each matter which was common or applicable only to one cause of action. *Anderson v. Blean*, 19 Cal. App. 581, 126 P. 559. While conceding that the finding did determine the total payments on the three notes, defendants originally urged that this lumping together of all payments, by leaving undetermined the amount of payment on each note, deprived them of an opportunity to question the sufficiency of the evidence to support the finding. However, their statement in their closing brief that plaintiff's concession that a third party had paid practically all of the note for \$45,000 "eliminates from discussion of the first three counts of the complaint all question other than that relative to the third

count" (next considered) amounts to an abandonment of this objection, and relieves us of further consideration of the matter. *Estate of Hinde*, 200 Cal. 710, 254 P. 561.

[3-6] In its third count, the complaint alleged that the corporation became indebted to a bank for the sum of \$8,000 advanced to it, and that, at the time of the advance, plaintiff's assignor, at the corporation's request and as an accommodation maker, executed and delivered to the bank his note in such amount. The court found in accordance with this allegation, except that it found that the money was advanced prior to the execution and delivery of the note. The evidence discloses that the corporation had previously borrowed from the bank, on the note of its fiscal agent, the sum of \$10,000 and that the note of plaintiff's assignor was given to satisfy the unpaid balance due thereon. The same note was alleged, proven, and found. The only difference between allegation and proof was as to whether the consideration therefor was money advanced by the bank prior or subsequent to its execution and delivery. This difference, therefore, is an immaterial variance (Code Civ. Proc. § 469), as plaintiff contends, and not a failure of proof, as defendants urge. *Brown v. Pickard*, 4 Utah, 292, 9 P. 573, 11 P. 512; *Taylor v. Morris*, 163 Cal. 717, 127 P. 66; *Williams v. Macondray*, 57 Cal. App. 359, 207 P. 285. This difference could have been removed by an amendment to the complaint, if defendants had been misled (Code Civ. Proc. § 469), but, as the record shows no objection at the trial, defendants cannot now, for the first time, attack the findings, amply supported by the evidence, on this ground. 2 Cal. Jur. 278. The court correctly found in accordance with the evidence. Code Civ. Proc. § 470. Defendants also contend that this finding is unsupported by the evidence, because the bank's records contradict verbal testimony that such sum of \$10,000 was deposited in the bank to the corporation's credit. While this is true, yet the same testimony, without contradiction, shows that the corporation received the money, although it may not have so deposited it. This testimony amply supports this finding.

The complaint alleged that the corporation became indebted to plaintiff's assignor in the sum of \$19,846.18 for moneys advanced to and for it (according to the fourth count) and for a balance, upon an account stated, due upon an open, mutual, and current account (according to the fifth count). The answer denied these allegations. The court found that, on a specified date, a balance upon an open, mutual, and current book account was due to plaintiff's assignor from Hunt-Jewett-Bontz Company, that four years previously the corporation had, in writing, promised to pay said debt, and that it, prior to the commencement of this action, had paid

all thereof except \$1,227.87 principal and \$1,390.03 interest. The court further found that plaintiff's assignor advanced moneys and credits to the corporation in the sum of \$17,425.27, upon which interest in the sum of \$5,159.23 had accrued. To prove the debt, a book of plaintiff's assignor, which showed about twenty-six items charged against Hunt-Jewett-Bontz Company and but four against the corporation, was admitted in evidence without objection. The assignor testified that the book was opened, prior to the corporation's creation, to show transactions with said company, and that, when the corporation succeeded to the company's business, the charges which were of the same general nature as formerly, while in truth against the corporation, were continued to be entered against the company. He attempted to give the details and basis of each charge, but was prevented, from so doing by defendants' objection that the entries were the best evidence. However, he did testify that each item evidenced a debt due from the corporation. Defendants now urge the insufficiency of the evidence to support the findings because only four items in the book charge or connect the corporation with the transaction recorded. They do concede in their opening brief that oral testimony of the assignor, given on reopening of the case, is competent evidence connecting the corporation with ten items, not charged on the book to it.

[7, 8] Neither count pleads an action of a book account, although the court did find that there was due on a book account the sum of \$1,227.87. To recover upon a book account, the book itself must show against whom the charge is made and a charge against one person cannot constitute a charge against another. *Wright v. Loaiza*, 177 Cal. 605, 171 P. 311. In view of the meager testimony on this matter, set forth in the briefs, we must assume, in support of this finding, that the court based it upon the above four items, which are admittedly sufficient in form and amount for that purpose. The introduction of the book in evidence did not render inadmissible the testimony of plaintiff's assignor as to the transactions evidenced by the entries. *Schurtz v. Kerkow*, 85 Cal. 277, 24 P. 609; *Bushnell v. Simpson*, 119 Cal. 658, 51 P. 1080; *Cowdery v. McChesney*, 124 Cal. 363, 57 P. 221.

[9, 10] Plaintiff questions the sufficiency of the evidence to support the finding that Geno & Co. were stockholders, because, as he claims, the agreement of April 24, 1922, between the corporation and Geno & Co. was a stock-selling agreement between principal and agent, not a stock subscription, and, even if it were a stock subscription, it was canceled by the board of directors, with the consent of the stockholders. An examination of that agreement clearly shows that, in apt language, it

evidenced a sale of stock with a present transfer of title, but with a deposit in escrow to secure payment of the unpaid balance of the purchase price. Ten months later, the board of directors adopted a resolution which, after reciting that Geno & Co. threatened litigation and that it would be necessary for the corporation to file suit to compel payment of the balance due under the agreement, authorized, the president to adjust and compromise the conflicting claims and to that end to cancel the balance due the corporation upon the surrender, release, or return of the stock. Whether the president ever acted does not appear, although the stock was in possession of the corporation at time of trial, marked "Canceled." The transaction pictured is the mutual cancellation of a completed sale of stock whereby, in consideration of the return of the stock, unpaid for, the corporation canceled the purchaser's indebtedness for that stock. But a subscription for capital stock of a corporation may only be rescinded or canceled with the unanimous consent of the stockholders. *Pacific Fruit Co. v. Coon*, 107 Cal. 447, 40 P. 542; *Thomas v. Wentworth Hotel Co.*, 16 Cal. App. 403, 117 P. 1041, 1046; *Silica Brick Co. v. Winsor*, 171 Cal. 18, 151 P. 425. Since there is not only an entire absence of an affirmative showing of such consent, but the positive testimony of two defendants that they did not consent, the court correctly found in accordance with the law and the evidence.

[11] Plaintiff contends that, as the evidence shows that there was no consideration for the issuance of "Class B Common" stock, the court erred in including that stock in its finding as to the total number of shares issued, which is one element in determining the extent of the stockholders' liability of the defendants. The complaint merely mentions the other two classes of stock, and is silent as to this class. Nor does it join as parties defendant the owners of this stock. The only evidence relative to this matter is contained in the minutes of the corporation offered by plaintiff, and the only pertinent parts of those minutes are the articles of incorporation and two resolutions, adopted by the board of directors on April 4, 1922, and February 3, 1925, respectively. From the articles, it appears that the corporation was incorporated under the laws of the state of Delaware with three classes of stock, to wit, Preferred and "Class A" common, each with a par value of \$100 per share, and "Class B" common of no par value. The first resolution, passed at the first meeting of the board, authorized the issuance of all the "Class B" common stock to three named persons, in consideration of their offer to turn over to the corporation the results of their exhaustive study of the manufacture of alcohol from sweet potatoes.

The question as to the proper basis of computing the total number of shares issued, in

an action to enforce stockholders' liability where several classes of stock of different par value have been issued, has been presented to the Supreme Court on several occasions collaterally, but never directly. In *Del Monte L. & P. Co. v. Jordan*, 196 Cal. 488, 238 P. 710, the court gave as one reason for denying a writ of mandate to compel the secretary of state to file amended articles of a California corporation, which set forth two classes of stock, one of par value and the other of no par value, that it was the intent of article 12, § 3, of the Constitution, as to stockholders' liability, to require corporations, organized under the laws of the state, to have their capitalization represented in shares of a single par value, because of the difficulty in determining the liability where stock differed in value. In *Land Development Co. v. Jordan*, 198 Cal. 346, 245 P. 187, a writ of mandate was issued, compelling the secretary of state to file articles of a domestic corporation which stated all stock was of no par value. In that case, the stock being all of one class, no difficulty could arise in computing the liability on a share basis. In *Commonwealth Acc. Corp. v. Jordan*, 198 Cal. 618, 246 P. 796, 801, a writ of mandate was issued to compel the filing of articles of a Delaware corporation, having a mixed stock structure, similar to that of the instant corporation. The court in that case stated that the stockholders of a foreign corporation are subjected to the same liabilities as are the stockholders of domestic corporations, when such foreign corporations enter this state for the purpose of transacting business. The court, in passing upon one phase of the question here involved, said: "The question of how this equalized liability of the stockholders of a foreign corporation is to be established and enforced is one which would be determinable by the courts when it arose in a proper case, but we do not think it is presentable upon the threshold of the proposed entry of such foreign corporation for the purpose of transacting business in this state, nor that it is involved in the present inquiry."

Is the instant case a proper one in which to establish that formula by which stock of different values may be computed with equality? We think not. The owners of the no par value stock are not before us. Obviously the creditor is interested because that formula determines the total number of shares, which is the starting point for the ascertainment of the individual liability. But the creditor (the plaintiff in this case) has not presented a record requiring or upon which the matter can be decided. The pleadings present no issue as to the non-par value stock. The evidence merely presents the question as to whether or not there was a consideration for this stock, but does not raise any question as to the value of such consideration. Upon

the first question, the only evidence is contained in the two resolutions, each contradictory of the other. The court, evidently, believed the recital in the first resolution and found that there was consideration. It was not asked or required to pass upon the value of that consideration. In absence of any evidence called to our attention to the contrary, it may be that the court believed that such consideration was a contribution to the corporate capital equal proportionately to that of other classes of stock.

Obviously, before any formula can be stated as to the relation between various classes in computing the total shares issued, it is essential that some evidence be introduced upon which to predicate that formula.

The judgment is affirmed.

We concur: TYLER, P. J.; CASHIN, J.

104 Cal. App. 554

**COOK v. CENTRAL MENDOCINO COUNTY
POWER CO.★**
Civ. 3857.

District Court of Appeal, Third District, California.

March 19, 1930.

Rehearing Denied April 18, 1930. Hearing Denied by Supreme Court May 15, 1930.

1. Appeal and error ⇨1011(1) — Review — Court's finding — Conflicting evidence.

That testimony was conflicting is immaterial on appeal, if trial court's finding is supported by sufficient evidence.

2. Corporations ⇨426(1, 10) — Ratification — Officers' contract — Benefits.

Corporation may ratify contract made by its officers, or accept benefits of such contract.

3. Corporations ⇨426(10) — Loan — Benefit — Note — Corporate obligation.

That money advanced to corporation was used for corporate purposes is important in determining whether note therefor, signed by president and treasurer, is corporate obligation.

The note in question was signed in name of corporation by its president and its treasurer, but was not under corporate seal, and had not been formally authorized by resolution of board of directors. The by-laws contained no provision authorizing president or treasurer to execute notes.

Appeal from Superior Court, Mendocino County; H. L. Preston, Judge.

Action by J. Andrew Cook against the Central Mendocino County Power Company. From a judgment for plaintiff, defendant appeals.

Affirmed.

Frank W. Taft, of Willits, and Mannon & Brazier, of Ukiah, for appellant.

Clifton Hildebrand and James S. Myers, both of Oakland, for respondent.

PLUMMER, J.

The plaintiff in this action had judgment against the defendant for the recovery of the sum of \$5,250 principal, together with interest thereon from the date of the entry of judgment on a promissory note dated September 22, 1923. From this judgment the defendant appeals.

At the conclusion of the trial, the court made and filed its findings, which we summarize as follows:

That on or about the 22d day of September, 1923, the defendant made, executed, and delivered to the plaintiff its promissory note, in writing, whereby it promised and agreed to pay to the plaintiff, ten days after date, without interest, the sum of \$5,250. The note contained the usual covenants as to payment of attorneys' fees and costs in the event of suit. The note was signed, "Central Mendocino County Power Co., Frank W. Taft, President. H. W. Cook, Treasurer." The seal of the corporation was not attached. That, at the time of the execution of this note, no previous resolution or authorization was passed or had by the directors of the corporation, or, as stated in the finding, "the execution of the aforesaid note was not formally authorized by the Board of Directors of the defendant corporation, in that no resolution was passed by the Board of Directors formally authorizing the execution of the note." The by-laws of the corporation contained no provision authorizing the execution of notes by the president and treasurer. That subsequent to the execution of said note, and on or about the 18th day of February, 1924, at a time when the plaintiff was about to institute a suit against the defendant company on the promissory note involved in this action, in consideration of the plaintiff agreeing to forbear bringing suit until the 15th day of May, 1924, the defendant company executed a forbearance agreement in the following words and figures, to wit:

"In consideration of the forbearance and agreement to forbear until on or after the 15th day of May, 1924, on the part of J. Andrew Cook, his heirs, executors, administrators or assigns, to bring any suit or action for the collection of that certain promissory note in his favor, dated September 22, 1923, in the principal sum of \$5,250.00, made, executed and delivered by the undersigned, Central

Mendocino County Power Company, to said J. Andrew Cook, or order, and of his agreement to extend and the extension of the maturity, or due date, of said note to said 15th day of May, 1924, Central Mendocino County Power Company hereby agrees and promises to pay interest on said principal sum of \$5,250.00 indebtedness evidenced by said note at the rate of eight (8%) per cent. per annum from the 3rd day of October, 1923, shall be due and payable on said 15th day of May, 1924, and said quarterly installments of interest shall be thereafter due and payable on the 3rd day of June, September, December and March in each and every year until the whole sum of said principal and interest shall be fully paid.

"In Witness Whereof, said Central Mendocino County Power Company has caused its corporate name to be hereto subscribed and its corporate seal hereunto affixed by its President and Treasurer, and duly authorized this 18th day of February, 1924, by resolution of the Board of Directors.

"Central Mendocino County Power Co.

"Frank W. Taft, President.

"[Corporate Seal.] H. W. Cook, Treasurer."

That the board of directors of the defendant corporation, at the time of the execution of the forbearance instrument, passed a resolution authorizing the execution of the same, and also, in addition, ratifying the promissory note involved in this action. That, by so ratifying the aforesaid promissory note, the same became a binding obligation of the corporation. That at the time of the execution of the note herein referred to, to wit, on the 22d day of September, 1923, the plaintiff advanced to the defendant the sum of \$5,000, and that the defendant company received the benefit of said money, and that the corporation is now estopped from questioning the authority of the president and the treasurer to execute said note on behalf of the corporation. That defendant, through its directors and officers, received the benefit of the plaintiff's money, with full knowledge of what the president and treasurer had done. That said note was not paid through any arrangement with Mrs. Amy Reque Long, had and made with Mrs. Lillian Cook, in relation to the purchase of the shares of capital stock in said corporation. The court further found that said promissory note was unpaid. Judgment was accordingly entered in favor of the plaintiff.

The record shows that, at the time of the organization of the defendant corporation, the promoters pooled 63,242 shares of the common stock thereof, this stock all being issued in the name of one H. W. Cook; the corporation being organized by Edward Morris, H. W. Cook, and Frank W. Taft, as principal promoters. Taft was elected president, and Morris vice president and general manager. There were two other persons electe

as directors, but the ones named apparently controlled and managed the business of the corporation. It appears from the record that Mrs. Lillian Cook and some others advanced considerable money to the defendant corporation, and were credited with an equitable interest in what was called the "pooled" stock, being the shares of stock to which we have heretofore referred; the record showing that the stock so pooled was for the purpose of enabling the corporation to more easily finance its enterprises.

The trial court, preceding the filing of its findings, delivered its opinion in writing, setting forth the facts surrounding the execution of the note sued upon, from which we take the following: "The defendant corporation was in great financial difficulties; Frank W. Taft was president; Edward Morris was the vice-president and general manager; H. W. Cook, a brother of plaintiff, was acting secretary and treasurer. Mr. H. W. Cook and his mother, Lillian Cook, had invested considerable money in the defendant company. The company had issued checks on the Bank of Willits in payment of its pressing obligations to the amount of between \$4,000 and \$5,000, and there were no funds in the bank to meet these checks. Mr. Morris was endeavoring by all means possible to obtain money to meet these pressing obligations. Mr. H. W. Cook was asked by Mr. Morris if a loan could be secured from the plaintiff; the matter was taken up with plaintiff and subsequently plaintiff, on September 21, 1923, gave his check to defendant, Central Mendocino County Power Company, for \$2,000, which was cashed by the defendant and deposited in the Bank of Willits to the account of the defendant corporation. On September 22, 1923, plaintiff deposited with the United Bank & Trust Company, of San Francisco, an additional \$3,000, with instructions to transmit the same by wire to the Bank of Willits for the credit of defendant. This was done and this money was also deposited in the Bank of Willits to the credit of defendant."

As we have stated, on February 18, 1924, the forbearance agreement was executed by the corporation and delivered to the plaintiff. By the terms of this forbearance agreement, the corporation promised and agreed to pay to the plaintiff the sum of \$5,250, with interest thereon at the rate of 8 per cent. per annum. The agreement concludes as follows: "In Witness Whereof, the said Central Mendocino County Power Company has caused its corporate name to be hereto subscribed, and its corporate seal hereunto affixed, by its president and treasurer, and duly authorized this 18th day of February, 1924, by resolution of the Board of Directors." A copy of the resolution of the board of directors was also set forth in the transcript, from which it appears that the board of directors of the cor-

poration, on the day in question, adopted a resolution authorizing the execution of the forbearance instrument to which we have just referred. A copy of this resolution was furnished the plaintiff, bearing the attestation of the secretary thereof as follows: "The above resolution, adopted by the Board of Directors of the Central Mendocino County Power Company, was ordered spread upon the minutes of a special meeting of the company, held at Willits, California, on February 18, 1924. Attest: H. W. Cook, Secretary. [Corporate Seal.]" On the same date, the 18th day of February, 1924, the general manager of the corporation, Edward Morris, wrote to the plaintiff inclosing the papers to which we have referred, and stating therein: "This being a company note, it is in no way involved in the Watson transaction, and is not jeopardized by the situation that we find ourselves in." This apparently refers to a note executed and bearing interest as of the original date, maturing May 15, 1924, obviously intended to take the place of the original note. As to whether such a meeting of the corporation was held, as herein referred to, the testimony is in conflict, both Morris and Taft testifying that there was no such meeting, notwithstanding the fact that both Morris and Taft had written letters stating in substance that such a meeting was held. The secretary testified that there was such a meeting. The court found in accordance with the testimony of the secretary, and we think the testimony sufficient to support the conclusion of the trial court in this particular.

[1-3] On behalf of the appellant, it is contended that the note was not an obligation of the company, but that it was intended as an advancement by the plaintiff for an equity in the pooled stock. As stated in the opinion of the trial court, there was some conversation in relation to the plaintiff advancing \$5,000, and accepting an equity in the pool herein referred to, but it is further stated in the opinion of the trial court that the plaintiff stated that the money was a loan to the company, and that he did not advance the money as the purchase of an equity in the pooled stock. The finding that the money was loaned and used by the company, is supported by sufficient testimony, although there is a conflict upon this issue. Being supported, the fact of conflicting testimony is immaterial here. Another principle also comes to the aid of the finding of the court, in view of the fact that the corporation had and used the money advanced by the plaintiff, as herein stated. In this particular we quote the language of the trial court: "I am also of the opinion that the defendant is estopped, by the fact that it received the benefit of the money, from now raising the question that the president and treasurer had no authority to contract on behalf of the corporation. The

general principle of estoppel is that having received and enjoyed, or obtained the benefit of the transaction, with knowledge, the corporation cannot repudiate liability and escape the burdens on the ground that it was not authorized," etc.—citing 6 Cal. Jur. p. 1129. The opinion of the court also refers to other facts disclosed by the record, and this we may also quote: "It is also in evidence, and not disputed, that on other occasions the president and treasurer had borrowed money and executed notes on behalf of the corporation, with the apparent approval and acquiescence of the Board of Directors." That a corporation may ratify the contract of its officers, or accept benefits of a contract made by its president or other officer, is well established. *Sessions v. Pacific Improvement Co.*, 57 Cal. App. 24, 206 P. 653; *Commercial S. Co. v. Modesto Drug Co.*, 43 Cal. App. 174, 184 P. 964; *Aigeltinger, Inc., v. Burke*, 176 Cal. 621, 169 P. 373; 6 Cal. Jur. p. 1129; *Cook on Corporations* (8th Ed.) § 713a, p. 2951; *Porter v. Lassen County, etc., Co.*, 127 Cal. 261, 59 P. 563; 6 Cal. Jur. p. 1122. Other cases might be cited, but we deem the foregoing sufficient. The fact that the money is used by the corporation for its purposes and benefits is a leading factor in supporting the conclusion of the trial court that the instrument sued upon is a corporate obligation. *San Joaquin Valley Bank v. Gate City Oil Co. et al.*, 170 Cal. 250, 149 P. 557.

It is contended on the part of the appellant that, in the sale of the pooled stock to Mrs. Long, as hereinbefore referred to, the money advanced by the plaintiff and the note issued by the company, as herein referred to, was considered as money representing the amount due the plaintiff, paid to one Lillian Cook. As stated by the trial court in its opinion, it appears from the transcript that such an arrangement was considered by other parties than the plaintiff herein, but, as also stated by the trial court, in the final escrow agreements entered into terminating in the sale and purchase of the pooled stock, no mention is made of the claim of the plaintiff.

We may further add that the transcript is entirely silent as to any agreement on the part of the plaintiff to accept payment from any person other than the corporation, nor does it appear from the transcript that any conversation or negotiations were ever had with the plaintiff relative to any such arrangement. The trial court in this particu-

lar, in its opinion, uses the following language, which we adopt: "I do not doubt that during the preliminary negotiations between Mrs. Long and Mr. Robinson, the attorney for Lillian Cook, the settlement of the J. Andrew Cook note involved in this action was discussed, and also that Mrs. Long desired that said note be included in the purchase and settlement of the Cook interests, but suffice it to say that said note was not included in the final settlement. All the evidence points unerringly to this conclusion—the J. Andrew Cook note was not surrendered; the case at bar, which was then pending in Alameda County, was not dismissed; no release was produced from J. Andrew Cook; the J. Andrew Cook note was not mentioned in the final escrow instructions given to the American Trust Company; Mrs. Long accepted the terms contained in the escrow instructions and completed the purchase without demanding that the J. Andrew Cook note be included; J. Andrew Cook was in no way a party or interested in Mrs. Long's negotiations to purchase the Lillian Cook stock. In the face of all these undisputed facts, it is impossible for me to find that Mrs. Long paid this J. Andrew Cook note."

Referring again to the resolution approving and ratifying the action of the president and treasurer of the company in giving the note sued upon, it is contended on the part of the appellant that the resolution, as heretofore stated, was never adopted, and points to the fact that the resolution does not actually appear in the minutes of the corporation. This, however, is explained by the secretary in stating that the resolution was kept off the minutes at the request of Morris, who, by the way, was the manager of the corporation, in order that the source from which the corporation was drawing its finances might not be disclosed, and it was not desired that other interests should learn of the transaction.

There being sufficient testimony in the record to support the findings of the trial court, it would serve no useful purpose to review the authorities cited by the appellant, based upon its contentions as to what the facts are, or as to what the findings of the trial court should have been.

The judgment is affirmed.

We concur: FINCH, P. J., R. L. THOMPSON, J.

104 Cal. App. 730

**DAVIES et al. v. MT. GAINES MIN. & MILL.
CO. et al.
Civ. 4024.**

District Court of Appeal, Third District, California.

March 28, 1930.

1. Appeal and error — 907(3) — Presumption — Findings — Judgment roll.

Findings, in case of appeal on judgment roll, must be taken as supported by testimony.

2. Corporations — 642(6) — Foreign corporation — Business within state — Purchase of mining property.

Foreign corporation purchasing mining property was not "doing business" within state within law relating thereto (Corporation Act 1915, as amended).

The issue arose in an action to set aside a certain deed executed to foreign corporation for certain mining property situated within the state upon the theory that the acquiring of such property constituted "doing business" within state, and the grounds upon which relief was predicated were that prior to purchase of the real estate the foreign corporation had not filed any certified copies of its articles of incorporation or otherwise complied with Corporation Act (St. 1915, p. 422) as amended by St. 1921, p. 638, and St. 1923, p. 1034.

[Ed. Note.—For other definitions of "Doing Business," see Words and Phrases.]

Appeal from Superior Court, Madera County; Stanley Murray, Judge.

Action by Mary Davies and another against the Mt. Gaines Mining & Milling Company and others. Judgment for defendants, and plaintiffs appeal.

Affirmed.

W. W. Kaye, of Los Angeles, for appellants.

Louis T. Milburn, of Mariposa, and H. K. Landram, of Merced, for respondents.

PLUMMER, J.

This action was instituted by the plaintiffs for the purpose of securing a judgment annulling, setting aside, and adjudging void a certain deed executed by the plaintiffs to the Mt. Gaines Mining & Milling Company.

[1] The record shows that the Mt. Gaines Mining & Milling Company is a corporation organized under the laws of the state of Nevada. On the 21st day of April, 1924, the plaintiffs, for a valuable consideration, made, executed, and delivered to the defendant mining company a deed of conveyance to certain

mining property situate in the state of California. The complaint is based upon the theory that the acquiring of this property by the defendant Mt. Gaines Mining & Milling Company constituted doing business within the state of California, and the grounds upon which plaintiffs allege they are entitled to the relief prayed for is that prior to the purchase of the real estate referred to the Mt. Gaines Mining & Milling Company had not filed any certified copies of its articles of incorporation, or otherwise complied with the act of the Legislature of 1915 (St. 1915, p. 422), as amended in 1923 (St. 1923, p. 1034), relative to foreign corporations transacting business within this state. The cause is before us simply upon the judgment roll, and therefore all the findings of the court must be taken as supported by the testimony.

The court found that on and prior to the 1st day of April, 1924, the Mt. Gaines Mining & Milling Company had not begun doing intrastate business in the state of California; that on and prior to said date said company had not maintained any office in the state of California for the purpose of transacting business in the state of California; that the conveyance from the plaintiffs to the mining company of the real property involved in the action was made for a good and sufficient consideration. The conclusions of law naturally followed, and were drawn by the court that the deed referred to was valid, and that the plaintiffs were not entitled to any relief in said action. The complaint and the findings referred to a mortgage executed by the mining company on the property purchased by it, which mortgage was executed to a third party, but as it does not affect the validity of the deed executed by the plaintiffs to the mining company, need not be further mentioned herein.

[2] In support of the appeal in this cause the appellants cite a number of Wisconsin cases, based upon a section of the Foreign Corporations Act of that state, which reads as follows: "No foreign corporation shall transact business or acquire hold or dispose of property in this state unless it shall have first complied with the requirements of the statute," etc. St. Wis. 1927, § 226.02. To this, the respondent interposes the unanswerable argument that the Corporation Act of the State of California does not, and has not, since 1921 (St. 1921, p. 638), required the filing of certified copies of its articles of incorporation, or other papers, prior to the acquiring or conveying of real estate in California. While the Foreign Corporations Act does provide certain penalties in the event that a foreign corporation begins to do business in this state without having complied with the provisions of the act, we find nothing therein which would support the action instituted by the plaintiffs. The trial court having found

that the defendant corporation was not doing business within the state, that it had simply purchased a piece of mining ground, consideration of authorities of other states where the statutes are different in this particular would simply be a waste of time. We need only to cite one California case, that of General Conference of Free Baptists v. Berkey, 156 Cal. 466, 105 P. 411, which holds that the simple purchase of real property is not doing business. Thus, in this case, if the mining company intended to carry on mining operations, it would be doing business when it began such work, but as the findings show it simply bought a piece of real estate, the case we have cited is conclusive.

The appeal is absolutely without merit, and the judgment is affirmed.

We concur: FINCH, P. J.; R. L. THOMPSON, J.

104 Cal. App. 782

LOESCHER v. WHIPPLE. ★
Civ. 6898.

District Court of Appeal, First District, Division 1, California.

March 31, 1930.

Rehearing Denied April 30, 1930. Hearing Denied by Supreme Court May 29, 1930.

1. Trust §60 — Discretionary power of trustee — Validity.

That trustee had discretion either to terminate or continue trust when beneficiary attained age of 21 did not render trust invalid.

2. Execution §264 — Sale — Title of purchaser — Nature of interest.

Judgment creditor claiming under valid sheriff's deed acquired whatever interest judgment debtor had in property at time of levy of execution.

3. Fraudulent conveyances §1 — Fraud — Actual or constructive.

Fraud of creditors may be actual, by intent to defraud, or constructive, by conveying property without retaining enough to pay creditors.

4. Fraudulent conveyances §57(4) — Depreciation of assets — Retroactive effect.

That remaining assets of judgment debtor depreciated after executing trust deed would not operate retroactively.

5. New trial §97 — Surprise — Requesting continuance.

That counsel failed to request continuance on ground of alleged surprise indicated that trial court did not abuse discretion in refusing new trial.

Appeal from Superior Court, Fresno County; Charles R. Barnard, Judge.

Action to quiet title by E. F. Loescher, trustee for Jack Loescher, against G. A. Whipple. From a judgment for plaintiff and an order denying motion for a new trial, defendant appeals.

Affirmed.

A. M. Drew, of Fresno, for appellant.

N. Lindsay South, of Fresno, for respondent.

McKENZIE, Justice pro tem.

[1] For two years prior to the 5th of September, 1924, Katie Loescher had in her custody a grandson nine years of age named Jack Loescher. It is not clear why the boy was living with his grandmother instead of with his father, E. F. Loescher. The boy was somewhat mentally deficient, and the grandmother appears to have been very solicitous of his future welfare; and having in mind that he might never be capable of providing for himself, she conceived the idea of giving the boy, through the medium of a trustee, a productive tract of land in Fresno county, consisting of about forty acres. This plan of making provision for her unfortunate grandchild had been in Mrs. Loescher's mind for some time, and on the 5th day of September, 1924, she caused to be executed a deed, which conveyed the real property involved in this action to her son, E. F. Loescher, who is the father of Jack Loescher. On the same day and as part of the same transaction, but by separate instrument, a declaration of trust relating to this property was executed by E. F. Loescher, as trustee, and Jack Loescher was named therein as beneficiary. The trust agreement was evidently prepared by one who had knowledge of such matters, and it fully provides for the management of the property by the trustee and the payment of the proceeds to the beneficiary. There is only one feature of this trust agreement which calls for special attention, and this is occasioned by appellants' contention that the trust is invalid for the reason, as stated by appellant, "It is void for uncertainty as to the subject and purpose of the trust." Appellant's contention that the trust agreement is invalid was asserted by way of demurrer and by objecting to its introduction in evidence. The trial court ruled against this contention, and appellant now complains of error in this particular. This issue can be quite appropriately disposed of at this point.

That portion of the trust agreement in question reads as follows: "Said conveyance, to wit, said deed which is hereby referred to and by reference made a part of this Declaration of Trust, is for the purpose of providing for Jack Loescher, the minor child of Trustee

§ For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

★ Rehearing denied. Hearing denied by Supreme Court.

E. F. Loescher, and child being of the age of nine years, said child hereinafter called and referred to as Beneficiary.

"The term of this trust and duration of the same is agreed to be until said Beneficiary shall arrive at the age of twenty-one years, at which time said property remaining in the hands of said Trustee may be conveyed and transferred to said minor child if in the opinion of said Trustee such should be done, said Trustor leaving it entirely in said Trustee with full discretionary power to at said time convey all property remaining under this trust to said Beneficiary, or to continue to use and handle said property. * * *

If we understand appellant's position correctly, his claim is that the discretionary power given the trustee to convey when the beneficiary attained the age of twenty-one years, or at some time later, or perchance not at all, renders the trust invalid.

We find nothing in the authorities cited by counsel to sustain his contention. On the other hand, in *re* Marshall's Estate, 147 Pa. 77, 23 A. 391, and *Cutter v. Hardy*, 48 Cal. 568, such a discretionary power was considered legal. The deed and the trust agreement show that the trustor absolutely parted with all her interest in the property and the title immediately vested in the beneficiary, subject, of course, to the trustee's legal title and the trust provisions.

[2] In July, 1927, the respondent commenced this action against defendant G. A. Whipple to the end that plaintiff's title to the property in question might be quieted. Defendant answered and likewise filed a cross-complaint against plaintiff and Katie Loescher, the aforesaid trustor. The cross-complaint is very voluminous and sets forth in detail a number of transactions which finally resulted in an execution sale to defendant of the trust property involved in this action. The following summary of the contents of the cross-complaint is sufficient to give an understanding of defendant's claim of title.

In March, 1922, Katie Loescher exchanged some property in San Jose for some land in Santa Cruz upon which defendant Whipple had a trust deed to secure the payment of \$4,500. In the trade, Mrs. Loescher agreed in writing to assume this indebtedness which was owing by the Hendersons, with whom Mrs. Loescher had exchanged properties. Mrs. Loescher prior to May, 1924, paid on this trust deed between eight and nine hundred dollars. In May, 1924, the Santa Cruz property was sold under the trust deed, and Whipple became the purchaser for the sum of \$2,000. After crediting this amount on the note secured by said trust deed, there remained a deficiency of \$2,786.83. Defendant alleged that Mrs. Loescher had knowledge of this deficiency; Mrs. Loescher denied this, and the court found she did not have knowl-

edge of it. On September 22, 1924, Whipple commenced suit in Santa Clara county to recover the trust deed deficiency from the Hendersons and Mrs. Loescher, but the court found that Mrs. Loescher had no knowledge of this suit or that Whipple expected her to pay this deficiency until after the 1st day of October, 1924. In this action, Whipple obtained judgment against Mrs. Loescher in the sum of \$2,976.44. In January, 1926, a writ of execution was issued to enforce this judgment, and by virtue of this writ all Mrs. Loescher's interest in the property in question was sold by the sheriff of Fresno county to Whipple for the sum of \$2,000, and subsequently Whipple obtained a deed for the property. The present action was instituted by plaintiff to clear the cloud caused by the sheriff's deed to Whipple.

The trial court found that the proceedings leading up to the sheriff's deed to Whipple were regular, and if Mrs. Loescher had any interest in the property at the time execution was levied such interest would pass to him.

[3, 4] The legal validity of the trust deed and the regularity of the sheriff's deed having been disposed of, there remains but one issue to consider and that is: Was the trust deed made in fraud of creditors? Such fraud may be actual, that is, by intent to defraud; or it may be constructive, as when one is generous before he is just and gives away his property without retaining enough to pay his creditors. The trial court found that Mrs. Loescher did not execute the deed with intent to defraud any creditor, and the court further found that at the time the deed was made Mrs. Loescher was not insolvent nor did she become insolvent by making a gift of this property. It is true that Mrs. Loescher's remaining assets, that is, the property she still owned after disposing of the trust property, depreciated greatly in value shortly after the making of the trust deed, but this in itself would not work retroactively. *Evans v. Sparks*, 170 Cal. 532, 150 P. 372.

It would take a great amount of space to recite the evidence and comment on the conclusions that might be drawn from the facts and circumstances shown by the record, and in the end it would serve no useful purpose. We deem it only necessary to say that after a careful reading of the entire record we are of the opinion that the findings of the trial court to the effect that the trust deed was not made in fraud of creditors were fully justified by the evidence.

[5] There remains for consideration the court's action in denying appellant's motion for a new trial. This motion was predicated upon Mrs. Loescher's testimony concerning what property she owned at certain times. The case was tried on March 29, 1928. In October, 1927, Mrs. Loescher's deposition was taken, and at that time she was interrogated about certain real property, and then, without

any reference to personal property, the following question was asked and answered: "Q. And did you have any other property than the Norris Colony property and this property I have just described, at that time? A. No sir, that is all the property I had." At the trial Mrs. Loescher, when asked concerning what property she had remaining after the trust deed was made, stated that she had notes, stock, money, etc., of the value of between fifteen and twenty thousand dollars. Counsel's position is that when he came into court he relied upon the former statement of Mrs. Loescher and was taken by surprise. He intimated at the trial he was taken by surprise, but he did not request a continuance, nor after the case was submitted did he ask to have the submission set aside so that he could present additional evidence. He waited until findings were signed and judgment entered, and then made a motion for a new trial which was based on the affidavits of Whipple and his attorney who tried the case. Counter affidavits were filed by respondent and his attorney. The affidavits are lengthy and complicated, and it would take much space to analyze them. We have read them, and conclude the counter affidavits have more convincing force. Moreover, counsel for respondent in his affidavit alleges that several weeks before the trial he furnished counsel for appellant with a list of the properties Mrs. Loescher had at the time the trust deed was made. We cannot say, as a matter of law, the trial court abused its discretion in refusing a new trial.

The judgment and order appealed from are affirmed.

We concur: TYLER, P. J.; CASHIN, J.

104 Cal. App. 577

MEYER v. STATE LAND SETTLEMENT BOARD.

Civ. 3997.

District Court of Appeal, Third District, California.

March 19, 1930.

1. Appeal and error ⇨374(4) — Supersedeas — State land settlement board — Public corporation.

Although state land settlement board was never charged with performance of governmental functions, it is essentially public, as regards requirement of supersedeas bond on appeal (Deering's Gen. Laws, Act 8008; Pol. Code, §§ 361e, 361f, added and amended).

The state land settlement board was created and constituted body corporate by St. 1917, p. 1566 (Deering's Gen. Laws,

Act 8008). Under Pol. Code, §§ 361e, 361f, as added by St. 1927, pp. 942, 943, and amended by St. 1929, p. 677, the board and all its officers were superseded by the department of agriculture and certain state officers acting ex officio. Under the original act, St. 1917, p. 1567, § 4, as amended by St. 1919, p. 839, § 2, the board was authorized to acquire property "on behalf of the state."

2. Appeal and error ⇨374(4) — State land settlement board — Giving supersedeas bond.

In action against state land settlement board which appealed from adverse judgment, no supersedeas bond was required (Code Civ. Proc. § 1058).

Code Civ. Proc. § 1058, exempts state, or people of state, or any state officer in his official capacity, from giving bond or undertaking.

3. Municipal corporations ⇨1038 — Execution — Property held in proprietary capacity.

Property held for proprietary purposes by municipal corporation may be subjected to levy and sale under execution.

4. States ⇨213 — Judgment against state — Execution.

Judgment against state merely assesses damages, and, in absence of statute, cannot be collected by execution against state or its property.

Action by A. H. Meyer against the State Land Settlement Board, a corporation. From a judgment for plaintiff, defendant appeals. Application for writ of supersedeas to the superior court to stay execution and garnishment pending appeal.

Writ granted.

See, also, 278 P. 452.

Ware & Ware, of Chico, for plaintiff.

Bond & Deirup, of Chico, U. S. Webb, Atty. Gen.; and Frank English and Charles A. Wetmore, Jr., Deputy Attys. Gen., for defendant.

PLUMMER, J.

While this action is before us upon appeal, we have here only to consider the petition of the defendant and appellant for a writ of supersedeas pending appeal.

The record shows that in the above-entitled action a judgment was entered in favor of the plaintiff in the trial court for the sum of \$9,500 and costs, from which judgment the defendant has appealed. Not having given any stay bond, the plaintiff took out and placed in the hands of the sheriff of Butte county an execution, under which the sheriff proceeded to levy upon certain lands described in the petition, and also proceeded

to serve a garnishment upon the First National Trust & Savings Bank of Chico, purporting to levy upon all moneys, effects, and credits in said bank under the control of the state land settlement board, the levy and garnishment herein referred to being made upon the theory that the lands described and the moneys referred to were subject to execution. In the matter now before us it is urged by the petitioner that, under the provisions of section 1058 of the Code of Civil Procedure, no undertaking to stay execution in this action is requisite, and, further, that the properties referred to belong to the state of California, and therefore are not subject to execution.

An answer to these questions requires a résumé of the acts of the Legislature relative to the state land settlement board, and the purposes for which the board was created.

[1] The act of the Legislature approved June 1, 1917 (St. 1917, p. 1566, Act No. 8008, Deering's General Laws), sets forth in the first section that the land settlement problem is of great importance to the welfare of the people of the state of California; that it is the purpose of the act to improve the general economic and social conditions of agricultural settlers within the state. This act was amended from time to time, but the essential purposes so declared have remained unchanged by any of the subsequent enactments.

Section 2 of the act, in order to carry out the objects thereof, created a state land settlement board to consist of five members to be appointed by the Governor. This provision has been amended from time to time, as will hereafter appear. Provision is then made for the designation of one of the members as chairman of the board, the employment of a secretary, and such other expert technical and clerical assistants as might be required; the compensation of the officers to be fixed by the board of control, with the approval of the Governor.

Section 3 of the act sets forth that: "The state land settlement board, hereafter called the board, shall constitute a body corporate with the right on behalf of the state to hold property, receive and request donations, sue and be sued, and all other rights provided by the constitution and laws of the State of California as belonging to bodies corporate."

The different sections of the act then provide for carrying the same into execution relative to the selection of lands, purchase of lands, sale of lands, etc., setting forth in great detail all of the acts which the board so created was empowered to perform.

Then follows section 25, making appropriation of the sum of \$260,000, out of any moneys of the state treasury, not otherwise appropriated. This section contains the following: "Of this amount, the sum of two hundred fifty

thousand dollars shall constitute a revolving fund to be known as the 'land settlement fund,' which is calculated to be returned to the state with interest at the rate of 4 per cent per annum within a period of fifty years from the date of the passage of this act," etc.

By an act of the Legislature approved May 16, 1927 (St. 1927, p. 943), the position of all the officers of the state land settlement board was abolished and, by section 361f of the act referred to, it was provided that the department of agriculture should succeed to, and was vested with all the duties, powers, purposes, responsibilities, and jurisdiction of, the state land settlement board, and of the several members, officers, deputies, and employees thereof. It was further provided that all the duties, responsibilities, and powers that had theretofore devolved upon the state land settlement board were transferred to the department of agriculture. This section contains, in addition to what we have said, the following: "For the purposes of this article, the terms 'State Land Settlement Board,' 'member of State Land Settlement Board,' or similar designation shall be construed to mean and refer to the Department of Agriculture."

Section 361e of the act just referred to, for the purposes of carrying out the functions and completing the work of the state land settlement board, specified that the board should thereafter consist of three members, to wit, the director of agriculture, state engineer, and the director of finance of the state of California, all acting ex officio.

Section 361f, to which we have referred, was again amended by an act of the Legislature, approved May 20, 1929 (St. 1929, p. 677). Likewise, section 361e of the act referred to was amended at the same time so as to provide that thereafter the persons having charge of the state land settlement affairs should be the director of finance, the director of public works, and the director of agriculture, all acting ex officio. This act has in view the closing up of the business affairs of the state land settlement board.

Section 4 of the original act (as amended St. 1919, p. 839, § 2) provided for the state land settlement board acquiring property for the state, the language of the section, in this particular, reading: "For the purposes of this act, the board may acquire on behalf of the state by purchase, gift or the exercise of the power of eminent domain," etc.

By the acts referred to, and especially section 361f, supra, at the time of the beginning of this action, the term "State Land Settlement Board" was defined to be the department of agriculture, and the use of those words would be held to be the same and mean the same as the words "Department of Agriculture." In other words, the use of the expression "State Land Settlement Board" legally meant the depart-

ment of agriculture. From this it follows that the title in this action, using the state land settlement board, must be held to be the same as though the title read "Department of Agriculture," and of which, so far as the functions of the state land settlement board were to be performed, devolved upon three state officers, to wit, the director of public works, the director of finance, and the director of agriculture. Section 4 of the act, as we have shown, provided for the acquiring of property in behalf of the state. There is no provision in the act as originally adopted or as set forth in any of the amendments thereto, under and by virtue of which the state land settlement board or the department of agriculture, or any of the state officers charged with the duties to be performed under the acts referred to, could acquire any interest or ownership whatsoever in either the lands or the moneys controlled by them in carrying out the purposes of the act. It will also be observed that, while the Legislature declared the state land settlement board to be a body corporate, it is only a corporation by virtue of legislative fiat, having no articles of incorporation or other rules governing its procedure, other than as set forth in the various sections of the act charging individual officers with the performance of the duties therein specified. There is nothing in the act, or any of the amendments thereto, giving the state land settlement board the powers and functions of a private corporation, in the sense that it has any ownership or interest whatever in any property upon which the board was required to administer. While the state land settlement board, as a corporate body, has not at any time been charged with the performance of any governmental function, it is essentially public in its nature, in that it is called upon to deal only with property belonging solely to the state of California. While its duties were proprietary in character, the board had no proprietary interest or ownership. In these respects it possessed none of the attributes of either a private or a municipal corporation, and therefore the principles of law relating to the acts of private corporations or municipalities acting in a proprietary capacity, controlling property of which such corporations are owners, are wholly inapplicable. It may be said that the state land settlement board, as a body corporate, is only a legal fiction or a convenience by means of which the state could embark in a colonization or land settlement experiment.

In addition to the original appropriation made by the Legislature, the record shows that large sums of money have been advanced under successive acts of the Legislature, from time to time, and that all of the money entering and invested in the enterprise came from funds, so far as the record shows, belonging to the state of California. That no

other than the state of California has any ownership in the property involved in this action will further appear by reference to the case of *State Land Settlement Board v. Henderson*, 197 Cal. 470, 241 P. 560. In this action it was held that all lands held by the state for settlement under the terms of the acts to which we have referred belonged to the state and were exempt from taxation under section 1 of article 13 of the Constitution.

[2] We may now consider the provisions of section 1058 of the Code of Civil Procedure. That section reads: "In any civil action or proceeding wherein the state, or the people of the state, is a party plaintiff, or any state officer, in his official capacity or on behalf of the state, or any county, city and county, city, or town, is a party plaintiff or defendant, no bond, written undertaking, or security can be required of the state, or the people thereof, or any officer thereof, or of any county, city and county, city, or town; but on complying with the other provisions of this code the state, or the people thereof, or any state officer acting in his official capacity, have the same rights, remedies, and benefits as if the bond, undertaking, or security were given and approved as required by this code." As we have seen, the state is the real party in interest in this action. It is the state's property only that is involved. And as we have further seen, even though the title of this action reads against the state land settlement board, it is in law and in fact against the department of agriculture. In other words, against the state of California, by and through its department of agriculture; and as we have further seen, is represented, for the purposes of the act in question, by three state officers, and their acting, by virtue of their official capacity, on behalf of the state. The state land settlement board, as a corporate entity, is not acting at all; as a corporate entity, its functions are ended, save and except as the requirements of the several acts necessitate the continuance of the legal fiction in order that the agricultural adventure of the state may be brought to a close. Even the name "Land Settlement Board" has been, by legislative act, transmuted into the meaning of "Department of Agriculture." The officers of the state land settlement board no longer exist. State officers only, in their official capacity as ex officio, are administering the affairs of the business herein referred to, and are doing so in behalf of the state. While the section does not exempt, in so many words, the state from giving an undertaking on appeal when it is a party defendant, it has been so construed. *San Francisco Law & Collection Co. v. State*, 141 Cal. 354, 74 P. 1047. Likewise, it is held that no undertaking on appeal is required of an officer of a county, city, or town when such officer represents his county, city, or town.

Lamberson v. Jefferds, 116 Cal. 492, 48 P. 485.

By virtue of the different provisions of the acts of the Legislature to which we have referred, three state officers are, in fact, acting in their official capacity in behalf of the state. They are acting under the legal designation of the department of agriculture, which includes the title used in this cause, and these three state officers are acting as fully and completely, under the designation of "Department of Agriculture," as though they appeared in their individual names. In this particular the law will regard the substance of the controversy. The fact that state property alone is involved, and the fact that officers of the state are acting in behalf thereof, even though the designation does not reveal the true identities, does not render section 1058 of the Code of Civil Procedure inapplicable. We see no escape from the conclusion that section 1058 of the Code of Civil Procedure must be construed as applying to actions such as are here presented, and that no stay bond is necessary.

[3] There is a further reason why the writ of supersedeas should be issued in this case. The existence of the levy and the garnishment tends to hinder and embarrass the department of agriculture in the administration and disposal of property belonging to the state. In an elaborate argument the respondent has set forth numerous authorities, to the effect that property held by corporations and used in a proprietary capacity may be levied upon and sold under execution. The basis for this argument is found in 23 C. J. 355, § 105, where the rule relied upon is stated as follows: "Where property of a municipal or other public corporation is sought to be subjected to execution to satisfy judgments recovered against such corporation, the question as to whether such property is leviable or not is to be determined by the usage and purposes for which it is held. The rule is that property held for public uses, such as public buildings, streets, squares, parks, promenades, wharves, landing places, etc., and generally everything held for governmental purposes, is not subject to levy and sale under execution against such corporation. * * * But where a municipal corporation or county owns, in its proprietary as distinguished from its public or governmental capacity, property not useful or used for a public purpose, but for quasi private purposes, the general rule is that such property may be seized and sold under execution against the corporation precisely as similar property of individuals is seized and sold." Numerous cases are cited supporting the text just quoted. There can be no question, but that the law set forth by respondent, and the cases cited, amply uphold the doctrine that property held for proprietary purposes by a municipality may be subjected to levy and sale under execution,

and with the doctrine set forth in the cases cited by respondent we fully agree, but, so far as applied to the case at bar, the whole argument is based upon a false premise. The state land settlement board never did, does not now, nor did any of the officers at any time mentioned in the acts, nor do any of the officers mentioned in the act as it now stands, own any interest in or to the property sought to be levied upon in this action. It is the property of the state that is sought to be subjected to the satisfaction of the plaintiff's claim, through the medium of an execution.

Similar questions have been presented and decided adversely to the respondent's contention, both by the Supreme Court and by the District Court of Appeal of this state. In *San Francisco Savings Union v. Reclamation District*, 144 Cal. 639, 79 P. 374, where it was sought to enforce a judgment against the reclamation district by execution, it was held that such proceeding was inadmissible, and that the only remedy was by way of mandamus to require the levy of an assessment.

In *People v. Honey Lake Valley Irrigation District*, 77 Cal. App. 367, 246 P. 819, 821, this court, speaking through Presiding Justice Finch, said: "Had the appellants been given judgment in this action, such judgment could not be enforced by execution against the district, but only by a suit in mandamus against the board of supervisors to compel the levying of an assessment to raise money with which to pay their claims"—citing authorities.

[4] As stated in *Westinghouse Electric Co. v. Chambers*, 169 Cal. 131, 145 P. 1025, 1026, the general rule is well established that "a judgment against the state, in cases wherein the state has permitted actions to be maintained against it, merely liquidates and establishes the claim against the state, and that, in the absence of an express statute so providing, such judgment cannot be collected by execution against the state or its property," etc. We do not need to cite the authorities, which are legion, to the effect that, where state property is held in trust, such property cannot be taken and sold upon execution. Our attention has been called to no act, and we have been unable to find any act of the Legislature authorizing state property to be sold upon execution, whether such property is used either in a governmental or in a proprietary character. The purpose or capacity in which state property is held does not, so far as we have been able to ascertain, alter the rule that state property cannot be levied upon and sold, save and except as permitted by the Legislature, and not being permitted, it cannot be done.

Here, again, we may refer to the case of *State Land Settlement Board v. Henderson*, supra, wherein it is held that the property referred to in the land settlement acts which

we have cited is state property. The reasoning of that case is full and complete, and is decisive as to the ownership of the property involved herein.

Without further citation of authorities, we are satisfied that the petition of the defendant and appellant should be granted, and a writ of supersedeas issued herein as prayed for. And it is so ordered.

We concur: FINCH, P. J.; R. L. THOMPSON, J.

104 Cal. App. 608

HAWKINS v. HAWKINS.

Civ. 4035.

District Court of Appeal, Third District, California.

March 20, 1930.

1. Divorce ⇨130 — Extreme cruelty — Proof.

If corroborated facts establish extreme cruelty within statute, decree of divorce is justified and failure to prove other cruelties alleged is immaterial (Civ. Code, § 94).

Civ. Code, § 94, defines "extreme cruelty" as the wrongful infliction of grievous bodily injury, or grievous mental suffering by one party to marriage upon the other.

2. Divorce ⇨150(2) — Extreme cruelty — Findings — Surplusage.

If corroborated facts establish extreme cruelty within statute as justifying divorce, other findings are surplusage (Civ. Code, § 94).

3. Divorce ⇨49(5) — Condonation — Extreme cruelty.

That wife agreed to return to husband for children's sake and cohabited with husband one night in hotel *held* not to consummate condonation of husband's cruelty (Civ. Code, §§ 111, 115, 116).

Civ. Code, § 111, provides that a divorce will be denied upon showing of condonation, and "condonation" is defined by section 115 as the conditional forgiveness of a matrimonial offense constituting cause for divorce. Section 116 provides that knowledge on part of condoner of facts constituting cause of divorce, reconciliation or remission of offense by injured party, and restoration of offending party to all marital rights, are necessary requirements to condonation.

4. Husband and wife ⇨1 — "Marital rights."

"Marital rights" as distinguished from "marital relations" include enjoyment of association, sympathy, confidence, domestic happiness, common dwelling, eating together,

profiting by joint property rights and intimacies of domestic relations (Civ. Code, § 116).

[Ed. Note.—For other definitions of "Marital Rights," see Words and Phrases.]

5. Divorce ⇨49(5) — Extreme cruelty — "Condonation" — Sexual intercourse.

"Condonation" by offended spouse of acts of extreme cruelty is not accomplished by sexual intercourse alone (Civ. Code, §§ 111, 115, 116).

[Ed. Note.—For other definitions of "Condone; Condonation," see Words and Phrases.]

6. Trial ⇨397(4) — Findings — Necessity — Evidence.

It is unnecessary to adopt findings relative to issue having no adequate support in evidence.

7. Divorce ⇨184(12) — Harmless error — Finding.

Failure to adopt findings on issue of condonation in divorce action *held* not reversible error where finding would necessarily be adverse to appellant.

Appeal from Superior Court, Tuolumne County; J. A. Smith, Judge.

Action for divorce by Hazel L. Hawkins against John H. Hawkins. From an adverse decree, the defendant appeals.

Affirmed.

J. C. Webster, of Sonora, for appellant.

R. R. Fowler and F. O. Hoover, both of Modesto, for respondent.

R. L. THOMPSON, J.

The plaintiff was awarded a decree of divorce from the defendant on the ground of extreme cruelty. She was also given the custody of their two minor children. The answer alleged condonation as a special defense, upon which issue the court failed to adopt a finding. This is assigned as a ground for reversal. The appellant also contends that the court's finding that he had denied the paterinity of one of his children is not supported by the evidence, for the reason that it lacks corroboration.

[1, 2] It is not contended that other acts of cruelty are not amply supported by the evidence. It is not necessary that all the alleged acts of cruelty shall be corroborated or even proved. It is enough if the facts which are corroborated fulfill the definition of extreme cruelty as it appears in section 94 of the Civil Code, and justify the entry of a decree of divorce on that ground. Other findings may be disregarded as surplusage. *Avery v. Avery*,

148 Cal. 239, 82 P. 967; *Hansen v. Hansen*, 86 Cal. App. 744, 261 P. 503; 19 C. J. 134, § 349; 9 R. C. L. 436, § 240.

[3] Upon the question of condonation the evidence is practically undisputed. On account of acts of alleged cruelty on the part of appellant the spouses were separated. Their home in Sonora was no longer maintained. The respondent was living in Oakland and was training to learn the art of hair dressing. Five days before the complaint in this action was filed the appellant visited his wife in Oakland and claims that a reconciliation was then reached, and that she condoned the alleged charges of cruelty. All that the record shows in this regard is that he visited his wife at the home of her sister in Berkeley and discussed their family affairs. He said: "We talked about the children, the home and where we would live. She said: 'For the sake of the children I'll try it,' and she agreed to return." That evening they went to a show together and that night they occupied a room together in an Oakland hotel, assuming the relationship of husband and wife. The appellant further says: "We talked about going back and living together and my wife and I expressly agreed with each other to condone and to resume marital relations."

The appellant then had no employment. He had no home to which he could take his wife and family. Except the one incident of cohabitation referred to there was no effort to restore marital rights. There was no subsequent cohabitation between the spouses. The following morning the respondent went to her mother's home at Turlock and never again saw her husband until the time of the trial. Within two or three days she telephoned him that she intended to make no further effort toward reconciliation. The complaint for divorce was immediately filed by her. The most that may be said regarding the issue of condonation in the present case is that the spouses discussed a reconciliation of their domestic troubles; that the respondent agreed to condone her husband's offenses and return to him "for the sake of the children," and that they went together to a show and slept together one night in a hotel. We are of the opinion this does not have the effect of consummating condonation.

A decree of divorce will be denied upon sufficient proof of condonation. Section 111, Civ. Code. Condonation is conditional forgiveness of a matrimonial offense which would otherwise furnish ground for a divorce. Section 115, Civ. Code. To consummate the defense of condonation it is necessary that the aggrieved spouse should (1) have knowledge of the facts constituting the cause for divorce (2) that reconciliation be accomplished and remission of the offense be granted, and that (3) the offending party be restored to all marital rights. Section 116, Civ. Code.

[4] It is doubtful whether the facts of this case adequately show reconciliation and remission on the part of the respondent. Her statement that she would "try" returning to the appellant "for the sake of the children" indicates a lack of forgiveness on her part. The fact that she immediately returned to her mother at Turlock and promptly filed a suit for divorce within a few days after their interview seems to refute the idea of reconciliation or remission. But assuming that the statement which was testified to by the appellant that they agreed "to condone and to resume marital relations" sufficiently fulfills the requirement of the statute with respect to reconciliation and remission, still there is an absence of evidence of "restoration of the offending party to all marital rights," unless it may be said that a single act of cohabitation of the spouses, which is accomplished in the rented room of a hotel, fulfills this requirement. We think it is insufficient under the circumstances of this case to constitute a consummation of condonation. The statute requires a restoration to all marital rights. It is not claimed there was a restoration to any marital rights in the present case, except the right of cohabitation on a single occasion. There is a clear distinction between the ordinary construction of the term "marital relations" and the statutory term of "all marital rights." The conjugal rights of married persons include the enjoyment of association, sympathy, confidence, domestic happiness, the comforts of dwelling together in the same habitation, eating meals at the same table, and profiting by the joint property rights as well as the intimacies of domestic relations.

[5] It has been repeatedly held that condonation of acts of extreme cruelty is not accomplished by sexual intercourse alone. *Bohnert v. Bohnert*, 95 Cal. 444, 30 P. 590; *Weber v. Weber*, 195 Mo. App. 126, 189 S. W. 577; 19 C. J. 87, § 201; *Beebe v. Beebe*, 174 App. Div. 408, 160 N. Y. S. 967; *Martin v. Martin*, 151 La. 530, 92 So. 46; *Reynolds v. Reynolds*, 34 How. Prac. (N. Y.) 346; *Gardner v. Gardner*, 2 Gray (Mass.) 434; *Phillips v. Phillips*, 1 Ill. App. 245; *Kennedy v. Kennedy*, 87 Ill. 250. Most of the foregoing cases hold that a single act of cohabitation is insufficient to support a claim of condonation of acts of cruelty, unless it is accompanied by other acts indicating an intention to forgive the offenses and to restore the offender to all marital rights. A distinction is drawn as to the effect of a single act of intercourse upon the defense of condonation of a cause of action founded on adultery and one which is based upon extreme cruelty. The cases also make proper allowance for the submission of the wife to the importunities or dominance of the husband on the theory that he is more forceful. In the case of *Bohnert v. Bohnert*, 95 Cal. 444, 30 P. 590, it is said: "Under our statute, one of the requirements necessary to

condonation is 'restoration of the offending party to all marital rights' (section 116, Civil Code), and this requirement is not proved by evidence of sexual intercourse alone." This is particularly true when but a single act of intercourse is accomplished under such circumstances as are presented in the present case.

[6, 7] Where there is no adequate evidence to support an issue in the trial of a case, it becomes unnecessary to adopt findings with relation thereto. A failure to adopt findings upon the issue of condonation in the present case is not reversible error, since the record would have required a finding adverse to the appellant. 24 Cal. Jur. 945, § 189; *White v. White*, 82 Cal. 427, 452, 23 P. 276, 7 L. R. A. 799; *Smith v. Smith*, 119 Cal. 183, 48 P. 730, 51 P. 183; *Malooof v. Malooof*, 175 Cal. 571, 166 P. 330; *Wolverton v. Wolverton*, 163 Ind. 26, 71 N. E. 123.

The judgment is affirmed.

We concur: PLUMMER, J.; FINCH, P. J.

PEOPLE v. DAWSON.★

Cr. 1924.

District Court of Appeal, Second District, Division 1, California.

March 29, 1930.

Rehearing Denied April 10, 1930. Hearing Granted by Supreme Court April 28, 1930.

1. Statutes §71, 77(1) — Special legislation — Uniformity.

Statute applying equally to all within natural class is not special legislation or void as not operating uniformly.

2. Statutes §74(1), 86 — Classification of crimes — Felonies and misdemeanors.

Statutory distinction between felonies and misdemeanors is natural and reasonable classification, not violating constitutional provisions against special legislation, or lack of uniformity (Pen. Code, §§ 17, 1387).

Pen. Code, § 17, defines felony as crime punishable by death or imprisonment in state prison and every other crime as misdemeanor, while section 1387 provides that dismissal of misdemeanor charge shall operate as bar to prosecution for same offense.

3. Criminal law §178 — Dismissal of felony charge — Delaying trial — Subsequent prosecution.

Order dismissing felony information for delay in bringing defendant to trial did not

bar subsequent prosecution for same offense (Pen. Code, §§ 1382, 1387).

Pen. Code, § 1382, requires that action be dismissed if not brought to trial within 60 days after filing of information, unless good cause to contrary be shown.

4. Criminal law §1202(1) — Prior conviction — Service of term — Pleading and proof.

To establish prior conviction of felony, prosecution must plead and prove that defendant served term in penal institution (Pen. Code, § 667).

Pen. Code, § 667, provides that one committing crime after having been convicted of offense punishable by imprisonment in state prison and "served a term therefor in any penal institution" is punishable as therein provided.

5. Criminal law §1202(6) — Judgment — Conviction of forgery — Prior conviction — Sentence — Validity.

Judgment ordering imprisonment "for the term prescribed by law" after reciting conviction of forgery and prior conviction of felony, without reciting service of term in penal institution, held not void as imposing too severe punishment (Pen. Code, § 667).

Appeal from Superior Court, Los Angeles County; Charles W. Fricke, Judge.

James H. Dawson was convicted of forgery, and he appeals.

Affirmed.

John F. Groene, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Alberta Belford, of Los Angeles, for the People.

HOUSER, J.

By an information filed in the superior court, defendant was charged with the crime of forgery; also, that before the commission of such offense he had been convicted of another felony on which judgment had been pronounced, which latter charge defendant admitted. It is asserted by appellant that, following his conviction of the offense of forgery, judgment was pronounced by the trial court against him, not only on his conviction of the crime of forgery, but as well under the provisions of section 667 of the Penal Code, as for one who theretofore had been convicted of a felony and had served a term therefor in a penal institution.

In substance, it is first contended by appellant that the provisions of section 1387 of the Penal Code to the effect that an order for the dismissal of an action "is a bar to any other prosecution for the same offense, if it is a misdemeanor," but shall not con-

stitute a bar to a further prosecution if the offense charged be a felony, is special and class legislation, and consequently unconstitutional and void, for the reason that if it be the law that a dismissal of an indictment or an information by which a defendant was charged with the commission of a felony does not bar a subsequent prosecution of the defendant for an offense identical with that originally charged against him, the effect is that upon the dismissal of a felony information, which is followed by a prosecution for an offense identical with that charged in the original information, the defendant is denied a speedy and public trial as guaranteed to him by article 6 of the amendments to the Constitution of the United States, as well as by article 1, § 13, of the Constitution of this state, and section 686 of the Penal Code.

In substance, section 1382 of the Penal Code provides that, unless good cause to the contrary be shown, the action against the defendant must be dismissed if not brought to trial within sixty days "after the finding of the indictment, or filing of the information." *Matter of Ford*, 160 Cal. 334, 338, 116 P. 757, 35 L. R. A. (N. S.) 882, Ann. Cas. 1912D, 1267.

[1, 2] By the record herein, it appears that defendant was actually brought to trial on the original information filed against him, but that, before the jury was impaneled in the action, "defendant did make his motion before said court to dismiss the said information and cause, and to discharge said defendant upon the ground that defendant, James H. Dawson, was not brought to trial within the time limited by law, and that he was not given a speedy trial," etc., which said motion was granted. In such circumstances, it would appear that defendant is in no position now to complain that he was not prosecuted under the original information. Furthermore, in the case of *People v. Palassou*, 14 Cal. App. 123, 111 P. 109, where a similar situation obtained, it was held that the fact that on the defendant's own motion he was discharged and the information dismissed because he had not been brought to trial within sixty days, as required by law, did not constitute a bar to a further prosecution under a new information for the same offense. However, appellant argues that because section 1387 of the Penal Code provides that the dismissal of a misdemeanor charge against a defendant shall operate as a bar "to any other prosecution for the same offense," the same rule should obtain where the defendant is charged with the commission of a felony; otherwise, in addition to the point that the statute constitutes special and class legislation, appellant contends that the statute is not uniform in its operation, convicts the defendant without due process of law, and denies to him the equal protection of the laws, in that the statute discriminates in fa-

vor of a defendant who may have committed a misdemeanor, as against one who may have committed a felony. The several questions thus presented may be reduced to the single inquiry as to whether offenses against the body politic may be legally divided into the two classes of misdemeanors and felonies, and procedure enacted which will be applicable to persons who are charged with the commission of the one class of criminal offenses and not be applicable to the other. A general rule, and one which has been so universally followed as to require no citation of authority therefor, is that, where a statute is made to apply equally as to all persons embraced within a natural class, the constitutional provisions directed against special legislation, lack of uniformity in the operation of the law, and the like, are not violated. From a consideration of section 17 of the Penal Code, which includes the statement that a felony is a crime which is punishable with death, or by imprisonment in the state prison, and that every other crime is a misdemeanor, it becomes apparent that as to the punishment or penalty which is to be imposed for a violation of the penal laws of the state, the Legislature by its enactment of the statute has recognized a distinction in degree as between or among different kinds of penal offenses. That such a classification is a natural one, not arbitrary, but based upon valid reasons and distinctions, and consequently not violative of the several constitutional provisions to which reference has been had, may be inferred from analogous adjudications by the Supreme Court of this state. *People v. Finley*, 153 Cal. 59, 94 P. 248; *People v. Quijada*, 154 Cal. 243, 97 P. 689; *People v. Carson*, 155 Cal. 164, 99 P. 970; *People v. Oppenheimer*, 156 Cal. 733, 106 P. 74; *Selowsky v. Superior Court of Napa County*, 180 Cal. 404, 181 P. 652; *People v. Camp*, 42 Cal. App. 411, 183 P. 845; *In re Todd*, 44 Cal. App. 496, 186 P. 790. Moreover, the classification as recognized in section 1387 of the Penal Code has stood, practically unchanged and unchallenged, for seventy-nine years. *Crim. Prac. Act*, St. 1851, p. 279, sec. 599.

It would seem clear that, as compared one with the other, a given offense may not be so serious in its consequences as another specified offense. In other words, as between two distinct offenses, one may be insignificant as far as its effect upon the body politic is concerned, while the other may be so heinous in character that to its frequent and unchecked commission might be attributed the origin of a possible state-wide disaster, or, eventually, the downfall of organized society. Manifestly, as relates to the penalty for the infraction of criminal statutes, the segregation into one class of comparatively trivial offenses from those which are placed into a second class because of their more serious effect upon the morals, the safety, or the welfare of the community, is justified. That the lesser

crimes should be denominated misdemeanors, and the greater, felonies, is of no consequence; nor does the fact that in its regulation, especially as it affects the dismissal of a prosecution for its commission, the one class is treated differently from the other, give occasion for any valid objection on the ground that such action amounts to an arbitrary or unreasonable discrimination. It is a most natural classification, and one which does no violence to constitutional guaranties.

[3] Appellant presents the specific point that the order of dismissal of the original action was final; also that it was appealable; and that it acted as a bar to further prosecution of the defendant for the same offense. It is apparent that the people accepted such order of dismissal as final. That the people attempted no appeal therefrom furnishes no ground for complaint on the part of defendant, and that such order did not bar a subsequent prosecution of defendant for the same offense is decided adversely to appellant's contention, first, by the provisions of section 1387 of the Penal Code, to which reference herein has been had; and, secondly, by the ruling in the case entitled *In re Begetrow*, 136 Cal. 293, 68 P. 773, 56 L. R. A. 528, in which it is also held that, by the prosecution of the defendant therein on the second information filed against him, no constitutional right of the defendant was invaded. See, also, *People v. Palassou*, 14 Cal. App. 123, 111 P. 109; *People v. Ammerman*, 118 Cal. 23, 50 P. 15.

[4] It is urged by appellant that the judgment pronounced against defendant was void for the reason that it imposed on him a more severe punishment for the crime of which he was convicted than is provided by the statute which specifically prescribes the penalty for the commission of such crime.

As hereinbefore intimated, by the information in the instant action defendant was "accused * * * of the crime of forgery; * * * and that before the commission of the offense charged, * * * the said defendant was * * * convicted of the crime of violation of section 146 of the California Vehicle Act (St. 1923, p. 564), a felony. * * *"

That part of the judgment of which appellant complains was as follows:

"* * * James H. Dawson having been duly found guilty in this court of the crime of forgery, a felony, as charged in the information, and having admitted prior conviction of a felony,

"It is therefore ordered, adjudged and decreed that the said James H. Dawson be punished by imprisonment in the state prison of the state of California at Folsom for the term prescribed by law."

In part, section 667 of the Penal Code provides that:

"Every person who, having been convicted of any offense punishable by imprisonment in the state prison, and having served a term therefor in any penal institution, commits any crime after such conviction, is punishable therefor as follows: * * *"

It will be noted that a part of the requisites to the imposition of the sentence of which complaint is herein made is that, following a prior conviction of an offense punishable by imprisonment in the state prison, the defendant must have "served a term therefor" in some penal institution; also, that the information herein was silent as to any allegation which related to any former service of a "term" by defendant in any penal institution; furthermore, that defendant pleaded guilty only to the charge of a prior conviction—which necessarily omitted the element of his having "served a term therefor in any penal institution."

Many authorities attest the rule that, in order to establish the prior conviction of a defendant of a felony, the statutory requirements must be fulfilled; that is to say, the necessary facts must be both pleaded and proved. *People v. Coleman*, 145 Cal. 609, 79 P. 283; *People v. King*, 64 Cal. 338, 30 P. 1028; *People v. Wagner*, 78 Cal. App. 504, 248 P. 946; *People v. Wallach*, 79 Cal. App. 605, 250 P. 578.

The opinion in the case of *People v. Sampson* (Cal. App.) 278 P. 492, contains a recognition of the fact that, in establishing a foundation for a valid judgment by which a more severe sentence may be imposed upon a defendant convicted of a criminal offense because of his prior conviction of a felony, it is essential that in some manner it appear that he has "served a term therefor" in some penal institution.

[5] It is clear that the duty of proving each of the statutory elements devolved upon the prosecution. Defendant pleaded guilty only to as great a charge as was contained in the information. Although it is manifest that a judgment by reason of which defendant would be subjected to punishment for the commission by him of the crime of forgery as severely as though both by the pleading and the proof in the action it appeared that theretofore he had been convicted of a felony, and had served a term therefor in some penal institution, would be violative of the rights of defendant; an examination of the judgment actually pronounced herein discloses that, after reciting the facts, to wit, that defendant had been convicted of the crime of forgery and that prior thereto he had been convicted of a felony, it was ordered that he be imprisoned "for the term prescribed by law." The attention of this court has been directed to no statute which, by its terms, purports to impose a more severe penalty on one convicted of a felony who theretofore simply has suffered a similar conviction, than is im-

posed upon one who never before has been convicted of a felony; and since the judgment herein contained no recital that following his conviction of a felony defendant had served a term therefor in a penal institution, the construction which should be placed upon the order contained in the judgment that defendant should be imprisoned "for the term prescribed by law," is that defendant be punished, not as prescribed by section 667 of the Penal Code, but only as is provided by the appropriate statute for a first offender convicted of the crime of forgery. So construed, as far as the point presented by appellant is concerned, the judgment is unexceptionable.

On examination of the record herein, this court is of the opinion that the evidence was sufficient to sustain the verdict of the jury.

Following his conviction, defendant gave notice of appeal, not only from the judgment and the order denying his motion for a new trial, but as well from several other orders which were incidental to the judgment.

It is ordered that the judgment as well as each of the several orders specified by defendant in his notice of appeal be, and they are, affirmed.

We concur: CONREY, P. J.; YORK, J.

104 Cal. App. 733

ALBERS v. SHELL CO. OF CALIFORNIA et al.*
Civ. 4026.

District Court of Appeal, Third District, California.

March 28, 1930.

Rehearing Denied April 26, 1930. Hearing Denied by Supreme Court May 26, 1930.

1. Negligence ⇨33(1) — Care — Due trespasser.

One owes duty only to abstain from willful or wanton conduct against trespasser.

2. Automobiles ⇨193(14) — Driver — Course of employment — Carrying friend — Expressly forbidden.

Driver of oil truck *held* not in course of employment in carrying passenger against employer's rules while making delivery.

3. Automobiles ⇨181(4) — Minor — Trespasser.

Minor over 20 years was in same class with ordinary trespasser when riding on truck against rules of its owner which he knew.

There was a sign immediately opposite the seat where minor sat which forbade any one except employee of company from riding on the truck.

4. Negligence ⇨11 — "Wantonness" — "Willfulness" — Defined.

"Wantonness" or "willfulness" are not negligence but indicate reckless conduct which has gone beyond negligence.

[Ed. Note.—For other definitions of "Wantonness" and "Willfulness," see Words and Phrases.]

5. Automobiles ⇨245(24) — Defective steering wheel — Liability to trespasser — Willful and wanton act.

Driving truck without nut fastening steering wheel to steering post where wheel was apparently firmly attached *held* not to present jury question of willful or wanton act, as respects liability for death of trespasser.

Deceased rode on defendant's truck, of which deceased's friend was driver, knowing it was against the rules. Driver knew nut was off and had reported fact to repair shop which had done nothing about it. Driver had driven truck several days without this nut. Wheel was apparently tightly fastened to steering shaft without nut but going over slight bump became loose and truck ran off bridge.

6. Automobiles ⇨181(5) — Defective steering wheel — "Trap."

Absence of nut from steering wheel *held* not to be a "trap" which is a very dangerous construction or condition designedly arranged to do injury.

[Ed. Note.—For other definitions of "Trap," see Words and Phrases.]

Appeal from Superior Court, Butte County; H. D. Gregory, Judge.

Action by John Albers against the Shell Company of California and another. From the judgment for plaintiff, defendants appeal. Reversed.

Irving D. Gibson, of Sacramento, and Seth Millington, of Gridley, for appellants.

George F. Jones, of Oroville, for respondent.

PLUMMER, J.

The plaintiff had judgment against the defendants in an action prosecuted to recover damages for the death of his son, Winfrid Albers, by reason of the overturning of an oil truck belonging to the defendant corporation, and driven by the defendant Morton. From this judgment, the defendants appeal.

The cause of action is based upon the alleged operation of the truck referred to while the steering mechanism thereof was in a defective and dangerous condition.

The complaint alleges in substance: That by reason of the willful, wanton, and gross negligence of the defendants, the nut which holds the steering wheel in place upon the steering shaft of the truck was absent; that the absence of the retaining nut made it probable that a jolt or jar would detach the adjustment of the steering wheel from the steering post and cause loss of control of the truck; that knowing the existence of the dangerous and unsafe condition of said truck, the defendants carelessly, wantonly, and negligently caused said truck to be driven over a certain highway leading to a bridge crossing Cherokee channel in Butte county; that as the truck was being driven, upon the approach to said bridge, the steering wheel became detached, the truck unmanageable, and, as a consequence, broke through the railing of the bridge referred to and fell to the bed of the canal below, resulting in the death of Winfrid Albers, who was then and there riding upon said truck. While the complaint does not allege specifically that the defendants knew of any probability that the steering wheel would become detached and cause the driver to lose control of the truck by reason of the missing nut, it does set forth that the absence of the nut from the steering wheel made it probable that the steering wheel would become detached from the steering post and result in a loss of control of the management of the truck, and that the defendants, well knowing the existence of said dangerous and unsafe condition, carelessly, wantonly, etc., caused the truck to be driven, which brings home to the defendants the allegation of knowledge of the hazard of driving the truck with defective steering mechanism.

The record shows that the defendant Morton, on the day of the accident, was making his rounds in the delivery of gasoline and oil; that in so doing he stopped at a certain farmhouse where Winfrid Albers had been working. It appears that the defendant Morton and Albers had been acquainted and friends for some years; that the deceased Winfrid Albers, having in mind returning to the town of Biggs, without any invitation from the defendant Morton, got upon the truck to ride into town. The record shows that the allowing of anyone to ride on the truck, other than employees of the company, was against the rules, and that there was a brass plate upon the dashboard directly in front of where Albers had taken his seat, on which plate were the words "Authorized employees, only, allowed on this vehicle. Shell Company of California." It would appear also from the record that Albers and a bystander had a conversation before Albers mounted the truck, relative to the rules of the company against anyone riding with the driver, and was also offered a ride into town in a private conveyance. After tak-

ing his seat in the cab of the truck, as stated, the defendant Morton, with Albers sitting at his right, propelled the truck along the highway leading to the bridge referred to. It appears from the testimony of the driver that while the highway thus traveled was in a good condition, there were certain places where it was slightly rough. An examination of this testimony shows, however, that it was not such as to impede progress or cause any particular inconvenience to anyone using the highway. Just as the truck approached the Cherokee canal bridge, a slight jar was experienced caused by a slight roughness in the pavement, the steering wheel became detached from the steering post, the driver lost control of the truck, and it plunged through the railing of the bridge to the bed of the canal below. Just prior to reaching the bridge, the truck had been running at a speed of from 20 to 25 miles per hour. As it approached the rise to the bridge, the defendant Morton testified that he slowed down to between 15 and 20 miles per hour.

On the part of the plaintiff it is contended that the circumstances surrounding this case show wanton and gross negligence. On the part of the appellants it is contended that negligence only is shown, if at all, and that as Albers occupied the position of a trespasser upon the truck, no liability has been incurred on account of his death.

The testimony shows that the steering wheel was not placed upon the steering shaft by hydraulic pressure, but was fitted down over the tapering end of the shaft by the use of a hammer; that there was a slot in the steering shaft, and also in that part of the steering wheel which fitted over the steering shaft, into which a way-key was fitted. This, for the purpose of preventing the steering wheel turning upon the steering shaft. Then, to hold the wheel and the way-key in place, the nut referred to was screwed down upon the steering shaft, threads being cut in the steering shaft for that purpose. While the nut was in place, the way-key could not become disengaged, and the steering wheel would not turn upon the steering shaft. With the nut displaced, the natural jar of the truck might loosen the way-key, and likewise, tend to loosen the steering wheel from the steering shaft. In other words, the tapering end of the steering shaft and the tapering orifice in the steering wheel, fitting over the same, would not be so tightly engaged, nor would the way-key be so firmly fixed as to prevent loss of control of the truck. Two witnesses called by the plaintiff, who had had considerable experience in the handling of trucks of the same model as the one involved in this action, testified that the only appliance which held the steering wheel in place on the steering shaft was the nut referred to. The defendant Morton testified that he

knew that the function of the nut referred to was to hold the steering wheel on the steering post; that the wheel was not very tight when it came off, or it would not have come off.

The testimony further shows that the taper fit on the steering post was to make it still more easily detachable; that while the nut was on the steering post, the wheel could not come off, and while the way-key was in the slot referred to, the steering wheel and the steering shaft would move in unison. The testimony further shows that by placing the steering wheel over the steering shaft, with the key in place, and tapping the wheel with a hammer, it would hold temporarily without the presence of the nut.

It appears from the record that the truck in question was examined by the jury; that the steering wheel had been replaced upon the steering post with the key in the key-way; and that it could not be lifted from the post at the time it was examined, but had to be tapped two or three times with a hammer before the steering wheel and steering post could be disengaged. The testimony does not show how the steering wheel was replaced upon the steering post, or just what force or hammering was used in replacing it after it had been disengaged at the time of the accident referred to. There was some testimony also introduced on the part of the defendants to the effect that the nut on the steering post above the steering wheel was not the only safety device; that without the nut, the tapering adjustment and the key referred to would suffice to control the movement of the truck.

The record further shows that the defendant Morton, the driver of the truck, had reported the loss of the nut from the steering post to the mechanic having charge of the division where the defendant Morton was employed, and that for three or four days he had been driving the truck with the nut missing; that nothing had been done, so far as the defendant Morton knew, toward replacing the nut; and further, that the truck had been kept at the company's garage and at a place where repairs were made. No question is raised as to the amount of the damages awarded.

The testimony further shows that while the deceased was a minor, he was nevertheless over the age of twenty years, and was seated immediately behind the sign on the dashboard in plain view thereof, whereon were the words to which we have referred, stating that only employees were allowed to ride upon the truck. In addition, the defendant Morton testified that he did not apprehend any danger from driving the truck with the nut missing from the top of the steering post. The superintendent of the auto department of the division of the Shell Company involved in this action, testified

that the nut was only one of the safety factors; that the way-key and the tapering of the fitting parts between the steering wheel and the steering shaft were likewise safety factors, and when they were in proper position, the truck would respond to the turn of the wheel.

The record further shows that one of the witnesses for the plaintiff, named Hayes, tried to remove the steering wheel from the automobile while it was in the courtyard, and was unable to lift the wheel off the steering shaft, although he was a large man, six feet one inch in height and weighing about two hundred pounds, and it was necessary to take a hammer and strike the steering wheel from the under side, twice on one side of the steering post and once on the other side of the steering post.

Upon the record showing the foregoing facts, it is contended on the part of the appellants: That the driver Morton was acting outside the scope of his employment in transporting Albers upon the truck, in violation of the orders of his employer; that such transportation was solely for the accommodation and convenience of Albers, and not on any business of the company; that the evidence fails to show any willful or wanton act or omission on the part of the driver Morton, resulting in the death of Albers; that Albers was a trespasser upon the truck, and one as to whom no duty was owed; also, that the court committed prejudicial error in instructions to the jury concerning willful, wanton, and gross negligence.

[1] The law appears to be very well settled in this state that as to a trespasser, one owes a duty only to abstain from willful or wanton conduct. *Giannini v. Campodonico*, 176 Cal. 548, 169 P. 80; *Gordon v. Roberts*, 162 Cal. 506, 123 P. 288; *Sessions v. S. P. Co.*, 159 Cal. 599, 114 P. 982. In support of their contentions, appellants cite the case of *O'Leary v. Fash*, 245 Mass. 123, 140 N. E. 282, 283, where it is held that a principal is not responsible for acts outside the real or apparent scope of authority, and that an invited guest riding on a truck could recover only in case of gross negligence. In the same case it is held, however, that a trespasser may recover for willful, wanton, and reckless misconduct. The facts of the *O'Leary Case* are as follows: The truck driver was engaged in delivering ice cream, and the driver, while in the course of his employment, was asked by the plaintiff and a companion for a ride; that the two got on the truck; that the plaintiff sat with her feet over the right-hand side of the truck, and there was nothing on the seat to keep her from falling off; she could hold on to the seat only with her right hand. The driver of the truck had proceeded about three-quarters of a mile, and just before coming to

an intersecting street was driving at the rate of between forty and forty-five miles per hour, and without checking the speed of the truck, turned into an intersecting street, whereby the plaintiff was thrown from the truck and injured. Upon this statement the court said: "The plaintiff was a guest of the driver of the truck, who permitted her to ride with him gratuitously. As against him she could recover only by proof of gross negligence"—citing a number of authorities. "Her rights against the defendant can mount no higher." The defendant was the owner of the truck and the employer of the driver. The trial court directed the verdict for the defendant, and this action was affirmed upon appeal. While this decision is from one of the most learned and highly respected courts in the country, and appears to be supported by a number of previous decisions in the same state, we cannot agree with the holding of the court that the testimony did not present circumstances sufficient to go to the jury, on the issue of willful, wanton, and reckless conduct. Knowing the position of the plaintiff upon the seat beside him, the driver, with his truck speeding at the rate of between forty and forty-five miles per hour, suddenly turned it into an intersecting street. That this conduct was willful and intentional seems to us beyond question. He may not have intended to injure the plaintiff, but he certainly intended to perform the act which resulted in injury. That propelling an automobile in such a manner furnishes facts from which the jury might conclude that the driver was acting wantonly and recklessly, appears also to us as being very clearly shown.

In the case of *Newlin v. Standard Oil Co.*, 122 Kan. 86, 251 P. 394, relied upon by appellants, it was held that the company was not liable for an injury to a six year old child occasioned by operation of a motor vehicle by one of his employees who, after he had refused to permit the child to ride, discovered the child had climbed onto the running-board, and negligently failed to stop the truck immediately. In that case it appears that the driver propelled the truck forward at a rate of five or six miles per hour, and had passed through some little ditches which caused the truck to tilt, and after going about 150 feet, he missed the plaintiff. It appears that the child fell off the running-board and was injured by one of the wheels of the truck. While holding that the employer, the Standard Oil Company, was not responsible by reason of the fact that there was no willful or wanton conduct, or gross negligence, the court nevertheless affirmed the judgment against the driver of the truck. There were rules in that case the same as in this, forbidding drivers to permit guests or others to ride on the truck. It may be mentioned, however, that there are no facts in

the case of *Newlin v. Standard Oil Company*, supra, showing any willful or wanton conduct, or gross negligence. It was simply a case of ordinary negligence, and the driver was held for his failure to use ordinary care. It is true that in the case just referred to, the opinion contains more dicta to the effect that the same rule would apply in the case of willful or wanton misconduct on the part of the driver of the car, which, however, is not the law in this state.

In *Zampella v. Fitzhenry*, 97 N. J. Law, 517, 117 A. 711, 24 A. L. R. 666, the court of errors and appeals in New Jersey held that an employer was not liable where a fifteen year old boy had been invited to ride with the driver and was injured by falling off the running-board of the truck. It appears that while the boy was riding on the running-board, the truck struck a rut, causing the boy to fall. Here, again, there is no willful or wanton misconduct or gross negligence shown on the part of the driver of the truck. The circumstances present only a case of want of ordinary care.

In the case of *Goldberg v. Borden's Condensed Milk Co.*, 227 N. Y. 465, 125 N. E. 807, it appears that a boy was injured by being thrown from a delivery wagon, where he was riding contrary to express orders, by the driver whipping up the horse so that the wagon was started suddenly. It was held in that case that the employer of the driver was not liable. The decision in this case was based upon the case of *Rolfe v. Hewitt*, 227 N. Y. 486, 125 N. E. 804, 14 A. L. R. 125, where it was held that the evidence was insufficient to warrant the submission of the cause to the jury on the ground of willful misconduct. There, the person injured was a guest of a chauffeur, and the question involved and decided was that the act of the chauffeur was outside the course of his employment. It appears from an examination of this case that only the question of negligence on the part of the chauffeur was involved, and not a question of willful or wanton misconduct or gross negligence. The facts show that the driver and the guest had gone to a certain village on an errand, had bought some materials, and on the way back, from some cause not stated, the driver lost control of the car. There is no evidence in the case showing that the car was defective in any particular, or in any hazardous or unsafe condition.

The case of *Armstrong's Administrator v. Sumne & Ratterman Co.*, 211 Ky. 750, 278 S. W. 111, does not involve any question of willful or wanton misconduct, or gross negligence, but is simply one of ordinary negligence, and a case involving the employment of a minor under fourteen years of age, and therefore, need not be further considered.

In the case of *Conner v. Citizens' Street Ry. Co.*, 146 Ind. 430, 45 N. E. 662, a case

also cited by appellants, it was held that the company was not liable upon evidence showing that the driver, upon a signal from plaintiff who was on the car with a friend, that the friend safely alighted while the car was in motion, and that the driver then started up by striking the mules with his whip, thereby throwing the plaintiff off, is insufficient to support a charge of willful injury, in the absence of any proof that the driver knew the plaintiff was about to alight. This very statement shows that no willful or wanton conduct was involved, or even gross negligence. There was another question, however, involved and considered by the court in that case, to wit the contributory negligence of the plaintiff in attempting to alight while the car was in motion.

The case of *Holwerson v. St. Louis & S. Ry. Co.*, 157 Mo. 216, 57 S. W. 770, 50 L. R. A. 850, simply holds that contributory negligence bars recovery in the absence of willful or wanton misconduct.

In the case of *Christie v. Mitchell*, 93 W. Va. 200, 116 S. E. 715, a case was presented where a driver of a truck, contrary to the owner's orders, had invited children to ride on the truck. It appears that the children had been engaged in some quarrel with other children who were not allowed to ride on the truck. After the truck had started, one of the children, who was holding himself on the truck by grasping a stake thereon, loosened his hold to shake his fist at one of the children with whom he had had a quarrel, and at this instant the truck, which was moving at a speed of about six miles per hour, struck a rut, causing the boy to fall from the truck and to be injured by one of the wheels running over him. There being no showing of willful or wanton conduct on the part of the driver, the owner was held not liable. In that case a number of authorities are cited, and the court reaffirmed the rule that the master owes no duty to one who is a trespasser or a mere invitee or licensee, except not to wantonly and willfully injure him—citing a large number of authorities. The same rule is followed in the case of *Carroll v. City of Yonkers*, 193 App. Div. 655, 184 N. Y. S. 847, where it was further held that the city owed no duty to inspect the steering apparatus of its automobile to discover whether it had been properly lubricated, etc. The contention was that the inspection of the steering gear would have exhibited the defect mentioned. In deciding this case the court refers to the case of *Plummer v. Dill*, 156 Mass. 426, 31 N. E. 128, 32 Am. St. Rep. 463, and *Hart v. Cole*, 156 Mass. 475, 31 N. E. 644, 16 L. R. A. 557, where it is said that as to licensees, the law requires only that the licensor shall not set traps for the licensee, and shall refrain from reckless, willful, or wanton misconduct tending to injure him.

And further, that a person invited to ride, stands in the same situation as a bare licensee who enters upon real estate which a licensor is under no obligation to make safe or keep safe, but who is liable only for active negligence. *Pigeon v. Lake*, 80 Conn. 237, 67 A. 886, 11 Ann. Cas. 371.

In the case of *Stipetich et al. v. Security Stove & Mfg. Co.* (Mo.) 218 S. W. 964, a case specially called to our attention by the respondent, the court of appeals of Kansas City was dealing with an injury to a minor who was in the position of a licensee as to the driver of the truck. It appears by the facts stated in the opinion in that case that the boy killed was of the age of ten years. The boy in question was riding on the running-board of the truck, or, rather, was on the running-board of the truck when the driver started the same suddenly, throwing the boy to the ground, one of the wheels passing over him. As the court pointed out in that case, there was active misconduct on the part of the driver, which the court considered sufficient to take the case to the jury on the ground of the willfulness of the driver in starting the truck in the heedless and reckless manner referred to.

In *Higbee Company v. Jackson*, 101 Ohio St. 75, 128 N. E. 61, 63, 14 A. L. R. 131, the Supreme Court of Ohio had under consideration the injury to a minor child by reason of the alleged willful and wanton conduct in driving one of the defendant's delivery wagons. The facts stated in the opinion show: That the truck in question was being driven in a westerly direction on Euclid avenue, in the city of Cleveland, a much-traveled street; that the injured minor, being a boy about 14 years of age, was riding on the running-board of the truck; that while he was riding in such position, with the knowledge of the driver, the driver, propelling the truck at the rate of about 45 miles per hour, ran it from the north or right side of the street over to the center line and onto and along the left side of the street, being the wrong side of the street on which to propel the automobile, and in so doing ran against the wagon which was proceeding easterly onto the south side of the street. The boy in question was on the running-board which came in collision with the wagon. The collision resulted in serious injury to the boy. The court, in the consideration of that case, holds that if the boy was a trespasser, he was entitled to the rights of a trespasser, which would safeguard him against any willful or wanton misconduct. The court likewise in that case approves the rule, which it states in the following language: "An action to recover for an injury occasioned by negligence, the element of willfulness being absent, will not lie, unless there exists between the defendant and the person injured a relation out of which there arises a duty of the former to exercise care toward

the latter." Further, in the same opinion, the court defines what it understands to be "willful and wanton conduct," as follows: "The authorities are uniform in holding that to constitute willful or wanton negligence it is not necessary to show ill will toward the person injured, but an entire absence of care for the life, person, or property of others which exhibits indifference to consequences makes a case of constructive or legal willfulness. A complete indifference to consequences distinguishes wrongs caused by wantonness and recklessness from torts arising from negligence"—citing many cases to support the rule thus stated.

In *Ziehm v. Vale*, 98 Ohio St. 306, 120 N. E. 702, 1 A. L. R. 1381, injury to a four year old child was involved, who had been driven off a truck belonging to the defendant, by the defendant's truck driver, who returned to the truck without noticing whether the child had again climbed onto the running-board of the truck. The court held that the starting of the truck without exercising care to see that the child was not in a perilous position constituted negligence. Neither willfulness nor wantonness were involved.

In the case of *Psota v. Long Island Ry. Co.*, etc., 246 N. Y. 388, 159 N. E. 180, 62 A. L. R. 1163, it was held that a suit imposing liability upon the owner of an automobile for a personal injury resulting from its negligent operation in the business of such owner, or otherwise, by any person legally using the vehicle, with the owner's express or implied permission, does not extend the liability to the owner of an automobile to include acts of his employee, who, contrary to his instructions and without the scope of his employment, "invites children for a ride, who are injured when the car is struck by a train." Judgment went for the plaintiff, and was reversed as to the owner of the automobile, though affirmed as to the driver.

In the recent case of *Monnet v. Ullman et al.*, 129 Or. 44, 276 P. 244, 247, it is held that the owner of a truck is not liable to one accepting an invitation from a truck driver, and who is injured, where there is no evidence of permission to carry passengers, the truck being used for the delivery of butter, eggs, etc., and patently not adapted or designed for the transportation of passengers. In that case the opinion points out what is and is not in the course of the employer's business. It is there said: "It is true that, if, in the course of the transaction of defendants' business, which necessarily involved driving along the highway, defendants' driver should perform that function so negligently as to run against one traveling on the road, or against such a person's vehicle, the defendants would be liable in damages, for the reason that the driver was authorized by his employer to drive upon that road, and, being so authorized, the employer assumes the burden of seeing

that he drives carefully." There was testimony in that case to the following effect: "That the driver was going down a grade at about thirty miles an hour; that the rate prescribed by the city of Kalama was twelve miles an hour, and that the pavement was wet and slippery; that a wood truck was crossing the highway from the west, and according to the plaintiff's evidence, had reached about the center of the highway when the accident occurred. If this evidence indicates a wilful intent to injure plaintiff, or wanton disregard for the consequences, the writer fails to see it. Taking the plaintiff's testimony as true, the driver was going down a rather steep grade at thirty miles an hour, when the rule required him to travel at twelve miles an hour, and in this he was negligent as a matter of law. He saw the truck coming across the highway at right angles to his course, and being, perhaps, unnecessarily alarmed for fear it would cross his path, swerved to the east, and being unable, on account of his speed, to stop his truck, ran to the edge of the highway and into the grade at Elm street, where the truck upset. He had as much at stake as his passenger; was, in fact, badly injured, and in an action by his passenger against him, his disregard of the rules of the city in driving at the prohibited rate of speed, would have justified the jury in finding him guilty of ordinary negligence, and requiring him to pay damages. But as against the defendant, plaintiff was not an invitee, because the driver had no authority to invite her," etc.

[2] The excerpt which we have taken from this case concerning the course of employment of the driver of the automobile, needs no elaboration to show that Winfrid Albers was not injured by the defendant Morton while Morton was in the course of his employment. Morton was employed to drive the truck down the highway leading to the bridge where the accident occurred, to deliver gasoline and oil, and was not employed to transport either a guest, a licensee, or a trespasser.

In the case of *Blood v. Austin*, 149 Wash. 41, 270 P. 103, the Supreme Court of Washington held that the following facts did not constitute gross negligence toward an invited guest: The car was being driven along a graveled road, the traveled portion being about twenty feet in width. At a point 250 feet from a curve there was a caution sign. The appellant testified that the respondent started to speed up at about 100 to 200 feet from the sign, at which time his speed was estimated at 30 to 40 miles an hour, when the defendant was asked to go slow. The curve was from 75 to 100 feet in length. In rounding the curve, the car ran against a railing on the left side, which gave way, causing the car to topple over. Upon approaching the curve, and within it, it appears that the right-hand side of the road had chuck holes

or ice pockets, and in taking the curve, the car was driven along the center of the highway. The roadway was frozen and covered with loose gravel or rocks, causing a lateral skidding or sliding on the pebbles of the wheels of the car to the left, until the railing was struck. It was further held that the injury was not the result of wantonness on the part of the driver.

The defect in the steering gear of the truck involved in this action is somewhat akin to defects in the braking equipment of automobiles. This defect has been considered by this court in the case of *Gilmore v. Caswell*, 65 Cal. App. 299, 224 P. 249, and *Latky v. Wolfe*, 85 Cal. App. 332, 259 P. 470, and by the Supreme Court in the case of *Rocha v. Garcia*, 203 Cal. 167, 263 P. 238. In all these cases, proof of such defect is held sufficient to establish the charge of negligence, and were that sufficient in this case, judgment of affirmance would follow as a matter of course.

The same ruling is had relative to defective brakes in the case of *Puhr, Administrator, etc., v. Chicago & N. W. Ry. Co.*, 171 Wis. 154, 176 N. W. 767, 14 A. L. R. 1334. There it was held that one approaching a railroad crossing at a rather high rate of speed, knowing that the brakes of his car were defective, was guilty of a high degree of negligence. Several cases are cited in the annotations following the case just referred to, which adopt the same rule.

In *Collins v. Anderson*, 37 Wyo. 275, 260 P. 1089, the charge was that the defendant was driving a car with defective steering mechanism, and that he drove down a grade at 25 to 30 miles per hour, and that by reason of the defective steering gear, the defendant lost control of the car, causing it to upset. An examination of the car after the accident revealed that one of the tires had become deflated. The court held that it was a question for the jury as to whether the driver of the car was guilty of negligence.

The Supreme Court of Wisconsin, in the case of *O'Shea v. Lavoy*, 175 Wis. 456, 185 N. W. 525, 20 A. L. R. 1008, had before it the question of negligence in driving a car equipped with defective springs, and the liability of the driver to an invited guest. Negligent operation of the automobile was not involved. The court, in the consideration of that case, used the following language: "We can see no difference between an invitation extended by a person to dine with him and an invitation extended to ride with him. It has been held by this court that in the former case the legal relation arising was that of licensor and licensee. *Greenfield v. Miller*, 173 Wis. 184, 180 N. W. 834, 12 A. L. R. 982. It follows that the same relation arises in the latter case, which conclusion is supported by authorities already cited. Whether or not the established rules of liability existing be-

tween licensor and licensee are applicable in the manner of the management of the automobile, they plainly are applicable so far as the condition of the automobile is concerned. According to those rules, the guest accepts the premises of his host as he finds them, subject only to the limitation that the licensor must not set a trap or be guilty of active negligence which contributed to the injury. Here, the accident happened, as said before, because of a broken spring, and the question was, did that constitute a trap within the meaning of the rule? That is the only basis upon which liability could be predicated. A trap, within the meaning of this rule as we understand it, is a hidden danger lurking upon the premises which may be avoided if known. Hence, it is the duty of the host to advise his guest of its presence so that the guest may enjoy the premises in a security equal to that enjoyed by the host. The guest has no right to a greater security than that enjoyed by the host or other members of the family. The host simply places the premises which he has to offer, at the disposal and enjoyment of his guest, upon equal terms of security. In this case the defendant considered the automobile to be in sufficient condition to make the trip. This is evidenced by the fact that he not only entrusted his own safety thereto, but that of his wife and children as well. There can be no stronger evidence of the belief of the ordinary well-meaning man in the sufficiency of the car to safely make the trip." It was further held that the circumstances detailed did not constitute gross negligence, and in the state of Wisconsin, the owner and driver of a car is not liable to guests for ordinary negligence, but only for gross negligence.

The same court, in the case of *Olson v. Hermansen*, 196 Wis. 614, 220 N. W. 203, 61 A. L. R. 1243, held that a host owes to his guest in an automobile, the duty to exercise ordinary care not to increase the danger to the guest, or to create any new danger.

In *Marple v. Haddad*, 103 W. Va. 508, 138 S. E. 113, 115, 61 A. L. R. 1248, the Supreme Court of West Virginia holds that one who is carried gratuitously in an automobile, at his own request, takes the machine as he finds it, subject to the duty of the operator to warn such licensee of any known dangerous defect in the vehicle. In that case, we find the following language: "Reasonable care for the safety of young Marple commenced only when he entered the truck. The defendant owed him no duty of prior inspection. 'He who enters an automobile to take a ride with the owner also takes the automobile and the driver as he finds them.' * * * 'A guest, upon premises or in the vehicle of another, must take such premises or vehicle as he finds them' (subject to the exception that it is the duty of the owner to warn the guest of any 'trap' known to the owner)"—citing the case which we have heretofore mentioned of Car-

roll v. Yonkers, holding that a city is not required to inspect cars to ascertain defects as against a mere licensee.

In the case of Puckett v. Pailthorpe, 223 N. W. 254, the Supreme Court of Iowa held that a charge of negligence, predicated upon one of the car doors being loose, and failing to advise a guest, by reason of which the invited guest was injured, was sufficiently established.

In Harber v. Graham, 143 A. 340, 342, 61 A. L. R. 1232, the Court of Errors and Appeals of New Jersey, in a case involving gross negligence, held that poor judgment might amount to gross negligence, but would not constitute either willfulness or wantonness. In that case the court further said: "Can it be that gross negligence contains any underlying element differentiating it in this respect from ordinary negligence? [That is, the exercise of judgment.] We think not. Both fall short of willfulness, either actual or constructive, and as is pointed out in the Massachusetts case above quoted, differ from each other in degree only rather than in quality. That this must be so we think is demonstrated by the fact that: 'The later American cases, with practical unanimity, reject the doctrine that negligence is capable of division into the different degrees of slight, ordinary, gross.'" The court then points out that certain cases make only the distinction between the negligence and what is called "willful" negligence. The court further held that the facts detailed in that case establish gross negligence.

In Mitchell v. Raymond, 181 Wis. 591, 195 N. W. 855, 858, the Supreme Court of Wisconsin again reaffirmed its former holdings as to a guest accepting the premises just as they are found. It is there said: "By the present holding there is no intention to limit or withdraw anything that has been said heretofore in such cases as Greenfield v. Miller, 173 Wis. 184, 180 N. W. 834, 12 A. L. R. 982, and O'Shea v. Lavozy, 175 Wis. 456, 185 N. W. 525, 20 A. L. R. 1008, or, to qualify the rule thereby recognized, namely, that the guest who comes upon the premises or enters into the vehicle of another must take such premises or vehicle as he finds them and as it pleases the owner, in the exercise of his right of dominion over his own property to maintain the same, provided, of course, such owner does not fail in the duty of informing or warning the guest of that which must be considered a trap or concealed defect or by no act of his creates a new danger." The facts in that case were held only to establish ordinary negligence, and therefore, insufficient to create liability on the part of the defendant.

[3] It will be observed that in all of the foregoing cases relative to the condition of the automobile, the injured party was either a licensee or an invited guest, and not a trespasser, and even under such circumstances,

liability was not established by any of the alleged defects, as they were not held sufficient to constitute gross negligence. It is also true that in the cases cited, and in the legion of cases referred to in the annotations found in the different volumes of American Law Reports to which we have referred, a very large percentage involve injuries to minors. In the case at bar, while the deceased was under the age of 21 years, he was in no sense a minor incapable of judging of the situation, and was in all respects in the same class with ordinary trespassers. He was warned that it was against the rules of the company to ride on the truck, and he had immediately facing him, while seated upon the uncushioned portion of the seat on the truck, a notice that employees only were entitled to ride there.

[4] In this state, negligence is now recognized as consisting of three classes, slight, ordinary, and gross, all of which are distinguishable from either wantonness or willfulness. Correctly speaking, wantonness and willfulness are not negligence at all. They indicate a reckless conduct which has gone beyond negligence constituting either of the three degrees, though in many of the cases, loose language appears, showing that the distinctions here mentioned have been lost to sight.

In 45 C. J. 674, § 38, we find the following: "When the terms are accurately used, there is a clear distinction between negligence and wantonness, in that mere carelessness or inadvertence may constitute negligence, whereas wantonness includes the elements of consciousness of one's conduct, intent to do or omit the act in question, realization of the probable injury to another, and reckless disregard of consequences. Accordingly, it has been said that wantonness and negligence are incompatible. Nevertheless, the term 'wanton negligence' is frequently used by the courts in expressing something more than ordinary negligence." Again, in the following section it is said: "That willfulness and wantonness express different ideas and are clearly distinguishable, in that willfulness includes the element of actual intent to inflict injuries, while in the case of wantonness, there is no such actual intent, but at most, an implied or constructive intent." In the same volume, on page 745, appears the following rule as to trespassers: "There is no duty to provide for the presence of trespassers, but a trespasser enters at his own risk, takes the property on which he enters, as he finds it. Therefore, the owner or person in charge of property owes to a mere trespasser thereon, no duty to keep the property in a suitable or safe condition, and is not under any obligations to remove hidden dangers, or to warn trespassers of their existence." This rule, of course, is subject to the exception heretofore noted as to traps.

In *Tognazzini v. Freeman*, 18 Cal. App. 468, 123 P. 540, 543, we find the following relative to negligence: "By 'negligence' is meant ordinary negligence—a term the significance of which is reasonably well fixed. By gross negligence is meant exceeding negligence—that which is mere inadvertence in a superlative degree. * * * By 'willful negligence' is meant not strictly negligence at all, to speak exactly, since negligence implies inadvertence, and whenever there is an exercise of will in a particular direction there is an end of inadvertence, but rather an intentional failure to perform a manifest duty, which is important to the person injured, in preventing the injury in reckless disregard of the consequences as affecting the life or property of another. Such conduct is not negligence in any proper sense, and the term 'willful negligence,' if these words are to be interpreted with scientific accuracy, is a misnomer."

In *Crosman v. S. P. Co.*, 44 Nev. 286, 194 P. 839, the Supreme Court of Nevada had occasion to consider the question of the alleged wanton and willful negligence of a switching crew in backing an engine without a rear light, whereby the plaintiff was injured while riding on a handcar being propelled on a double track against the course of traffic. In that case the distinction is drawn between "negligence," "willfulness" and "wantonness," substantially as herein stated.

In 19 California Jurisprudence, 555, considering the subject of willful and wanton injury, the text-writer uses language somewhat less exact. It is there said: "It has been stated that there may be negligence and wantonness at the same time. Carelessness does not imply wantonness, but as wantonness may exist with intent to injure, it may imply carelessness. To do an act in reckless disregard of consequences, though not intending to do an injury, is to do the act in a careless and negligent manner, and it would, under some circumstances, be wantonly done."

[5, 6] There is nothing in this case which indicates that the defendant Morton, as the driver of the truck belonging to the defendant Shell Company, in any degree apprehended that he was driving a truck attendant with any unusual dangers. That there are dangers inherent in automobile traffic is beyond question. The staggering array of damage suits found in the books is sufficient corroboration of this statement. No other instrumentality has so appealed to the fancy of the American public, or so revolutionized the habits and customs of the people, but its adoption and

use has been coincident with fatalities mounting into the tens of thousands, and it may be truthfully said that everyone who starts upon an automobile ride, to some degree at least takes not only his personal security, but his life as well in his hands. However, these considerations are not sufficient to support verdicts in damage cases. All of the facts which we have considered were practically before the court upon the conclusion of the plaintiff's case, and the motion of the defendants for a nonsuit should have been granted. If the question of negligence only were involved in this case, we would be inclined to the view that the facts appearing in the record are sufficient to send the case to the jury, but as it manifestly fails to show any willful or wanton act or omission on the part of the driver Morton, there is nothing in the case to support the verdict. The jury might be warranted in finding that the sending of the truck out on the highway with the nut missing from the top of the steering post, constituted negligence, but the evidence shows clearly that the deceased was a trespasser. We do not see how it can be found that the absence of the nut constituted anything which comes within the definition of a trap, and as the appellants could be found liable in damages only for some willful or wanton misconduct, a verdict and judgment without the presence of one or the other of these elements cannot be sustained in this case. A "trap" is a term used to designate any very dangerous construction or condition designedly arranged to do injury. *Moffatt v. Kenny*, 174 Mass. 311, 54 N. E. 850; 38 Cyc. 948.

While a jury might reasonably infer from the testimony in this case that the jar occasioned to the steering wheel by the driving of the truck upon the highway, would tend to disengage the steering wheel from the steering post, the fact that the steering wheel could not be lifted from the steering post without the use of a hammer to tap the wheel on the underside the number of times mentioned, enforces the conclusion that the driver was not acting either willfully or wantonly, but might assume that the steering mechanism was reasonably safe for the uses and purposes for which the truck was intended.

By reason of what we have said, other alleged grounds for reversal need not be considered.

The judgment is reversed.

We concur: FINCH, P. J.; R. L. THOMPSON, J.

105 Cal. App. 28

McVEA v. NICKOLS.

Civ. 123.

District Court of Appeal, Fourth District, California.

April 1, 1930.

1. Automobiles ⇨245(72) — Injury to pedestrian — Contributory negligence — Question for jury.

Contributory negligence of pedestrian struck by automobile while crossing street *held* for jury.

2. Automobiles ⇨216 — Injury to pedestrian — Public highway — Reasonable care.

Pedestrian has same right on public highway as driver of automobile, subject to exercise of right with reasonable amount of care, under existing circumstances.

3. Negligence ⇨136(26) — Contributory negligence — Precaution for safety — Question of law.

Contributory negligence is usually question of law, where injured party takes absolutely no precautions for his own safety.

4. Trial ⇨143 — Conflicting evidence — Inferences — Question for jury.

Conflicting evidence, together with possible inferences therefrom, presents question of fact for jury.

5. Appeal and error ⇨1060(1) — Injuries to pedestrian — Examination of juror — Automobile insurance — Prejudice.

Questioning prospective juror, in pedestrian's action for injuries sustained when struck by automobile, relative to interest in automobile insurance company *held* not prejudicial.

6. Automobiles ⇨246(56) — Injuries to pedestrian — Instruction — Speed — Grade crossing — Obstructed view.

Evidence in pedestrian's action for injuries sustained when struck by automobile warranted instruction as to law on speed over grade crossing when view is obstructed.

7. Automobiles ⇨246(56) — Injury to pedestrian — Instructions — Restrictions on speed.

Instruction on restrictions as to speed, in pedestrian's action for injuries when struck by automobile, *held* not erroneous under evidence.

The instruction was to the effect that any person driving vehicle on public highway should drive the same at a careful and prudent speed not greater than was reasonable and proper, having due regard to

traffic, surface, and length of highway, and that no person should drive any vehicle at such a speed as to endanger life, limb, or property of any person.

Appeal from Superior Court, Kern County; William D. Dehy, Judge.

Action by Andy McVea against A. W. Nickols. Judgment for plaintiff, and defendant appeals.

Affirmed.

Harvey & Heard, of Bakersfield, for appellant.

M. G. Brittan, of Bakersfield, for respondent.

BARNARD, J.

In this action the plaintiff recovered a verdict against the defendant for \$3,500, on account of injuries sustained through being struck and knocked down by an automobile operated by defendant. Upon the hearing of the usual motion, the court ordered a new trial unless the plaintiff remitted one-half of the amount of the verdict. The plaintiff consented, and thereupon the motion for new trial was denied. The defendant has appealed from the judgment based upon the verdict, as thus altered.

It appears from the evidence that about 8 o'clock on the evening of January 15, 1928, the defendant was driving an automobile through the city of Bakersfield. He was traveling north on Chester avenue. This street crosses a railroad, with several tracks, at a point where there is no street intersection. Chester avenue is paved from curb to curb, to the south of the railroad crossing, with a sidewalk on the east side thereof. The railroad crossing itself is paved, but with no sidewalk. From the railroad crossing, the state highway extends north on Chester avenue, paved in the center, with an unpaved portion on each side. Just prior to the accident, the plaintiff was proceeding north on the easterly sidewalk of Chester avenue. Upon reaching the intersection of Chester avenue with the railroad, the plaintiff looked up and down the tracks, looked south on Chester avenue, and, seeing no automobile, proceeded across the railroad tracks. There is a conflict in the evidence as to whether he was simply crossing the tracks, going north, or as to whether he was not only crossing the tracks but proceeding along them in a westerly direction, toward the west side of the street. It is not contradicted that while on the railroad tracks, where the street is paved, and where there is no sidewalk, he was struck by the automobile driven by the defendant, and thrown from twenty-five to thirty-five feet. When the car stopped, the plaintiff was under the car, and the car was on the unpaved portion of the

road, north of the railroad tracks and east of the paved highway.

[1] The defendant testified that he did not see the plaintiff until he was within five or six feet of him; that his car was going in a straight line toward the plaintiff; and that he had no memory of turning or swerving his car. He testified at one time that he was proceeding along the center of Chester avenue, and at another time that he was to the right of the center but close to a street car track. How close he was to the street car track does not appear. The record shows that a machine going straight north in the center of the street, after crossing the railroad tracks, would be upon the paved portion of the highway, but that a machine proceeding nearer the right-hand side of the street would, at the time of crossing the railroad tracks, have to swerve to the left to be upon the paved portion of the highway. It does not appear from the evidence just how far to the east of the center of Chester avenue a car would have to be in order to make necessary a swerve to the left, in order to be upon the paved portion of the highway after crossing the railroad tracks. There was evidence that the usual custom of cars traveling north on this street is to swerve to the left or toward the west, because of the narrowing of the paved or traveled portion of the highway north from the railroad tracks. Defendant was familiar with the street in question, which is the main street for automobiles coming in or going out of Bakersfield. It was stipulated that the point where the accident occurred was not in the business section, and there was introduced in evidence an ordinance of the city of Bakersfield, containing the following: "Outside of business district, no pedestrian shall cross a roadway other than by a route at right angles to the curb, and when crossing at any place other than a cross-walk, shall yield the right-of-way to all vehicles upon the roadway."

Appellant contends that the failure of the plaintiff to look more carefully before proceeding across or along the tracks, and his failure to give the right-of-way to defendant's machine, as required by the ordinance mentioned, constitute contributory negligence, as a matter of law. The entire question of contributory negligence of the plaintiff was submitted to the jury upon appropriate instructions. Under the circumstances shown here, we think the issue as to contributory negligence on the part of the plaintiff was a question of fact, and properly left to the jury.

In *Moss v. Boynton Co.*, 44 Cal. App. 474, 186 P. 631, 632, the rule is laid down as follows:

"Contributory negligence 'is a question of law only when the evidence is of such a character that it will support no other legitimate inference than that in the one case the plain-

tiff was guilty of contributory negligence. * * * When the evidence is such that the court is impelled to say that it is not in conflict on the facts, and that from those facts reasonable men can draw but one inference, and that an inference pointing unerringly to the negligence of the plaintiff contributing to his own injury, then, and only then, does the law step in and forbid plaintiff a recovery. * * * Even where the facts are undisputed, if reasonable minds might draw different conclusions upon the question of negligence, the question is one of fact for the jury.' *Zibbell v. Southern Pacific Co.*, 160 Cal. 237, 240, 116 P. 513; *Wing v. Western Pac. Co.*, 41 Cal. App. 251, 182 P. 969."

[2-4] In the instant case, there is a conflict in the evidence on a number of important points. There is evidence to indicate the plaintiff was struck after he had reached a point on the railroad tracks, which is west of the east line of the paved portion of the highway, which extends north from the tracks. There is other evidence which indicates he was struck at a point to the east of that line. There is evidence indicating that the plaintiff was attempting, not only to cross the railroad tracks, but to cross Chester avenue along the line of the railroad tracks. There is other evidence which indicates that the plaintiff was crossing the tracks and proceeding on his way north, and the inference is possible that he intended following the east line of the paved portion of said highway, north of the tracks, and also that there was no side-walk north of the railroad tracks. A pedestrian has the same right to travel upon a public highway as has the driver of an automobile, subject to the exercise of this right with a reasonable amount of care, under the circumstances then existing. *Hatzakorjian v. Rucker-Fuller Desk Co.*, 197 Cal. 82, 239 P. 709, 41 A. L. R. 1027. In considering both the conflicting evidence and the inferences most favorable to the plaintiff, which may legitimately be drawn, it cannot be said that a reasonable mind must conclude that the plaintiff was negligent. Where an injured party takes absolutely no precautions for his own safety, the question of contributory negligence is usually one of law. Where, however, he takes some precautions, but for some reason fails to see an approaching automobile, or misjudges its speed or distance, or for some other reason assumes he may avoid injury to himself, the question is usually one of fact for the jury. The evidence here is uncontradicted that the plaintiff looked before starting to cross the tracks, and, having taken some precautions, his case would fall within the usual rule. In addition, there is a conflict in the evidence and in the possible inferences therefrom, and the question was therefore one of fact for the jury.

[5] Appellant's second objection relates to a question asked of a prospective juror. The

question is as follows: "Mr. Premo, are you a stockholder or interested in the Union Automobile Insurance Company?" The principal argument made is that to permit such a question, with what is claimed to be its inevitable effect upon the jury, is prejudicial per se to the defendant. In *Eldridge v. Clark & Henry Construction Co.*, 75 Cal. App. at page 532, 243 P. 43, 50, the court says:

"No case has been cited—indeed none can be found—which goes to the extent of holding that, where such an examination by plaintiff is allowed, it is prejudicial per se. To the contrary, many cases hold that there are certain circumstances under which such an examination may properly be allowed and all the cases hold that, where the allowance of that line of examination, either of jurors on their voir dire or of witnesses, involves error, the question whether it is or is not to be deemed to be of sufficient gravity, in its effect upon the rights of the defendant, to require a reversal, is dependent entirely upon the circumstances of each particular case."

In the case of *Cozad v. Raisch Improvement Co.*, 175 Cal. at page 624, 166 P. 1000, 1002, the Supreme Court uses the following language:

"We know of no rule of law which would require a reversal for referring to the real party defendant of an action under such circumstances, while the propriety of eliciting information touching a juror's or witness' personal interest in favor of such interested indemnity company is, where the right is exercised within the sound discretion of the court not to be questioned on appeal."

While this language is used in discussing a different phase of the matter of prejudice ascribed to questions that may convey to the jury an idea of the presence of an insurance company in the background, it seems to be such an expression on the point raised as we are not at liberty to disregard. See, also, the following cases: *Arnold v. California Portland Cement Co.*, 41 Cal. App. 420, 183 P. 171; *Baldarachi v. Leach*, 44 Cal. App. 603, 186 P. 1060; *Williamson v. Hardy*, 47 Cal. App. 377, 190 P. 646; *Murphy v. Shaffer*, 58 Cal. App. 453, 208 P. 1003; *Girard v. Irvine* (Cal. App.) 275 P. 850; *Daniel v. Asbill* (Cal. App.) 276 P. 149.

Appellant concedes that the decisions are against his contention, but urges that we change the law, on account of the impossibility of proving that such questions are not asked in good faith, and because of the more or less obvious dangers that are inherent in permitting such an impression or suggestion to reach the jury. While we have some sympathy with appellant's point of view, we feel that the rule has been sufficiently established to require that any change, or consideration thereof should come from the Supreme Court.

It is further urged that the fact that the verdict in this case was reduced by the trial court, as a condition of denying a motion for a new trial, shows that the question to which objection is made resulted in prejudice to the defendant. Not only was the question so worded as to be within the rights of respondent under the decisions, but any excess in the verdict has been taken care of by the action of the trial court. In view of the evidence in the record, as to the injuries sustained by the plaintiff, the present verdict cannot be held to be excessive.

[6, 7] It is next contended that the court erred in giving the following instruction to the jury:

"Ladies and gentlemen of the jury, I instruct you that the law of the State of California declares as follows: '113. Restrictions as to speed. (a) Any person driving a vehicle on the public highways of this state shall drive the same at a careful and prudent speed not greater than is reasonable and proper, having due regard to the traffic, surface and width of the highway, and no person shall drive any vehicle upon a public highway at such a speed as to endanger the life, limb or property of any person.'

"1. Fifteen miles an hour in traversing a grade crossing of any steam, electric or street railway when the driver's view is obstructed. A driver's view shall be deemed to be obstructed when at any time during the last 100 feet of his approach to such crossing he does not have a clear and uninterrupted view of such railway crossing and of any traffic on such railway for a distance of 400 feet in both directions from such crossing.'"

Objection is made to this instruction, both upon the ground that there is no evidence of any obstruction to the extent specified in that portion of the California Vehicle Act quoted in the instruction, and upon the second ground that there is no evidence showing that defendant's rate of speed in any manner contributed to the accident. As to the first ground of objection, there was evidence that to the south of the railroad tracks, and to the west of Chester avenue, there was a building, store, service station and a lot of little cabins, and to the south of the tracks, on the easterly side, there was a big garage and big building where oil was stored, and that the block was practically filled. One witness testified that the view from the east side of Chester avenue, looking up the railroad tracks, was blocked. Appellant insists that there is no evidence that the view was blocked for a distance of 400 feet. A part of the testimony having been given with reference to a map or diagram not in the record, it is not possible to review its weight. But to come within the terms of the law it is not necessary that the view be blocked for 400 feet, but that the

same be blocked at any point within said distance. While there is conflicting evidence on the point, there is sufficient evidence in the record to warrant instructing the jury as to the law in reference to an obstructed view at such a point. There was also conflicting evidence as to the speed of defendant's car, and as to the point in the street where the plaintiff was struck. Perhaps the principal question in the case was as to the position of defendant's car in reference to the center of the street, and whether he should have swerved to the left to keep on the paved portion of the highway north of the railroad tracks. Defendant's speed may have had a material relation to his seeing the plaintiff in time, and to whether or not he should have seen the necessity for, and have made, a swerve to the left to keep on the highway. Not only was the question of defendant's speed material as to the original responsibility for the accident, but it was also material with reference to the extent of the injury, in view of the uncontradicted evidence that the plaintiff was dragged 25 to 35 feet. In view of the conflicting evidence, the court was not in error in giving the instruction.

For the reasons given, the judgment is affirmed.

We concur: MARKS, Acting P. J.; BEAUMONT, Justice pro tem.

104 Cal. App. 780

WILLIAMSON v. MOORE et al.
Civ. 303.

District Court of Appeal, Fourth District, California.

March 29, 1930.

Justices of the peace §42 — Jurisdiction — Population of township — Action on note.

Justice of peace in township of Riverside, which was found to have population exceeding 30,000, held to have jurisdiction of action based on note for \$500, with interest, and \$100 attorney's fees. (Code Civ. Proc. § 112).

Application by R. H. Williamson for writ of mandamus prayed to be directed to the Justice Court of Riverside Township, Riverside County, and L. J. Difani, as Justice of the Peace, to compel respondents to exercise original jurisdiction in action in which petitioner is plaintiff. R. A. Moore was substituted in place of L. J. Difani, as Justice of the Peace.

Peremptory writ issued.

Best & Best and J. L. Granttham, all of Riverside, for petitioner.

R. A. Moore, of Riverside, for respondents.

BARNARD, J.

The petitioner herein filed an action, as plaintiff, in the respondent justice's court, on September 3, 1929, demanding judgment for \$500, with interest at 8 per cent. from March 1, 1928, for \$100 attorney's fees, and costs of suit. Said suit was based upon a promissory note made payable in said township. A summons was issued and served and the defendants defaulted. On October 18, 1929, petitioner, as such plaintiff in said action, appeared before L. J. Difani, as such justice of the peace, offered to make proof of the service of summons, and demanded the entry of judgment in his favor. Following the refusal of said justice of the peace to enter said judgment, or to accept jurisdiction in such action, this proceeding was begun by the filing of an appropriate petition. Petitioner alleges that at all times since September 1, 1929, said township of Riverside has had a population in excess of 30,000 inhabitants. Petitioner seeks a peremptory writ of mandate, directing and commanding respondent to forthwith hear the proof of petitioner, and, if such proof be found sufficient to enter judgment in favor of petitioner, and commanding the respondent to accept and exercise jurisdiction over said action. Proof having been made that the said L. J. Difani had, after the beginning of this proceeding, resigned as such justice of the peace, and that R. A. Moore is now the duly appointed, qualified, and acting justice of the peace in the said township, after due proceedings had, an order was made by this court substituting the said R. A. Moore in the place and stead of the said L. J. Difani, as respondent justice of the peace in this proceeding. An answer was filed by the respondents admitting all of the allegations of the petition, except that it is denied that said township has a population in excess of 30,000 inhabitants, or that it has had such a population at any time since September 1, 1929.

Upon stipulation of the parties, Earl W. Porter was appointed by this court as referee, to take evidence and determine the facts in regard to the population of said township, and report his findings to this court. His report and findings were filed herein on March 14, 1930, in which he found that the population of the township of Riverside, county of Riverside, state of California, was, on March 1, 1930, in excess of 30,000, and that at all times since August 1, 1929, the population of said township has been, and now is, in excess of 30,000. Said report and findings are accompanied by a statement of the evidence upon which they are based. All parties concerned have stipulated that the findings of said referee are correct, and that they may be adopted as the findings of this court. In accordance with such report and such findings, and upon the evidence submitted by

the referee, in support thereof, this court now finds as a fact that the township of Riverside, county of Riverside, state of California, had, on March 1, 1930, a population in excess of 30,000, and that said township has had at all times since September 1, 1929, a population in excess of 30,000.

Under authority of the case of County of Los Angeles v. Justice's Court of Beverly Hills Township et al. (Cal. Sup.) 281 P. 611, we hold that the respondent justice's court of the said township of Riverside, and the respondent justice of the peace thereof, must take jurisdiction of all matters coming within the jurisdiction prescribed by section 112 of the Code of Civil Procedure. And, although the same is not involved in this proceeding, since the population of said township is hereby found to be in excess of 30,000, it should also be stated that it is the duty of the respondent justice's court and the respondent justice of the peace thereof to accept, and exercise as well, the jurisdiction conferred by section 1425 of the Penal Code of this state.

Let a peremptory writ of mandate issue, directed to and commanding the respondent the justice's court of the township of Riverside, Riverside county, Cal., and R. A. Moore, as justice of the peace of said township, to forthwith accept and exercise jurisdiction over the matter herein referred to, and to proceed to hear and determine such matter in accordance with the law.

We concur: MARKS, Acting P. J.; BEAUMONT, Justice pro tem.

PEOPLE v. GOMEZ et al. ★
Cr. 3283.

Supreme Court of California.

April 9, 1930.

Rehearing Denied May 8, 1930.

1. Homicide §253(1) — Conviction — Sufficiency of evidence.

Evidence *held* to sustain conviction for first degree murder (Pen. Code, § 189).

2. Homicide §29 — Guilt.

Which of defendants conspiring to kill deceased wielded hammer striking him *held* immaterial; each being equally guilty.

3. Jury §131(8) — Examination on voir dire — Attitude regarding death penalty.

Both people and defense in first degree murder case may test on voir dire attitude of jurors regarding death penalty.

4. Jury §131(8) — Voir dire — Death penalty — Attitude — Punishment for jury.

Permitting prosecuting officer, in murder prosecution, to question jurors on voir dire concerning attitude regarding death penalty, *held* not error, where question of punishment was committed exclusively to jurors.

The court took an active part in the examination of jurors on the voir dire, and stated that, in first degree murder case, question of penalty is committed exclusively to conscience and judgment of jurors, and that, if verdict be brought in finding defendant guilty of murder of first degree, and nothing is said about penalty, it becomes duty of court to impose extreme penalty, but that jury may mitigate punishment. In general charge to jury, the court stated punishment for murder of first degree is death or confinement in state prison for life, at discretion of jury trying case.

5. Criminal law §438 — Photograph of deceased — Admissibility.

Photograph of deceased showing incision marks made for autopsy and indicated by surgeon *held* admissible in murder prosecution, where it was not claimed photograph did not otherwise show condition of deceased after murder.

6. Criminal law §655(1) — Court — Reference to death penalty — Error.

Court's reference in murder prosecution to death penalty as extreme penalty *held* not error.

7. Criminal law §726 — District attorney's comments — Life imprisonment — Sentence — Misconduct.

District attorney's comments in murder prosecution on effect of life imprisonment sen-

tence provoked by defense argument that it was greater than death penalty *held* not misconduct.

In Bank.

Appeals from Superior Court, Alameda County; Fred V. Wood, Judge.

John Gomez and another were convicted of murder, and they appeal.

Affirmed.

Willard W. Shea, Public Defender, of Oakland, for appellant Gomez.

Guy R. McCoy, of Oakland, for appellant Ryley.

U. S. Webb, Atty. Gen., Lionel Browne, Deputy Atty. Gen., and Earl Warren, Dist. Atty., and J. Paul St. Sure, Deputy Dist. Atty., both of Oakland, for the People.

SHENK, J.

John Gomez and George Ryley were charged by indictment in the county of Alameda with the murder of George Jones. They were tried together, the jury returned verdicts of guilty as charged, without recommendation, and judgments of death were pronounced against them. Appeals from the judgments of conviction and from the orders denying their motions for a new trial are prosecuted on one record.

[1] No point is made that the evidence is insufficient to justify the verdicts of murder of the first degree. Indeed, no other conclusion would have been warranted under the evidence. Section 189, Pen. Code. The defendants were young men who had lived at or in the vicinity of Livermore and had known each other for many years. The deceased, at the time of the murder, was a man about seventy years of age. He was the proprietor of a taxicab service, which had its headquarters in a pool hall, also conducted by the deceased. The defendants had known him also for several years.

Prior to the night of May 18, 1929, the defendants deliberately conspired to rob the deceased, "Dad" Jones, as he was familiarly known. In concert they conceived the plan of luring the deceased, by a false telephone call in the nighttime, to a point outside of Livermore, knock him unconscious with a gas pipe, rob him of the cash on his person, and return to the pool hall, there to loot the place before the deceased could recover consciousness and return to his place of business. They consummated their purpose on the night of May 18. The deceased was by telephone requested to perform taxicab service at Olivina Gates, a spot some two or three miles from Livermore, and he responded to the call. Failing conveniently to find a gas pipe, the defendants acquired a hammer with which to

assist them in perpetrating the crime. When the deceased arrived at the place appointed, one of the defendants struck the deceased in the head with the hammer, immediately depriving him of consciousness, which he never regained. There was no evidence of resistance on the part of the deceased. The autopsy disclosed that the skull had been fractured by a blunt instrument in several places. In some places the skull bone had been driven into the brain tissue as much as two inches. The jaw was also fractured, and the scalp and face were otherwise contused. The defendants divided equally between themselves the \$23.20 in cash found upon the person of the deceased and threw away his wallet, which contained checks.

[2] After their apprehension, each of the defendants admitted the commission of the crime charged, but each sought to relieve himself of its atrocity by contending that the other had wielded the hammer. Under the circumstances, it was immaterial which struck the death blow, for each is equally guilty of the crime. *People v. Kauffman*, 152 Cal. 331, 92 P. 861.

As grounds for the appeal, it is contended that the court committed error in permitting the prosecuting officer to inquire of the jurors on voir dire as to their state of mind respecting the death penalty, particularly whether they would have any hesitancy in bringing in a verdict carrying the death penalty, if there was no proof of extenuating circumstances and the punishment should be mitigated. The court took an active part in the examination of the prospective jurors, correctly stating in connection with the examination of Claude S. Thomas, who subsequently served as a juror, that in a first degree murder case the question of the penalty "is committed exclusively to the conscience and judgment of the jurors; that if a verdict be brought in finding the defendant guilty of murder of the first degree and nothing is said about the penalty it becomes the duty of the court to impose the extreme penalty and hang him. But the jury is clothed with exclusive judgment and discretion in all these cases of murder of the first degree, of mitigating the punishment, and they may, if they desire to mitigate the punishment and make it life imprisonment, bring in a verdict which finds the defendant guilty of murder of the first degree and fix the punishment at imprisonment in state prison for life."

In the general charge to the jury the court again correctly stated the law as follows: "The punishment for murder of the first degree is death or confinement in the state prison for life, at the discretion of the jury trying the case. The law prescribes no rules or tests for the guidance of jurors in the exercise of its discretion in determining whether the greater or lesser penalty shall be inflicted,

but leaves the question of punishment solely to the judgment and conscience of the jury."

[3, 4] Both the people and the defense in a first degree murder case have the right to test on voir dire the attitude of a prospective juror regarding the infliction of the death penalty. But there is no place in such examination for the intimation or suggestion that the question of the punishment in such a case is not one solely within the discretion of the jury. The record herein discloses that the trial court was fully aware of the criticism and strictures placed by this court upon the instructions in the cases of *People v. Bollinger*, 196 Cal. 191, 237 P. 25, and *People v. Arnold*, 199 Cal. 471, 250 P. 168. We find no error in the rulings of the court in connection with the voir dire.

[5] Objection is made to the introduction in evidence of a photograph of the deceased taken after the autopsy had been performed. This photograph showed marks of the incisions made for the purposes of the autopsy. It is contended that the abhorrence of the jurors was thereby prejudicially aroused. But the autopsy surgeon pointed out to the jury the marks resulting from his examination, and it is not claimed that the exhibit otherwise did not correctly depict the condition of the deceased after the murder. There is no merit in the contention.

[6, 7] It is further contended that the court misconstrued the law in referring to the death penalty as the "extreme" penalty, and that the district attorney was guilty of misconduct

in commenting upon the effect in this state of a sentence of life imprisonment. The death penalty has been denominated the "extreme penalty" on numerous occasions by this court, and it is so generally considered. The argument is that life imprisonment would be greater punishment than death in this case because of the youth of the defendants. It may fairly be assumed, as urged by counsel for the people, that this same argument was presented to the jury by defendants' counsel. The correctness of this assumption is not denied by counsel for the defense. The argument of the latter is, under the practice, not printed in the transcript. It therefore seems entirely probable that the remarks of the district attorney as to the effect of a sentence of life imprisonment in this state was provoked by the argument to the jury on behalf of the defendants. Furthermore, no objection to the remarks of the district attorney was interposed at the time they were made.

We find no error in the court's instructions to the jury nor in the refusal to give certain other requested instructions. The defendants were fairly tried for the offense of which they were charged, and, notwithstanding the very earnest presentation of their cause on appeal, we find no ground for reversal.

The judgments and orders are, and each is, affirmed.

We concur: WASTE, C. J.; RICHARDS, J.; SEAWELL, J.; PRESTON, J.; CURTIS, J.; LANGDON, J.

209 Cal. 241

WOOD ESTATE CO. v. CHANSLOR et al.*
Sac. 4052.

Supreme Court of California.

April 1, 1930.

Rehearing Denied April 28, 1930.

1. Appeal and error ⇨930(1) — Presumptions — Conflicting evidence.

Conflict in evidence must be determined in favor of respondent on appeal.

2. Fraudulent conveyances ⇨298(1), 300(1) — Trust deed — Consideration — Fraudulent purpose — Evidence.

Evidence *held* to establish that trust deed was supported by consideration and executed without intent to defraud creditors.

3. Corporations ⇨1 — Separate entity — Evidence.

Evidence that trust deed beneficiary owned over half of stock of debtor *held* insufficient to permit court to disregard fiction of separate corporate existence.

4. Corporations ⇨1 — Separate entity — Evidence.

To warrant disregard of corporate entity, it must appear that corporation is alter ego of its stockholders, and that to recognize separate entity would consummate wrong.

5. Corporations ⇨426(10) — Manager's authority — Estoppel of corporation to deny.

Corporation receiving money with knowledge of manager's promise to execute trust deed *held* estopped to deny manager's authority, even if authority given by directors' resolution was ineffective (Civ. Code, §§ 320, 320a, 2309, 1624, subd. 5).

The trust deed was claimed invalid because resolution authorizing its execution was not duly passed at duly assembled meeting of board of directors of corporation, since one of its directors was absent and not duly notified of special meeting, as required by Civ. Code, § 320, and director in no way waived notice as required by section 320a. It appeared that the director had not given his place of residence or his business address to secretary of corporation and that he had disappeared.

6. Corporations ⇨425(5) — Estoppel — Applicable against creditors.

Estoppel of corporation to deny authority of manager to execute trust deed *held* applicable against creditors of corporation.

In Bank.

Appeal from Superior Court, Plumas County; James O. Moncur, Judge.

Action by the Wood Estate Company against Flora Lee Chanslor, Thomas Allen Chanslor, and others. From a judgment in favor of the plaintiff, the named defendants appeal.

Affirmed.

F. H. Dam, of San Francisco, for appellants.

L. H. Hughes, of Quincy, and Thomas P. Boyd, of San Rafael, for respondent Wood Estate Co.

William B. Crocker, of San Anselmo, for respondent Plumas Grass Valley Mines Co.

H. W. B. Taylor, of San Anselmo, for respondent Redwood Highlands Co.

WASTE, C. J.

The defendants have prosecuted this appeal from a judgment quieting the plaintiff's title to certain mining property situate in the county of Plumas. Plaintiff and defendants claim title from the same source, to wit, from the Plumas Grass Valley Mines Company, hereinafter referred to as the Mining Company. Plaintiff-respondent derived its title by virtue of a sale and conveyance under a trust deed executed by the mining company. Defendants-appellants claim title by virtue of a sale to them on an execution issued on a money judgment recovered by them against the mining company in an action for damages for personal injuries. The facts show that the trust deed through which the respondent derails title was delivered by the mining company to the respondent the Wood Estate Company, together with a contemporaneous chattel mortgage, to secure a prior indebtedness of the mining company to the Wood Estate Company and its predecessors in the sum of \$39,500, evidenced by a promissory note in that sum. The promissory note was executed and delivered at the same time the trust deed and chattel mortgage were delivered, under circumstances hereinafter pointed out. The trust deed, chattel mortgage, and promissory note above mentioned antedated by two days the judgment executed upon by appellants, and upon which their title depends, although the action in which said judgment was entered had been commenced seven months prior thereto. Recordation of the trust deed and chattel mortgage occurred after rendition and entry of appellants' judgment, but while execution thereon was being stayed at the instance of the judgment debtor, the mining company. The appellants had not recorded an abstract of the judgment at the time the trust deed was recorded, and had not, therefore, acquired a prior lien under section 674 of the Code of Civil Procedure. This trust deed and chattel mortgage running to respondent, the Wood Estate Company, served to charge all of the property of the mining company with the payment of the indebtedness owing to respondent.

From the above facts it appears that both in point of time of execution and time of recordation the lien upon which respondent relies antedated the lien of appellants. Appellants contend that the lien upon which they rely is entitled to priority, and that therefore the judgment quieting title in respondent should be reversed. Appellants attack the judgment on three main grounds, to wit:

(1) That the trust deed through which the respondent received title was executed and delivered without any consideration therefor having passed to the mining company, and was executed and delivered with the fraudulent intent and purpose of precluding the appellants from realizing on any judgment they might thereafter procure in their action for personal injuries then pending against the mining company.

(2) That this court should disregard the fiction of the distinct corporate existence of the mining company, and treat the acts complained of as the acts of the Wood Estate Company, on the theory that the mining company was "in reality but the alter ego of the Wood Estate Company," or, at most, the alter ego of the Wood Estate Company and Buel, manager of the mining company.

(3) That Buel and the secretary of the mining company had no authority from the mining company to execute the trust deed, for the reason that the resolution authorizing its execution was passed at an improperly and illegally assembled meeting of the board of directors of the mining company.

[1, 2] The contention of appellants that the trust deed was executed and delivered without consideration, and with the fraudulent intent of defeating appellants' probable judgment is amply refuted by the findings of the trial court as supported by the evidence. There is an abundance of evidence tending to show that during his lifetime E. K. Wood, deceased, had loaned to the mining company sums of money totaling \$17,000, and that subsequent to his death, and at various times up to March 9, 1918 (the date the trust deed was executed), E. K. Wood's estate, the Wood Estate Company, had advanced and loaned to the mining company further sums aggregating \$22,500, totaling \$39,500. It is true that there is a conflict in the evidence on this point, but under elementary rules, that conflict must be determined in favor of respondent on this appeal. It very definitely appears, therefore, that the mining company, the trustor, was indebted to the Wood Estate Company, the beneficiary, in the sum of \$39,500 for actual cash advanced and used by the mining company in carrying on its business, when on March 9, 1918, in response to numerous requests of its creditor for security, it executed its note in the above-mentioned amount, and delivered its trust deed as security therefor. The record discloses that the respondent, the Wood Estate Company bought in the property at the

trustee's sale for \$40,000, and so credited the mining company's account. This evidence, accepted by the trial court as reflecting the true situation, adequately disposes of the appellants' contentions that the trust deed was without consideration and executed with the fraudulent design of preventing appellants from collecting on any judgment they might thereafter procure in their action against the mining company.

[3, 4] Appellants' contention that the mining company was "in reality but the alter ego of the Wood Estate Company," or the alter ego of the Wood Estate Company and Buel, does not merit a very serious consideration. We feel that the evidence in this case falls far short of that necessary to permit this court to disregard the fiction of separate corporate existence. It is quite true that the respondent the Wood Estate Company was the owner of considerably over half the stock of the mining company, and it is also very likely that, as such majority stockholder, it controlled its policies. But these facts, standing alone, can avail appellants but little. The law is well settled that, in order to cast aside the legal fiction of a distinct corporate existence, it must appear that the corporation is the business conduit and alter ego of its stockholders, and that to recognize it as a separate entity would aid in the consummation of a wrong. In other words, not only must it appear that one man or two men own the stock and control the policies, but it must also be shown that there is such a unity of interest and ownership that the individuality of such corporation and such person or persons has ceased; and it must further appear from the facts that the observance of the fiction of separate existence would, under the circumstances, sanction a fraud or promote injustice. *Minife v. Rowley*, 187 Cal. 481, 487, 202 P. 673; *Erkenbrecher v. Grant*, 187 Cal. 7, 11, 200 P. 641; *Ellet v. Los Altos Country Club Properties*, 88 Cal. App. 740, 746, 264 P. 270. The court below, on ample evidence, found against appellants on the issue of bad faith. The record before us does not warrant a disregard of the corporate entity.

[5] The strongest attack made upon the validity of the trust deed by appellants is that the resolution authorizing its execution was not passed at a "duly assembled" meeting of the board of directors of the mining company. The facts upon which appellants predicate this contention are as follows: The by-laws of the mining company provide that each director shall, at the first meeting after his election, cause to be entered in the minutes his address, to which all notices may be directed until similar notice and entry of change of residence has by him been given in writing. Notice of special meetings of the board of directors, the by-laws also provide, shall be given by leaving a written or printed notice at the last-known place of business or resi-

dence of each director. It is the duty of the secretary to serve all notices required by law or the by-laws of the company. One of the directors of the mining company (Chamberlain) did not attend the meeting at which the resolution of authorization was passed, and neither received, nor waived, notice of its calling, nor consented in writing to its being held. The trial court found that all of the directors of the mining company had been elected on or about April 24, 1916, and "that on or about said date last named P. G. Chamberlain [the non-attending director], one of said directors, did not give his place of residence or his business address to the secretary of the corporation, nor has he at any time since given to said secretary, his residence or his business address; and that shortly after said date last named said Chamberlain disappeared, and his whereabouts became unknown and particularly to the secretary of said corporation and that at the time said meeting of said board of directors was had, said secretary did not have, nor for a long time prior thereto had not had or had not known, the place of residence or business address of said Chamberlain. The court further finds that divers meetings of said board of directors were held between the date of the organization of said corporation Plumas Grass Valley Mines Company and said 9th day of March, 1918, and that said P. G. Chamberlain did not attend any one of said meetings." Appellants therefore contend that, since one director was absent and not duly notified of the special meeting, as required by section 320, Civil Code, and in no way waived notice as required by section 320a of the Civil Code, the meeting of the board of directors was improperly and illegally assembled, and that therefore the resolution authorizing the trust deed was of no legal effect and could not confer authority on the officers therein designated to execute and deliver the instrument. Appellants rely on the general principle enunciated in such cases as *Relley v. Campbell*, 134 Cal. 175, 66 P. 220; *Curtin v. Salmon River, etc., Co.*, 130 Cal. 347, 62 P. 552, 80 Am. St. Rep. 132; *Richman v. Bank of Perris*, 73 Cal. App. 321, 238 P. 754; *Richman v. Bank of Perris* (Cal. App.) 282 P. 801, and others—to the effect that a special meeting of the board of directors held without the requisite notice is void, and directors present thereat cannot perform any valid corporate act. Assuming, for the purpose of this opinion, but not deciding, that under the circumstances here presented the resolution of March 8, 1918, conferred no authority on Buel and the secretary to execute the trust deed, it does not follow that under the facts of this case the trust deed is not binding on the Mining company. Both appellants and respondent have failed to emphasize certain facts which to this court seem decisive of the issues presented. The trial court made the following finding:

"That on or about the 3rd day of October, 1916, one J. F. Buel was the vice-president and manager of said Mines Company and had full control of all of the operations and business of said mining company, and was at all times held out to the world by said mining company as its general manager and business agent. That said J. F. Buel, in his capacity of vice-president and manager of said mining company, represented to E. K. Wood, since deceased, that said mining company was in need of large sums of money with which to prosecute and bring to completion the work of developing certain mining properties and securing therefrom auriferous gravels in profitable quantities, and also to secure by purchase or lease additional mining properties, and that if said E. K. Wood would loan said mining company money to use for such purposes, said mining company would give to said E. K. Wood its note in payment thereof, and would secure the payment of said note by the execution of a deed of trust upon all its real property and a chattel mortgage on all its personal property. That said E. K. Wood did accept said proposition, and did loan to said mining company to the full sum of \$17,000.00. That on the 27th day of July, 1917, and before the work of developing said mine was completed, said E. K. Wood died testate; and thereafter, after proceedings for that purpose had, Frederick J. Wood was appointed one of the executors of the last will and testament of said decedent, and that such executor became entitled to the possession of said indebtedness and the right to collect the same from said mining company. That said Frederick J. Wood, as such executor, agreed with said J. F. Buel as the manager of said corporation, to make further advances of money to said mining company for the purpose aforementioned, in consideration of the promise of said Buel, in behalf of said corporation, that said corporation would execute a note to cover all of the amounts theretofore loaned to it by said decedent E. K. Wood and such further advances as might be made by said executor out of the funds of said E. K. Wood estate, and would secure the payment of said note by the execution of a deed of trust conveying said real property and a chattel mortgage on its personal property to such trustees or persons as said Frederick J. Wood might name; and that, in consideration of said promise of said mining corporation and relying thereon, said Frederick J. Wood, out of the funds of said estate, did advance and pay to said mining corporation, the further sum of \$22,500.00, making in all the aggregate sum of \$39,500.00 received by said mining company from said E. K. Wood, and said Frederick J. Wood, as executor of the last will and testament of said E. K. Wood, deceased.

"That thereupon, on the 9th day of March, 1918, said mining company, in fulfillment of its said promise, executed the deed of trust

mentioned in the cross-complaint on file herein, to-wit: that certain deed of trust dated the 9th day of March, 1918, made and executed by Plumas Grass Valley Mines Company, a corporation, party of the first part, to C. A. Thayer and H. W. B. Taylor, parties of the second part (trustees), and W. T. Wood and F. J. Wood, parties of the third part, which said deed of trust was thereafter on the 12th day of March, 1918, duly recorded in the office of the County Recorder of the County of Plumas, State of California, in Volume 17 of Mortgages, at page 267, and which deed of trust was given to secure the payment of a certain promissory note for the sum of \$39,500.00 of even date with said deed of trust executed by said mining corporation to said W. T. Wood and F. J. Wood; and that said deed of trust was executed to the persons above named and they took and held the same, for the uses and benefit of said E. K. Wood Estate."

Thus it clearly appears from the findings that Buel was the general manager and business agent of the corporation, and was held out by the corporation as such. It further appears that as far back as October 3, 1916, this business agent represented to E. K. Wood that, if he (the said E. K. Wood) would advance certain moneys to the mining company, it (the mining company) would issue its promissory note, secured by a trust deed and chattel mortgage on all the mining company's property. It is obvious that, under the provisions of sections 2309 and 1624, subdivision 5, of the Civil Code, the authority of Buel to make such an agreement would have to be in writing; that is, evidenced by a resolution of the board of directors passed at a meeting duly assembled. The facts show that this precedent authority was never conferred. But, in reliance on the representations of Buel, E. K. Wood advanced to the mining company the sum of \$17,000, and respondent the Wood Estate Company, also in reliance thereon, advanced a further sum of \$22,500. Thus the total sum of \$39,500 had been advanced by E. K. Wood or his estate to the mining company in reliance on Buel's promises and representations before March 9, 1918, the date Buel executed the trust deed. All of this money was received by the mining company with knowledge of the promise of its general manager and used by the corporation to carry on its activities. In fact, the evidence shows the mining company could probably not have continued in existence had not this money been advanced.

It would be clear, under well-settled doctrine, that, if Buel had executed the trust deed without precedent authority on October 3, 1916, the mining company would be estopped to deny his authority in so doing. But here the trust deed was executed March 9, 1918, by Buel and the secretary, after the moneys had been advanced in reliance on his promise that such a trust deed would be executed by the mining company. Assuming that the resolution of March 8, 1918, was legally insufficient to constitute either a ratification of Buel's promise or to confer authority on Buel to execute the trust deed (because one director was absent, as pointed out *supra*), this court can see no legal difference between a situation where the trust deed is issued when the promise is made and a situation as is here presented, where, in reliance on the promise, the money is advanced, and then the trust deed is executed by the agent in a good-faith attempt to carry out the promise.

[6] On the authority of the principle discussed above, we therefore hold that the mining company is estopped to deny Buel's authority in executing the trust deed, regardless of the validity of the resolution conferring that authority upon him. It is too elementary to need citation of authority that, if the corporation is estopped, in absence of fraud, the estoppel likewise applies against the creditors of the corporation. This is so because the creditors get only the rights of the debtor, and no more. 10 Cal. Jur. 652.

It should also be pointed out that the two parties to the trust deed—i. e., the mining company and respondent—are not seeking to avoid the instrument, but, in fact, both are seeking to uphold it. Appellants' objection is that the authority of the agent must be in writing under our statute of frauds. Just how a third party to such a contract can attack it, when the two principals do not object, is not made to appear. It would seem to be the rule that third parties cannot avail themselves of the defense of the statute if the two principals acquiesce. 12 Cal. Jur. 925; 25 R. C. L. 736.

For the foregoing reasons, the judgment is affirmed.

We concur: RICHARDS, J.; PRESTON, J.; LANGDON, J.; CURTIS, J.; SEAWELL, J.; SHENK, J.

209 Cal. 273

CHERNEY et al. v. JOHNSON et al.

Sac. 3971.

Supreme Court of California.

April 7, 1930.

1. Judgment ⇨720 — Action on merits — Appeal — Affirmance.

Matters considered in action decided on merits and affirmed on appeal *held res judicata*.

2. Vendor and purchaser ⇨339 — Balance due — Deposit — Delay — Purchase money — Recovery.

Delay of purchaser in depositing balance due on land contract as condition for performance after judgment did not preclude recovery of purchase money paid on vendor's failure to perform.

Judgment in prior action to enforce contract for sale of property provided for enforcement of contract on purchaser's depositing balance due within 30 days after judgment. Vendor agreed with purchaser that appeal should operate as stay of proceedings. Within 30 days after remittitur was indorsed filed by clerk, though more than 30 days after remittitur was transmitted to clerk, purchaser made required deposit. Vendor received every benefit during proceedings and failed to do things required of him by judgment and was in no way harmed by delay in filing deposit.

In Bank.

Appeal from Superior Court, Sacramento County; Ernest Weyand, Judge.

Action by Vincent Cherney and another against W. D. Johnson and another. Judgment for plaintiffs, and from an order made after alternative decree, defendant named appeals.

Affirmed.

Theodore W. Chester, of Sacramento, for appellant.

White, Miller, Needham & Harber, of Sacramento, for respondents.

SEAWELL, J.

[1] Appeal from an order made after entry of an alternative decree. The cause out of which this action arises was heard and decided on its merits against the appellant on an original appeal. *Cherney v. Johnson*, 72 Cal. App. 725, 238 P. 150. A petition for hearing by this court was denied. The matters and things therein considered are *res judicata*.

The issues therein adjudicated, so far as they are necessary to an understanding of the instant appeal, were:

One R. N. Hicks was in possession of the land involved in suit, to wit, 57.51 acres situate in the county of Sacramento, under an executory contract of sale thereof to him by the Natomas Company, one of the defendants herein, but it has no pecuniary interest in the success of either the respondents or appellant. Appellant Johnson acquired an option in his own name from Hicks to purchase said lands, and thereupon respondents, who had sold their farm in Wisconsin, entered into an agreement with appellant for the purchase of said Natomas Company lands at the price of \$18,690.75. Respondents paid down \$9,000 and gave their promissory note for \$1,000. The note was thereafter assigned by appellant Johnson to a third person. The balance of the purchase price was to be paid in eight or nine annual installments at the option of the respondents. The respondents, who never entered into possession, brought this action against appellant, alleging misrepresentations as to the quality of a certain portion of the land included in the agreement of sale and also noncompliance with the terms of said agreement on the part of appellant, and prayed for certain rebates upon the purchase price by reason of misrepresentations as to the quality of said lands and also by reason of overdue installments and reclamation assessments levied against it upon which bonds had been issued in the sum of \$4,000, constituting a lien thereon; for the surrender and cancellation of said promissory note and for other specific and general relief. The court filed its findings of fact and conclusions of law and judgment on February 27, 1923. By the judgment jurisdiction of the cause was retained to the end that a further judgment and decree might be entered in the event that Johnson should fail to comply with the terms of said judgment. As already pointed out, this judgment was affirmed upon appeal. The judgment provided that Johnson should specifically perform his contract with respondents; that within thirty days from the entry of the decree, respondents should pay to the clerk of the court one-eighth or one-ninth, as they shall elect, of the sum of \$3,115.75, the sum adjudged to be due on said contract of purchase after making certain deductions on account of misrepresentations as to the quality of said lands and for other rebates, for each year that elapsed between March 26, 1920 (date of execution of agreement), and the date of said payment, with interest to the 26th day of March last preceding the date of payment, at the rate of 6 per cent. per annum, which sum was to be paid by said clerk to appellant Johnson upon delivery by him to said clerk of the receipt of the defendant Natomas Company of California or its successor in interest under the contract made by the Natomas Company with R. N. Hicks showing payment made to said company of all moneys due it to the date of the entry of

the decree; that said Johnson should pay all water charges constituting a lien on said land to the date of the entry of the decree and all county taxes, prorating the taxes for the year 1922-23, from the 1st day of July, 1922, to the date of filing said receipt.

Respondents were adjudged to be entitled to possession of said property from and after the date of filing said receipt. It was also decreed that appellant Johnson should furnish and file with the clerk of the court an undertaking in the sum of \$4,000 conditioned that he would comply with the terms and conditions of said contract with the Natomas Company; that if respondents, within thirty days from the date of filing said judgment, should make the payments therein provided to be made by them, and if the appellant shall fail to file said receipt within sixty days from the date of notice of said decree, said contract shall be declared terminated and rescinded and the clerk shall thereupon repay to plaintiffs the sums paid to him under the terms thereof and shall enter judgment in favor of respondents and against appellant Johnson in the sum of \$10,000 with interest at the rate of 7 per cent. per annum from March 27, 1920, to the date of entry of said judgment; that upon payment in full to said appellant Johnson of the sums due and to grow due, in accordance with the terms of said contract of date March 26, 1920, appellant Johnson shall convey or cause to be conveyed to respondents the real property described in said contract by good and merchantable title, free from liens and incumbrance except liens created by respondents or accruing after the date of the filing of said receipt, and except the lien of said reclamation assessment. All payments becoming due under the terms of said reclamation assessments after the date of filing said receipt, and all water charges and taxes other than those provided to be paid by appellant, shall be paid and assumed by respondents.

Appellant was served with notice of entry of judgment as of March 1, 1923. Nine days thereafter, to wit, March 10, 1923, appellant served and filed his notice of appeal, which appeal resulted in an affirmance of the judgment. Pending the appeal appellant was in possession of said property, and both he and the respondents regarded the appeal as operating as a stay of proceedings, as no action was taken by either pending the appeal. Within thirty days after the day on which the remittitur was indorsed "Filed" by the clerk of the trial court, to wit, July 27, 1925, appellant was served with notice that the judgment had been theretofore entered, and further that respondents, pursuant to the judgment from which the appeal was taken, had deposited \$2,665.75 with the clerk of said court, with directions to pay the said sum over to appellant Johnson upon his performance of the conditions imposed upon him by said de-

cree as a condition precedent to the payment of said fund to him. The affidavit of the clerk of the District Court of Appeal, Third Appellate District, is to the effect that the remittitur was issued July 22, 1925, and the package containing said remittitur bears the indorsement of the county clerk of Sacramento county as having been indorsed July 22, 1925. The clerk of the department of the superior court in which the case was tried was absent from his duties as such clerk at the time the remittitur arrived. He avers that he left the office on his vacation July 4 and did not return until Saturday, July 25, 1925. That upon his return on said day he found a great many papers and legal documents upon his desk, including said remittitur. That on the following Monday, to wit, July 27, 1925, he stamped the said remittitur as being filed of that day. No showing is made that any official note was made of its receipt prior to the day it was stamped as filed. It was not placed with the other papers in the case, but it was placed upon the desk of the department clerk with other papers and documents which had accumulated while the clerk was on his July vacation. The attorney who had charge of the instant case for respondents averred by affidavit that between July 27, 1925, and August 25, 1925, he inspected the records in the county clerk's office to ascertain the date of the receipt of the remittitur and found that it was marked as filed July 27, 1925, and he relied upon the filing mark as bearing the true date on which it was received. There is nothing in his affidavit inconsistent with that averment. Upon the state of the record as herein set out respondents, on December 15, 1925, notified appellant in writing that on Monday, December 21, 1925, they would move the court for an order directing the clerk of said court to enter judgment in said cause in favor of respondents and against the appellant in the sum of \$10,000, said sum being the amount respondents paid to appellant under said agreement of March 26, 1920, with interest thereon at the rate of 7 per cent. per annum, to date of judgment, and further directing the clerk of said court to pay over to respondents said sum of \$2,665.75, deposited by said respondents under the terms of the judgment theretofore entered.

The motion came before the court for hearing pursuant to said notice, and the court found, omitting matters not pertinent to the point involved, as follows:

"* * * That on July 21, 1925, the petition of the defendant Johnson for a hearing by the Supreme Court of this State was denied, that on July 22, 1925, the remittitur of said Appellate Court was transmitted to and delivered to the Clerk of the Superior Court of the State of California, in and for the County of Sacramento, and that said remittitur, from the time of such delivery, was held

in the possession of a deputy clerk of said court until July 27, 1925, on which date it was endorsed by said clerk "Filed" July 27, 1925, and on said last mentioned date was entered in the docket of said case as filed July 27, 1925; that between July 27, 1925, and August 25, 1925, attorneys for plaintiffs inspected the records of said case to ascertain the date of receipt of said remittitur by the Superior Court and saw and relied upon said filing mark as endorsed on said remittitur, as being the true date and believed that said last mentioned date was the true date of the receipt of said remittitur by the Superior Court; that within thirty days after July 27, 1925, and on August 25, 1925, plaintiffs, pursuant to the terms of said decree herein, deposited with the Clerk of this court the sum of Two thousand six hundred sixty-five and 75/100 (\$2,665.75) Dollars, being the amount of principal payments and of interest thereon, accrued and payable on the date of said deposit under the terms of the contract sued upon herein, as said contract was construed and declared specifically enforceable by the decree of specific performance, entered herein on February 28, 1923;

"That defendant Johnson has performed none of the acts enjoined upon him by the terms of said decree; that said sum so deposited by plaintiffs is still in the possession of said Clerk; that pending said appeal, the making of said deposit by plaintiffs was stayed; that said deposit was made within the time required by law and by the terms of said judgment of February 28, 1923; that time was not of the essence of said original contract, so specifically enforced, nor of the essence of said judgment of February 28, 1923; that the defendant Johnson was not injured by the delay, if any, in making said deposit;

"It is therefore ordered, adjudged and decreed that the clerk of this court pay over to plaintiffs the said sum of Two thousand six hundred sixty-five and 75/100 (\$2,665.75) Dollars, heretofore deposited by plaintiffs with said clerk, accepting the receipt of plaintiffs' attorneys therefor, and

"It is further ordered, adjudged and decreed that plaintiffs have judgment against the defendant Johnson in the sum of Fourteen thousand one hundred fifty and no/100 (\$14,150.00) Dollars, being said sum of Ten thousand (\$10,000) Dollars, with interest thereon from the 27th day of March, 1920, to the date hereof, at the rate of 7% per annum. * * *

From the latest judgment this appeal is taken, the rights and obligations of the parties under said contract having been determined by the first judgment from which the appeal was taken.

[2] The only points made on this appeal are that respondents did not make payment of the amount found by the court to be due appellant within the thirty days' period fixed by the alternative judgment, and further, granting that the appeal stayed all proceedings, the said deposit with the clerk was not made within thirty days after the remittitur was actually received by the clerk. We think there is no substantial merit in these contentions.

The appellant filed no bond upon taking the appeal, yet he received every benefit that would have been conferred by the furnishing of an undertaking on appeal. He did none of the things which the alternative judgment imposed upon him and during the pendency of the appeal he had the use and benefit of \$10,000, money of respondents, and also the possession of the real property in suit. Respondents received no benefit whatever from the transaction except legal interest for the use of their money which had passed into appellant's hands. The parties to the action and the court treated the appeal taken from the alternative judgment as staying proceedings. The inaction of appellant gave color to the mutual belief that the appeal acted as a stay, and he made no move that would tend to disturb such belief. The reciprocal duties cast upon appellant were greater than those cast upon respondents. The appellant was receiving every benefit that he would have enjoyed had he given an appeal bond. He lost nothing by the delay and he was doubtless anxious that the status quo should be preserved. With this state of facts before us, even though the proceedings were not stayed by operation of sections 942, 943, Code of Civil Procedure, the situation is such that appellant should not be allowed to doubly profit by the grace which had been extended to him.

The question as to the coming down of the remittitur was considered and disposed of by the court in its judgment, and we are in accord with the disposition therein made.

Judgment affirmed.

We concur: WASTE, C. J.; RICHARDS, J.; SHENK, J.; PRESTON, J.; LANGDON, J.; CURTIS, J.

209 Cal. 286

In re SCHLUTER'S ESTATE.★

MOORE v. REYNOLDS.

L. A. 11370.

Supreme Court of California.

April 8, 1930.

Rehearing Denied May 8, 1930.

1. Executors and administrators ⇨224 — Guardian's lien — Death of ward — Claim against estate.

Guardian claiming lien against estate of deceased ward for sums expended was not required to present claim against estate (Code Civ. Proc. § 1493).

2. Guardian and ward ⇨68 — Reimbursement of guardian — Sums rightfully expended.

Court could authorize reimbursement of sums rightfully expended by guardian on behalf of ward, and allow full amount to which equity entitled her.

3. Guardian and ward ⇨22 — Guardian's lien — Ward's death — Tracing property.

Guardian could trace into deceased ward's estate and impress with her lien for sums expended as guardian such property of her ward as was actually or constructively in her possession (Code Civ. Proc. § 1765).

Code Civ. Proc. § 1765 provides that lawfully appointed guardian has care and custody of person of his ward and management of all his estate according to order of appointment.

4. Guardian and ward ⇨163 — Guardian's expenditures — Reasonableness — Court's determination — Binding effect in other proceedings.

Court's determination of reasonableness of sums claimed by guardian in accounting was binding in proceedings to subject assets of deceased ward's estate to lien.

5. Guardian and ward ⇨145 — Final account — Settlement — Notice.

Notice of settlement of final account of guardian must be given for ten days before hearing (Code Civ. Proc. §§ 1634, 1789).

6. Guardian and ward ⇨22 — Ward's death — Jurisdiction of property — Guardian's lien.

Court, in deceased ward's estate proceedings, acquired jurisdiction of property subject to guardian's lien imposed by another court.

In Bank.

Appeal from Superior Court, Los Angeles County; Walter J. Desmond, Judge.

In the matter of the estate of Charlotte Schluter, deceased. Motion by Adelaide

Moore against Willetta Reynolds, being the same person as Mrs. James J. Reynolds, executrix, for an order to subject the assets of the estate to a certain charge and lien. From an adverse order, the executrix appeals.

Affirmed.

Superseding opinions in 284 P. 222, and 285 P. 360.

George Acret, of Los Angeles, for appellant.

Davis & Thorne, Leland S. Davis, and Lester C. Thorne, all of Los Angeles, for respondent.

PRESTON, J.

Appeal from order of superior court of Los Angeles county subjecting assets of an estate of a ward to a charge and lien in favor of her guardian.

Said ward named appellant as executrix of her estate under a last will and testament dated July 20, 1926, and she also established a joint bank account with right of survivorship in the names of herself and appellant. Appellant also had possession of certain of her personal property which was located in Los Angeles county, where she resided. Later, said ward removed temporarily to Monterey county, and, under proceedings instituted in the superior court there, respondent was appointed guardian of her person and estate and went into actual possession of certain other personal property consisting of some valueless stock and a few articles of wearing apparel.

Said ward died on December 12, 1926, in Monterey county, although still a resident of Los Angeles county. Appellant was thereupon duly appointed executrix under said will. She thereafter caused publication of first notice to creditors to be made on February 3, 1927. Said guardian proceeding meanwhile in Monterey county presented, to the superior court there, her final account and on April 7, 1927, that court made an order settling the account and allowing her, as a charge and lien against the property and estate of said decedent, the total sum of \$1,150.08, covering \$775.08, items paid out by her both before and after her appointment as guardian for the support and maintenance of said ward, together with \$200 for her services and \$175 on account of attorney's fees. During the month of September, 1927, said guardian presented her claim for said amount supplemented by a copy of the order made by the Monterey county court, to said executrix, who promptly rejected it. Thereafter, said guardian filed in the probate proceeding in Los Angeles county a motion for an order to subject the assets of the estate to said charge. Said executrix resisted the motion upon the ground first, that the claim was filed several months after the time had expired within which claims could

be filed against the estate and, second, that the court was without jurisdiction to subject the estate to the said lien. Upon the hearing, the superior court of Los Angeles county made its order subjecting the assets of said estate to a first lien in favor of respondent for the sum of \$1,260.07, from which appellant, as said executrix, prosecutes this appeal.

[1] Was the guardian in this action required to present a claim against said estate as contemplated by section 1493 of the Code of Civil Procedure?

The case of *Estate of Clanton*, 171 Cal. 381, 153 P. 459, 461, respondent claims, announces the rule applicable to property impressed with the lien of a guardian; that it may be traced into the estate and may be subjected to the satisfaction of obligations due the beneficiary and the guardian will not, by failing to present a claim, be held to have waived his recourse against the estate of his ward. In this behalf the court there said: "Next it is argued that the guardian waived his recourse against the estate of his ward because he failed to present any claim. * * * While it is true that the relation of guardian or administrator to the ward, the heirs and the estate is one of contractual nature (*Estate of Kincaid*, 120 Cal. 205, 52 P. 492), and that a liability of one to the other growing out of such a relation is a contractual liability, it does not follow that, unless a claim against the estate of the deceased be filed, the guardian of the incompetent waives all recourse. The guardian is not asking a personal judgment. He could not obtain one if he were. *Estate of Boyes*, 151 Cal. 151, 90 P. 454; *Estate of Kincaid*, 120 Cal. 205, 52 P. 492. All that he can obtain on the settlement of such account is an order declaring his claim for overpayment a charge against the estate of the ward and directing its payment out of any moneys on hand belonging to the ward. That he has a right to have such charge or lien declared is settled. *Estate of Moore*, 96 Cal. 530, 31 P. 584; *Finnerty v. Pennie*, 100 Cal. 407, 34 P. 869; *Estate of Boyes*, 151 Cal. 151, 90 P. 454. This being the case, he has the further right, under section 1500, Code of Civil Procedure, to obtain this relief in the proceeding for the accounting, without having filed or presented a claim against the estate. * * * In *Rogers v. Schlotterback*, 167 Cal. 52, 138 P. 728, it was held that property impressed with a trust or that property's equivalent in a new form, when traced into the estate, and so into the hands of the personal representative of the deceased trustee, may be subjected to the satisfaction of the obligations due to the beneficiary, even though no claim against the estate has been previously presented. The same rule applies to property impressed with the lien of a guardian.

* * *

[2] That it was also within the power of the court to authorize reimbursement of all sums rightfully expended by said guardian on behalf of said ward and to allow her the full amount to which equity entitles her is also plain, for in the above cause the court further said: "Some of the items of the account approved by the court were for expenditures without formal allowance previously made by the court. Under our liberal system, if the expenditures of the guardian have been just and equitable, they will be allowed, regardless of the obtaining or failure to secure orders of the court authorizing them. 'The criterion for determining whether a past maintenance should be allowed is whether a chancery court would have authorized it in advance.' In *re Beisel's Estate*, 110 Cal. 276, 40 P. 961, 42 P. 819. The same rule is declared in *Estate of Boyes*, 151 Cal. 155, 90 P. 454."

[3] Appellant, however, strenuously objects to application of the above ruling in this action, contending that the case is distinguishable upon the facts from the case at bar, in that it concerns only property which was in the constructive possession of the guardian while the case at bar concerns property over which the guardian never had any claim of right whatsoever. The *Clanton Case* was a proceeding of an equitable nature brought to settle the account of a guardian after death of his ward. Virtually all of the estate consisted of real property which, having been surrendered by the guardian, the court authorized the administrator of the ward's estate to sell, the proceeds of sale passing to said administrator. Refuting the contention there made that the surrender of said property and its sale destroyed the lien of the guardian because such lien could not be extended to the fruits of the sale, the court held: "Appellants seem to admit that, if the guardian had in his possession the property which he administered, or if the estate of the decedent still possessed it, then 'it might be contended that an order made by this court would be effectual to charge such estate.' Undoubtedly proceedings by the guardian for the settlement of his accounts are in rem, and not against the person of the ward as such. *Estate of Kincaid*, 120 Cal. 205, 52 P. 492; *Estate of Boyes*, 151 Cal. 151, 90 P. 454. But the guardian in this proceeding was not seeking a personal judgment. He was insisting that the lien upon the real property for the amount of his advances should extend to the proceeds of the sale of the said realty. If that fund were insufficient to pay his claims as guardian, he would have no deficiency judgment which he might enforce against any property that might come into the hands of the administrator from sources other than the estate of the incompetent. But we see no reason why his equitable lien may not extend to the fund resulting from the sale of the interest of the de-

cedent in the land. It must be remembered that this is an equitable proceeding (citing cases). There could be no sale by the guardian of his ward's land after the latter's death. * * * It is the guardian's duty after the death of the ward to settle his account with the court, or with the administrator. Section 1754, subd. 3, Code Civ. Proc. To be sure, the provisions of that section refer to obligations which may be enforced under the guardian's bond, but they accurately define the duties of the guardian. The court of equity, having the entire matter before it, could declare the existence of the lien upon the proceeds of the sale of the land, and could direct the payment of the amount due the guardian out of that sum."

Therefore, considering the last-mentioned contention of appellant herein, and as the views above set forth make it plain that respondent could succeed in tracing into said estate and impressing with her lien as a guardian such property of her ward as was actually or constructively in her possession, we are left with the question of whether the entire estate of said ward, which included money turned into the estate from said joint bank account, situate within the state of California, was by reason of said guardianship proceedings placed in the constructive possession of said guardian.

[4] Section 1765 of the Code of Civil Procedure provides that a lawfully appointed guardian has the care and custody of the person of his ward and the management of *all* his estate according to the order of appointment. Unfortunately the transcript does not contain a copy of the order appointing respondent; presumably, however, she was appointed a general guardian. See sections 236-239, inclusive, Civ. Code. Section 239 provides: "A general guardian is a guardian of the person or of all the property of the ward within this state, or of both." In other words, under the showing made by the record, which contains copies of orders made subsequent to said order of appointment by both Monterey and Los Angeles courts and in the absence of any contention to the contrary, we are warranted in concluding that said order of appointment was couched in general terms, entitling respondent to recover the items claimed by her and subjecting not only the Monterey property, which was in her actual possession, but which she surrendered to the estate, but also all the other property of said ward within the state, to a constructive trust in her favor for the amount due, the determination of the Monterey court, under the showing made, with respect to the reasonableness of the sums claimed by respondent being also final and binding upon us in this proceeding.

[5] Under section 1789 of the Code of Civil Procedure, providing that proceedings for set-

tlement of the accounts of guardians and notice required thereof, are the same as those required by the provisions of said Code concerning estates of decedents, section 1634 of said Code, which provides for final settlement of the accounts of an administrator or executor, becomes applicable in a proceeding of this nature as to the notice required for the settlement of the final account of a guardian and notice must therefore be given for a full period of ten days before the hearing. *Livermore v. Ratti*, 150 Cal. 458, 89 P. 327. That appellant, in this case, had both actual and constructive notice of respondent's claim long prior to the commencement of said ten-day period, is apparent from the above statement of facts.

[6] The ward's estate consisted of both real and personal property. The proceedings in the Monterey court were instituted prior to the estate proceedings in Los Angeles. From the above pronouncements it, therefore, follows that the former court had jurisdiction to make said order extending respondent's lien to the Los Angeles property and the Los Angeles court acquired jurisdiction thereof subject to restrictions, orders, or liens imposed upon it by said Monterey court; hence, its action in making the order from which this appeal is taken was proper.

The judgment is affirmed.

We concur: WASTE, C. J.; CURTIS, J.; SHENK, J.; RICHARDS, J.; SEAWELL, J.

209 Cal. 283

McKEON v. NEUSCHWANDER.

No. 12861.

Supreme Court of California.

April 7, 1930.

I. Action $\Leftrightarrow$ 2 — Lost lease — Sale of leasehold — Lessor's liability.

Lessee who lost copy of lease, and whom lessor refused second copy, could not recover damages from lessor resulting from consequent inability to sell leasehold.

It appeared from the lessee's complaint that the lessee lost his lease and requested another copy of the lessor which the lessor refused to furnish, and that thereupon the lessee commenced an action to restore the lost lease. However, between the time of the lessee's request for second copy and the entry of the judgment restoring the lease as a lost document, the lessee had been offered, by a bona fide purchaser, the sum of \$12,500 for his interest in the leasehold, and by reason of the fact that he did not have his lease and by reason of the refusal of the lessor to execute a copy,

the lessee was unable to sell his leasehold interest.

2. Action ⇨1 — Right — Duty — Violation.

Cause of action involves primary right, corresponding duty, and violation thereof.

3. Action ⇨2 — Lost lease — Furnishing new copy — Lessor's duty.

Lessor owes lessee no duty to supply second copy of lost lease on lessee's request.

4. Lost instruments ⇨3 — Lost lease — Proceeding for restoration — Second copy — Landlord's refusal.

Sole remedy of lessee, on lessor's unwillingness to supply second copy of lost lease, is by proceeding to have document judicially restored, and lessor's refusal is material only on question of costs in restoration proceeding.

In Bank.

Appeal from Superior Court, City and County of San Francisco; John J. Van Nostrand, Judge.

Action by Christopher D. McKeon against Matilda Neuschwander. Judgment for defendant, and plaintiff appeals.

Affirmed.

Knight, Boland & Christin, of San Francisco, for appellant.

Edward J. Lynch, of San Francisco, for respondent.

WASTE, C. J.

Plaintiff prosecutes this appeal from a judgment for costs entered in favor of the defendant upon the sustaining of a general demurrer to the complaint without leave to amend. From the allegations of the complaint it appears that on March 8, 1922, the defendant, by written instrument, let and demised to the plaintiff, for a period of seven years, certain real property situate in the city and county of San Francisco; that during the term of said lease the plaintiff lost and mislaid his copy of the lease; that in the months of July and September, 1926, plaintiff requested the defendant to execute and deliver to him another copy of said lease; that defendant at all times neglected and refused to comply with such request; that plaintiff thereupon commenced an action having for its purpose the restoration of the lost lease; that judgment was thereafter duly entered in such action restoring said lease; that between the time plaintiff first requested the defendant to execute and deliver to him a second copy of the lease and the entry of the judgment restoring it as a lost document, plaintiff had been offered by a bona fide purchaser the sum of \$12,500 for all of his right,

title, and interest in and to the leasehold premises; and that, "by reason of the fact that plaintiff did not have his lease, which was lost as hereinabove alleged, and by reason of the refusal of defendant to execute a copy thereof and to restore the same, plaintiff was unable to and could not sell all of his right, title and interest in and to said lease," all to his damage in the sum of \$12,500.

[1-4] We are of opinion that the court below properly sustained defendant's demurrer without leave to amend. The case is apparently one of first impression, for our research has failed to disclose any case presenting for adjudication the precise point here involved. Plaintiff concedes that he is urging a novel point, and his brief cites us to but one case which has to do solely with the right of an interested party to proceed either in equity or at law under a pertinent statute or code section to secure the judicial restoration of a lost document (*Brown v. Anderson-Cottonwood Irr. Dist.*, 183 Cal. 186, 190 P. 797) wherein our law upon this subject is fully stated. There can, of course, be no question but that plaintiff had the right to proceed, as he in fact did, to have his lost lease judicially restored. A suit of this character, however, is "not one for relief against a wrong committed by the defendant, but is one to enforce a right in the plaintiff." *Brown v. Anderson-Cottonwood Irr. Dist.*, supra, page 188 of 183 Cal., 190 P. 797, 798. This "right" to have a lost document judicially restored merely means that there is available to an interested party a proceeding wherein, upon competent evidence, he may have the terms and provisions of such lost document judicially declared. It does not carry with it the right to compel, and we have been unable to find any statute requiring, the other party to such document to furnish a second copy thereof to take the place of the lost copy. In other words, the defendant was not legally obliged to comply with the plaintiff's request in this regard. It is essential to the statement of any cause of action that there be a primary right and corresponding duty and a violation thereof. *McKee v. Dodd*, 152 Cal. 637, 641, 93 P. 854, 14 L. R. A. (N. S.) 780, 125 Am. St. Rep. 82. The absence of these essential elements precludes the plaintiff herein from stating a good cause of action, and the defendant's demurrer to the complaint was, therefore, properly sustained without leave to amend.

The defendant being unwilling to supply a second copy of the lease to the plaintiff, the latter's sole and only remedy in this connection was to proceed to have the document judicially restored. This course he regularly pursued. Defendant's refusal to furnish the requested copy of the lease could be "material only on the question of the defendant being liable for costs" in the restoration pro-

ceeding. *Brown v. Anderson-Cottonwood Irr. Dist.*, supra, page 188 of 183 Cal., 190 P. 797. Inspection of the judgment entered in that proceeding, a copy of which appears in the transcript herein, tends to indicate that the plaintiff availed himself of the right to recover his costs therein. Plaintiff's alleged loss is chargeable to his own carelessness in misplacing, or his misfortune in losing, his copy of the lease, rather than to any violation of a legal right or breach of a legal duty by the defendant.

The judgment is affirmed.

We concur: LANGDON, J.; PRESTON, J.; CURTIS, J.; SHENK, J.; RICHARDS, J.; SEAWELL, J.

209 Cal. 270

MEADOWS v. SNYDER et al.
Sac. 4424.

Supreme Court of California.
April 5, 1930.

1. Mortgages $\S$ 187—One taking possession of mortgaged land under agreement with mortgagor and in recognition of relation is "mortgagee in possession."

"Mortgagee in possession" is one taking possession of mortgaged land by virtue of agreement between him and mortgagor and in recognition of relation between them.

[Ed. Note.—For other definitions, see Words and Phrases, First, Second, and Third Series, Mortgagee in Possession.]

2. Mortgages $\S$ 188—Trust deed conveys no right of possession, and trustor may remain in possession and until execution of trust maintain action therefor.

Though trust deed passes legal title, it conveys no right of possession, and trustor may remain in possession, and, until execution of trust, maintain action to recover possession even when trust deed is silent upon that subject.

3. Mortgages $\S$ 199(1)—Grantee under conveyance from trustor before execution of trust held entitled to possession rendering those wrongfully retaining possession liable for rent (Civ. Code, $\S$ 3334).

Where trustor under trust deed conveyed premises before execution of trust while he was entitled to possession, grantee held entitled to possession and, under Civ. Code, $\S$ 3334, parties in possession were liable for reasonable rental value thereof during time they wrongfully retained possession.

4. Landlord and tenant $\S$ 53(2)—Purchaser agreeing with tenant in possession that he should retain possession held not to justify tenant's withholding possession from subsequent purchaser.

Agreement between purchaser of property and tenant in possession that purchaser wanted

tenant to stay in possession and keep premises up in condition it was at time in order that purchaser might resell property held not to justify tenant's withholding possession from subsequent purchaser.

5. Landlord and tenant $\S$ 53(2)—Agreement between purchaser and tenant in possession regarding rent held not intended to give tenant right to possession without paying rent after title passed to subsequent purchaser.

Agreement between purchaser of premises and tenant in possession that, in event of purchaser's failure to take and pay for personal property within 30 days, tenant shall be relieved of payment of any rental, held not intended to give tenant continuing right to hold property without payment of rent after title had passed to stranger to agreement.

6. Appeal and error $\S$ 1071(6)—Failure to find on affirmative matters in answer held not prejudicial error, where findings thereon must under evidence necessarily have been adverse to appellants.

Failure of trial court to find on all affirmative matters set up in answer held not prejudicial error where, if findings thereon had been made, they must necessarily have been adverse to appellants under uncontradicted evidence.

In Bank.

Appeal from Superior Court, Sonoma County; Ross Campbell, Judge.

Action by H. W. Meadows against James A. Snyder and others. Judgment for plaintiff, and defendants appeal.

Affirmed.

For opinion of District Court of Appeal herewith adopted, see 282 P. 1003.

Nutter, Hancock & Rutherford and Arthur P. Hayne, all of Stockton, for appellants.

Frederick Dubovsky and E. E. Keyes, both of Oakland, for respondent.

PRESTON, J.

After a careful reconsideration of this cause, we adopt, as the opinion of this court herein, the opinion heretofore rendered by Mr. Presiding Justice Finch of the Third Appellate District as follows:

The plaintiff was given judgment against the defendants for the sum of \$700 as the reasonable rental value of the premises in Cloverdale, Sonoma county, known as "Dad Snyder's Inn," for a period of seven months, commencing October 14, 1925. The defendants have appealed from the judgment.

The answer admits that the plaintiff was the owner of the property during the seven months mentioned, that the defendants were in possession thereof during all of that time, and that the reasonable monthly rental value thereof was \$100. Relying on such admissions, the plaintiff introduced no evidence.

The facts hereinafter stated appear from the testimony of the defendants and documentary evidence concerning which there is no dispute.

On and prior to September 9, 1920, and at all times thereafter until March 28, 1925, the defendants Spoerke and Thompson were the owners of the property mentioned; the title standing in Spoerke's name. On September 9, 1920, in like manner, they owned and held the personal property used in and in connection with the inn. On the day last mentioned, they, in Spoerke's name, entered into an agreement with the defendant Snyder, by the terms of which they leased the inn to him until March 1, 1922, at a rental of \$75 a month, and gave him an option to buy the property for \$11,500. In the same instrument they agreed to sell the personal property to him for \$3,500, \$1,000 of which was to be paid in cash and the remainder in installments. The agreement provided that the owners might sell the premises "at any time during said lease," and that, in the event of such a sale, "the buyer must also buy the furniture therein contained." Snyder went into possession under the lease, and he has been in the actual possession thereof continuously since such entry. March 28, 1925, Spoerke conveyed the real property to W. T. Hopkins, and the latter gave his promissory note in payment of the purchase price, secured by a deed of trust covering the same property. Snyder and Hopkins executed an agreement, dated April 2, 1925, by the terms of which Snyder agreed to deliver possession of the premises to Hopkins and a bill of sale of the personal property upon his payment within 30 days of \$4,000 for the personal property, Snyder to pay rental at the rate of \$100 a month for the time he might remain in possession but providing "that in the event the said sum of \$4,000 is not paid as hereinabove specified within the said period of 30 days, then and (in) that event this agreement shall become null and void, and the said party of the first part shall be relieved of the necessity of delivering up possession of the said premises or executing the said bill of sale or the payment of any rental as herein specified." Hopkins failed to make the payment provided for in the agreement, and it appears that he made no attempt to carry out the terms of the agreement. It appears that he conveyed the premises to the plaintiff, because, as stated, the pleadings admit that the plaintiff became the owner thereof on October 14, 1925. The plaintiff served notice on the defendants of his purchase of the property, and demanded that they pay rental at \$350 a month or vacate the premises, but they did neither. Spoerke thereafter caused the premises to be sold under the terms of the trust deed. He became the purchaser at the sale and received a deed for the property May 15, 1926.

The answer of the defendants covers 15 pages of the transcript. In addition to denials and admissions of averments of the complaint, it sets up affirmative matters as a defense, and then proceeds to allege four further separate defenses. There is some uncertainty as to the particular grounds upon which the appellants rely for a reversal. In their closing brief they say: "Respondent complains that we do not specify the defense we rely on. * * * The only variable quantity in the various defenses is the way in which the relation between Thompson and Spoerke on the one hand, and Snyder on the other, is pleaded. We have this pleaded in three ways: First, that the relation is that of principal and agent. Second, vendor and vendee, and, third, landlord and tenant. The evidence discloses the exact relationship of the parties and shows that same was that of the vendor and vendee. Under the terms of this contract the vendee was to pay the vendor \$75 each month as installments on the purchase price."

The answer alleges that by the agreement of September 9, 1920, Snyder agreed to pay the purchase price of the real property "in installments of \$75 each and every month," but the agreement contains no such provision or any provision binding Snyder to purchase such property on any terms whatever. By that agreement he was given a mere option to purchase the property at the price stated therein. The answer alleges "that on the 28th day of March, 1925, said defendant, Frederic Spoerke, conveyed said property to one W. F. Hopkins." There is no denial of the allegation of the complaint "that the plaintiff became the owner of the said premises on the 14th day of October, 1925." The answer alleges that Spoerke purchased the property at the sale under the trust deed, and that the property was thereupon conveyed to him, and that "the said Frederic Spoerke ever since said time has been, and still is, the owner of said property, but that the defendant W. H. Thompson ever since said day, has likewise owned an interest therein." It thus appears that there is no basis for the claim that, during the period for which the plaintiff was allowed the rental value of the premises, Snyder was in possession thereof as the vendee of his codefendants, or that they had any interest in the property other than their rights under the trust deed.

[1-3] There is nothing in the record which would warrant a finding that the defendants, or any of them, were in possession of the property as beneficiaries under the trust deed. It was not introduced in evidence, and its terms were not proved. Appellants contend that such beneficiaries were in the same position as "mortgagees in possession," and that therefore they were liable at most for the

income they received from the property. "A 'mortgagee in possession' is one who takes possession of the mortgaged land by virtue of an agreement between him and the mortgagor, and in recognition of the relation between them." *Freeman v. Campbell*, 109 Cal. 360, 362, 42 P. 35. No such an agreement was proved in this case. A trust deed passes the legal title, "but it conveys no right of possession, and the trustor may remain in possession, and, until the execution of the trust, may maintain an action to recover possession even when the trust deed is silent upon the subject of possession." *Sacramento Bank v. Alcorn*, 121 Cal. 379, 383, 53 P. 813, 814; *Hollywood Lumber Co. v. Love*, 155 Cal. 270, 273, 100 P. 698; *MacLeod v. Moran*, 153 Cal. 97, 100, 94 P. 604. Under these authorities, the plaintiff was entitled to possession of the property upon the conveyance thereof to him, and the defendants are liable for the reasonable rental value thereof for the time they wrongfully retained the possession thereof. Civ. Code, § 3334.

[4] There is testimony that, at the time Hopkins and Snyder executed the agreement of April 2, 1925, "Mr. Hopkins told Mr. Snyder that he wanted him to stay in possession and keep it up in the condition it was at that time in order that he might resell the property," but this is no justification for withholding possession from a subsequent purchaser of the property.

[5] The provision in the agreement of April 2, 1925, that, in the event of Hopkins' failure to take and pay for the personal property within 30 days, Snyder "shall be relieved of * * * the payment of any rental as herein specified," must be construed as relating to the period of time within which Hopkins was given the right to complete the purchase of the property, at the end of which time the agreement was to become "null and void" in the event of failure to pay for the property. That provision certainly was not intended to give Snyder the continuing right to hold the property without payment of rent after the lapse of six months, when the title had passed to a stranger to the agreement.

[6] It is true, as contended by the appellants, that the trial court did not find on all the affirmative matters set up in the answer. If findings thereon had been made, however, under the uncontradicted evidence relating to every material issue so raised, such findings must necessarily have been adverse to the defendants, and therefore it was not prejudicial error not to find thereon. 24 Cal. Jur. 944.

The judgment is affirmed.

We concur: WASTE, C. J.; LANGDON, J.; RICHARDS, J.; SEAWELL, J.; SHENK, J.; CURTIS, J.

HENDERSON et al. v. GENERAL ACCEPTANCE CORPORATION.★

S. F. 13720.

Supreme Court of California.

April 5, 1930.

Rehearing Denied May 5, 1930.

1. Action ~~64~~48(1) — Replevin and quieting title — Uniting causes of action.

Complaint against assignee of automobile conditional sales contract, wrongfully assigned, seeking claim and delivery of contract and to quiet title to automobile, was proper (Code Civ. Proc. § 427).

Code Civ. Proc. § 427, authorizes joinder of several causes of action in same complaint under certain circumstances, as where all causes arise out of contracts, expressed or implied; claims to recover specific personal property; injuries to property; or claims arising out of same transaction, or transactions connected with same subject of action.

2. Factors ~~64~~51 — Assignee of conditional sales contract — Charged with notice.

Assignee of automobile conditional sales contract from factor indebted to assignee, making effort to trace title, was charged with notice of factor's defective title (Civ. Code, § 19).

It appeared that plaintiff corporation delivered automobile to retail dealer, with authority to sell within thirty days for cash, and dealer wrongfully sold it under conditional sales contract which he assigned to defendant. The dealer was indebted to defendant, which had received at least one check from him which had been returned for insufficient funds. Defendant made some effort to trace title by inquiry regarding its registration, but finding no trace of title made no further investigation. Civ. Code, § 19, provides that one having actual notice of circumstances sufficient to put prudent person upon inquiry has constructive notice of facts which, by prosecuting inquiry, he might have discovered.

3. Factors ~~64~~64 — Proceeds embezzled by factor — Recovery from third person.

Principal's proceeds, embezzled by factor may be recovered from one charged with notice of factor's unauthorized acts.

In Bank.

Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Action by Charles P. Henderson and others, as trustees for Henderson Securities Corporation, against the General Acceptance Corporation.

poration. From a judgment for plaintiffs, defendant appeals.

Affirmed.

Superseding opinion in 280 P. 1013.

Arnold C. Lackenbach, of San Francisco, for appellant.

Franklin T. Poore, of San Francisco, for respondents.

SHENK, J.

[1] This is an appeal from a judgment for the plaintiff in an action to recover the possession of a contract of conditional sale, or the value thereof, and to quiet the plaintiff's title as against any interest claimed by the defendant in and to an automobile which was the personal property described in the contract.

The Henderson Securities Corporation, the predecessor of the plaintiff trustees thereof, and herein referred to as the plaintiff, delivered the automobile to P. A. Hunter, doing a retail automobile business at Vallejo under the name of Vallejo Motor Sales Company, with authority to Hunter to sell the automobile within thirty days for cash. Disregarding and in violation of his authority as a factor Hunter sold the car and delivered it to George A. Jewett under a contract of conditional sale, taking the contract in the name of his own company. Hunter at the time was indebted to the defendant on certain automobile transactions and had given the defendant a check for some \$1,700 on account of such indebtedness, which check was returned to the defendant because of insufficient funds in the account against which it was drawn. The defendant pressed Hunter for payment, whereupon Hunter assigned his contract with Jewett to the defendant, the assignment being dated June 3, 1927. The plaintiff learned of the assignment on June 6th, made demand on the defendant on June 8th, and brought this action shortly thereafter.

The complaint is in two counts; the first, in claim and delivery of the Jewett contract, and the second, to quiet the plaintiff's title in and to any interest in the car claimed by the defendant. We find no merit in the defendant's contention of misjoinder, as the joinder appears to be authorized by section 427 of the Code of Civil Procedure. The allegations of the complaint were of the ultimate facts, and the court made findings in favor of the plaintiff in similar form. The main contention to be considered is whether the evidence is sufficient to support the findings.

[2, 3] It is conceded that Jewett was an innocent purchaser for value and is to be protected in his possession of the car. The plaintiff was also innocent of any wrong doing or

negligence in the transaction. The defendant knew of the unsatisfactory business conduct of Hunter. When it obtained the Jewett contract from Hunter, the defendant's representative expressed concern as to the title to the car, and made an effort to trace the title by inquiry at Sacramento as to its registration. Finding no trace of the title there, the defendant made no further independent inquiry. The facts were abundant to arouse the suspicions of the defendant as to Hunter's title and to put the defendant upon further inquiry as to the title, information as to which was readily available at the place of business of the distributor of the car in San Francisco. Section 19, Civ. Code. The defendant was therefore charged with notice of the defective title, and the implied finding of the trial court that the defendant had such notice has sufficient evidentiary support. The case is one wherein the trusted agent has embezzled the proceeds belonging to the owner of the car, which proceeds may be followed by the principal wheresoever they may be traced and be recovered as against any one having notice or legally charged with notice of the agent's unauthorized manipulations. *National Bank of New Zealand v. Finn*, 81 Cal. App. 317, 253 P. 757; 25 C. J. 416.

No other points require discussion.

The judgment is affirmed.

We concur: WASTE, C. J.; RICHARDS, J.; SEAWELL, J.; CURTIS, J.; LANGDON, J.; PRESTON, J.

209 Cal. 293

WETENHALL v. CHAS. S. MABREY CONST. CO. et al.
S. F. 13312.

Supreme Court of California.

April 9, 1930.

Partnership 64—Name of individual trader followed by word "company" was not fictitious, and individual trading under that name could sue without filing certificate (Civ. Code, §§ 2466, 2468).

Sole trader's use of his name and initials, followed by word "company," did not necessitate filing of certificate stating name and place of residence under Civ. Code, §§ 2466, and 2468, as condition to maintaining action, since name adopted was not fictitious, in view of fact that individual business, and not partnership business, was involved.

In Bank.

Appeal from Superior Court, City and County of San Francisco; C. J. Goodell, Judge.

Action by W. S. Wetenhall, doing business under the name and style of the W. S. Weten-

hall Company, against the Chas. S. Mabrey Construction Company and another. Judgment for plaintiff, and defendants appeal.

Affirmed.

For opinion of District Court of Appeal herewith adopted, see 280 P. 391.

Robert H. Schwab, of Sacramento, for appellants.

G. R. Perkins, of San Francisco, for respondent.

WASTE, C. J.

This appeal by the defendants from a judgment entered on the pleadings presents the question whether or not an individual doing business as such and using his own name and initials, followed by the word "Company," is required to file with the clerk of the county and publish the certificate required by sections 2466 and 2468 of the Civil Code. On petition to this court, after decision and judgment in the District Court of Appeal, it was contended that the decisions on the subject were not uniform, in that an opposite view to that expressed by the decision in this case had been reached by the District Court of Appeal of another district in *Collection Service Corporation v. Conlin* (Cal. App.) 277 P. 749, 750, in which case a hearing in this court had not been sought.

Our examination discloses that the facts of the two cases are essentially different. In the *Conlin* Case it was alleged and found that the assignor of the plaintiff "was doing business under the [registered] *fictitious* name of," etc. (italics ours), which distinguishes the case from the one at bar. We are therefore content to adopt, as the opinion and decision of this court, the opinion of the District Court of Appeal, prepared by Mr. Justice pro tem. H. L. Preston, viz.:

This is an action by plaintiff against the contractor as principal and the bonding company, above named, as surety, for materials furnished to the contractor and used in the construction of a building in San Bruno, Cal.

Appellants rely upon two special defenses which are set forth in their answer: First, "that plaintiff has failed to comply with the provisions of section 2466 to section 2468, inclusive, of the Civil Code of the State of California, and for that reason said action is barred." Paragraph I of the complaint is as follows: "That plaintiff now is and was at all times herein mentioned doing business under the name and style of W. S. Wetenhall Company, with his office and principal place of business in the city and county of San Francisco." Section 2466 of the Civil Code provides: " * * * Every person transacting business in this state under a fictitious name and every partnership transacting business in this state under a fictitious name, or a designation not showing the names of the per-

sons interested as partners in such business, must file with the clerk of the county in which his or its principal place of business is situated, a certificate, stating the name in full and the place of residence of such person and stating the names in full of all members of such partnership and their places of residence."

The first question, therefore, to be determined is whether the name "W. S. Wetenhall Company" is a fictitious name. An examination of the following authorities fully convinces us that the name "W. S. Wetenhall Company" is not fictitious. *Spreckels v. Grace Darling Hospital Ass'n.*, 28 Cal. App. 646, 648, 153 P. 718; *Pendleton v. Cline*, 85 Cal. 142, 24 P. 659; *Carlock v. Cagnacci*, 88 Cal. 600, 601, 26 P. 597; *McLean v. Crow*, 88 Cal. 644, 647, 26 P. 596; *Lamberson v. Bashore*, 167 Cal. 387, 391, 139 P. 817; *Andrews v. Glick* (Cal. Sup.) 272 P. 587; *Hall et al. v. King* (Cal. App.) 279 P. 814.

If the name "W. S. Wetenhall Company" is not fictitious, then he does not come within the purview of section 2466 at all, for the reason that he is an individual doing business under the name and style of "W. S. Wetenhall Company," and is not a partnership. That portion of section 2466 of the Civil Code reading "or a designation not showing the names of persons interested as partners in such business," etc., refers only to partnerships and not to an individual. Or, in other words, if the name used by W. S. Wetenhall is not fictitious and no other person is interested with him in the business, he does not have to comply with said section 2466. This section is not susceptible of any other reasonable interpretation. Our conclusion is strengthened by the language used in the latter part of section 2468 of the Civil Code, which reads: "No person doing business under a fictitious name, * * * nor any persons doing business as partners contrary to the provisions of this article, * * * shall maintain any action * * * until the certificate has been filed and the publication has been made. * * *"

We are not unmindful of the fact that in such cases as *Andrews v. Glick*, supra; *Hall v. King*, supra; *North v. Moore*, 135 Cal. 621, 67 P. 1037; *Schwarz & Gottlieb, Inc. v. Marcuse*, 175 Cal. 401, 165 P. 1015; *Nicholson v. Auburn Gold Min., etc., Co.*, 6 Cal. App. 547, 92 P. 651, and similar cases, the courts have held that the various names used, while not fictitious, were designations not showing the names of the persons interested as partners in the business, and therefore were required to file the certificate under section 2466 of the Civil Code. An examination, however, of these cases will show that in all of them two or more persons were interested in the business. We have been unable to discover any case in which a single individual who was doing business under a name not his own, but

one which was not fictitious, was required to comply with said section 2466, before he could maintain an action, notwithstanding, from the name used alone it might be impossible to determine how many persons were interested in the business.

The second contention made by appellants is wholly without merit. The portion of the answer relied upon does not raise any issue whatever, and needs no special discussion.

The judgment is affirmed.

We concur: LANGDON, J.; PRESTON, J.; CURTIS, J.; SHENK, J.; RICHARDS, J.; SEAWELL, J.

ISAACSON v. UNION TRUST CO. OF SAN DIEGO et al.*

L. A. 9525.

Supreme Court of California.

April 1, 1930.

Rehearing Granted April 28, 1930.

1. Pleading $\S$ 237(3)—In trustee's action to establish trust in stock for bankrupt, trial amendment, conforming to proof alleging fraudulent pledge and sale to pledgee, was properly allowed.

In action by trustee of bankrupt to establish secret trust for benefit of bankrupt and to have title to stock vested in trustee, amendment to complaint to conform to proof, alleging execution of promissory note by bankrupt to defendant, fraudulent pledge of stock, and pretended sale to pledgee, was properly allowed as not altering essential characteristics of action, where pledgee stated he did not wish continuance when matter was suggested.

2. Pleading $\S$ 236(3) — Allowance of trial amendment to pleadings is within court's discretion, not to be disturbed without showing of prejudice.

Allowance of trial amendments to pleadings rests in sound discretion of court, and ruling should not be disturbed on appeal in absence of showing that prejudice resulted therefrom to extent that party aggrieved was deprived of substantial right or deprived of fair trial.

3. Bankruptcy $\S$ 279—Trustee in bankruptcy may pursue bankrupt's property held by third persons in fraud of creditors.

Trustee in bankruptcy has right to pursue property of bankrupt claimed to be held by third persons in fraud of creditors.

4. Limitation of actions $\S$ 103(2)—Limitation of action to recover stock held in trust did not commence until repudiation of trust.

Action by trustee in bankruptcy to establish title to stock held by third person under agreement to hold stock in trust for bankrupt held based on express trust, and against which statute of limitations did not commence to run until trust was repudiated.

5. Limitation of actions $\S$ 103(3)—Trust in stock held by pledgee in trust for bankrupt held not repudiated until pledgee's answer to action by trustee in bankruptcy to recover stock.

In action by trustee in bankruptcy to establish title to stock pledged to defendant and sold to pledgee under agreement that pledgee was to hold stock in trust for bankrupt, repudiation of trust first took place when pledgee filed answer denying allegations of complaint and alleging limitations, and hence action was not barred by statute of limitations commencing on repudiation of trust.

6. Judgment $\S$ 256(2)—Judgment restoring stock to trustee in bankruptcy held too broad, under findings that pledge by bankrupt was bona fide and should be modified to prohibit recovery until debt was paid.

In action by trustee in bankruptcy to establish express trust in stock for bankrupt and recover stock, judgment restoring stock to trustee absolutely held too far-reaching under findings that transaction for pledge and sale of stock up to time of sale was bona fide, but that sale was made with secret agreement that pledgee was to hold stock in trust for bankrupt, and hence judgment must be modified to deny recovery of possession of stock until debt was paid.

7. Limitation of actions $\S$ 167(1)—Pledgee can retain property until debt is paid, though debt is barred by limitations.

Pledgee has right to retain possession of pledged property until debt for which it was given as security is paid, and pledgee cannot be required to surrender property, though debt is barred by statute of limitations and no affirmative action can be taken to enforce it.

SEAWELL and RICHARDS, JJ., dissenting.

In Bank.

Appeal from Superior Court, San Diego County; Frank C. Collier, Judge.

Action by J. A. Isaacson, as trustee in bankruptcy of the estate of J. C. Rice, a bankrupt debtor, against the Union Trust Company of San Diego and others. Judgment for plaintiff, and defendants appeal.

Affirmed as modified.

For opinion of District Court of Appeal adopted herewith, see 273 P. 119.

Superseding opinion in 275 P. 529.

L. E. Dadmun, of Los Angeles, and Sweet, Sterns & Forward and Rolland C. Springer, all of San Diego, for appellants.

Curtis Hillyer and Edgar Kendall, both of San Diego, for respondent.

PER CURIAM.

Upon further consideration of the above-entitled cause, we are satisfied that the opinion first rendered therein by the learned District Court of Appeal, Third Appellate District, written by Mr. Justice pro tem. Tuttle, expresses the views of this court; therefore

said opinion then so rendered, as follows, is now hereby adopted as the opinion of this court herein:

This is an action brought by plaintiff, as trustee in bankruptcy of the estate of J. C. Rice, a bankrupt, to secure an adjudication of the ownership and title to certain property, and to establish the interest of plaintiff, as trustee, in the same, and for an accounting and recovery of money. Judgment went for plaintiff, and defendants J. C. Rice Company and M. Y. Wolf now appeal from the same, and also from the order denying motion for new trial and the order denying the motion to vacate and set aside the judgment and render judgment in favor of defendants.

The complaint alleges that plaintiff is the trustee in bankruptcy of the estate of J. C. Rice, a bankrupt debtor; that at the time of the filing of the petition in bankruptcy said J. C. Rice was the owner of an undivided one-half interest in certain lands situate in the county of San Diego, known as the "Lincoln Acres"; that heretofore the said J. C. Rice, acting in the name of the defendant J. C. Rice Company, entered into an agreement with defendant Rae Investment Company whereby said defendant and said Rice became owners in common of the tract of land hereinbefore described, taking the title thereto in the name of defendant Rae Investment Company; that subsequent thereto said Rice and said defendant Rae Investment Company entered into an agreement with said defendant R. E. Harrison Company under and by virtue of the terms of which said R. E. Harrison Company became the selling agents for the defendants Rae Investment Company and the said J. C. Rice in the sale of said tracts of land hereinbefore described; that a large number of parcels of land have been sold and the contracts for the purchase of the same have been placed with the defendant Union Trust Company for the purpose of collection; that the defendant Union Trust Company has collected a large amount of money upon said contracts, as plaintiff is informed and believes, one-half of which is the property of the said bankrupt; that the said R. E. Harrison Company has entered into said contracts under its own name, but in fact as and for the defendants Rae Investment Company and the said J. C. Rice; that the plaintiff is informed and believes, and on such information and belief alleges, that said J. C. Rice Company, a corporation, was organized by the said J. C. Rice as a vehicle through which to transact business and conceal his assets from his creditors, and that ever since its organization said J. C. Rice has used said corporation for that purpose, and that ever since its organization said J. C. Rice has been and now is the sole owner of the said J. C. Rice Company and all of its assets, and that the said J. C. Rice Com-

pany is in fact and always has been J. C. Rice, the bankrupt debtor; that prior to the commencement of this action the said court of bankruptcy duly made and filed its order in said bankruptcy proceedings, authorizing and directing plaintiff to commence and prosecute this action. On information and belief plaintiff alleges that said defendant M. Y. Wolf claims to own 247 shares of the capital stock of said J. C. Rice Company, being all of the capital stock of said company except 3 shares, and that the claim of the said M. Y. Wolf to said stock is without any right whatever, and that in truth and in fact the said J. C. Rice, the bankrupt debtor, was the owner of all of the capital stock of the said J. C. Rice Company at the time of the filing of his petition in bankruptcy.

At the trial of the action an amended complaint, to conform to the proof, was filed under order of court. The allegations of this amended complaint are similar to those in the original, except that certain other lands are added. The following additional allegations appear: That certain other parcels of real property stand on the records in the name of defendant J. C. Rice Company, but that they were, at the time the bankruptcy petition was filed, owned by said J. C. Rice; that on November 21, 1918, and at a time when J. C. Rice was insolvent, he was the owner of all the stock of defendant J. C. Rice Company, to wit, 250 shares; that for the purpose of hindering, defrauding, and delaying his creditors, he (J. C. Rice) executed and delivered to defendant Wolf a promissory note for \$21,458.79, and as security therefor pretended to pledge to said Wolf 247 shares of said stock; that on September 9, 1919, said Wolf made a pretended sale of said stock to himself, and credited a payment of \$15,000 on said note; that prior to said sale a creditor of said Rice levied an execution on said stock, and that said pretended sale was made to assist said Rice in concealing his assets from his creditors, and that said sale was made with the secret understanding that it was to be held in trust by said Wolf, and that said Wolf now holds the same in trust for plaintiff as trustee in bankruptcy.

Appellants each filed separate answers, which are practically the same. They deny the essential allegations of the complaint. In addition, the statute of limitations is pleaded.

As the entire appeal revolves around the sale of said stock, we quote, in part, the finding of the court upon this issue: "That on the 21st day of November, 1918, the said J. C. Rice was indebted to defendant M. Y. Wolf in the sum of \$21,458.79, and that on said 21st day of November, 1918, the said J. C. Rice did in consideration of said indebtedness sign, execute, and deliver to said de-

fendant M. Y. Wolf his certain promissory note for the sum of \$21,458.79, payable to the order of defendant M. Y. Wolf, five years after its date, with interest thereon at the rate of seven per cent. (7%) per annum, payable at maturity, and said J. C. Rice did at said time pledge and deliver to said M. Y. Wolf 247 shares of the capital stock of said J. C. Rice Company, and also stock in other companies; among the stock so pledged being stock of the Central Mortgage & Investment Company, as collateral security for the payment of said note; *that said note so signed, executed and delivered by said J. C. Rice to M. Y. Wolf, and delivery of the said 247 shares of the capital stock of said J. C. Rice Company and stock of the other corporations to said M. Y. Wolf, as security for the payment of said \$21,458.79 note, was a bona fide transaction and made in good faith on the part of said J. C. Rice and M. Y. Wolf, and for valuable consideration.* That the value of said stock so pledged was fixed in said note by said J. C. Rice and said Wolf in said note at the sum of \$75,000.00. That said alleged pledgee's sale of said 247 shares of the stock of said J. C. Rice Company by the said M. Y. Wolf to himself on said 9th day of September, 1919, was made with the secret understanding and agreement between said J. C. Rice and said M. Y. Wolf that said M. Y. Wolf would hold said stock in trust for said J. C. Rice, and that said M. Y. Wolf does now hold said stock in trust for said plaintiff as trustee in bankruptcy of said J. C. Rice and that the claim of said M. Y. Wolf to said stock of said J. C. Rice Company is without any right whatever as against this plaintiff." The judgment does not mention the stock, but it is decreed that "plaintiff, as such trustee in bankruptcy, is the owner of said J. C. Rice Company, a corporation, and all its assets and property of every kind and nature." This is treated and construed by all the parties as an adjudication that plaintiff, as trustee, is the owner of said shares of stock, and we will follow that construction.

[1-3] It is contended by appellants that the court erred in allowing said trial amendment to the complaint, for the reason that said amendment changes the cause of action. When the case was called for trial, respondent admitted that no cause of action was stated against defendant M. Y. Wolf, and that he was only referred to in the caption and prayer of the complaint. Thereafter, and during the trial, permission was granted to file the amended complaint to conform to proof, referred to, *supra*. It is the position of appellant, with reference to said stock, that the amended complaint states a cause of action to set aside the sale of said stock. If this were true, it would no doubt be the addition of a new cause of action. As we view the pleading, the action was

commenced by the trustee to establish a secret trust for the benefit of the bankrupt, and to have the title to said stock vested in said trustee. If, in fact, Rice and Wolf had a secret understanding that the latter was to hold the stock as his own, the effect of this was to work a deception upon the creditors, and this would be true whether a deception was intended or not. The pleading of fraud, therefore, does not alter the essential characteristics of the action, which was, in effect, for the purpose of impressing a trust upon the stock in the hands of Wolf.

This precise point was before the court in the case of *Ury v. Van Every*, 181 Cal. 604, 188 P. 985, and it was there so held. The matter of the allowance of trial amendment to the pleadings rests in the sound discretion of the court, and such ruling should not be disturbed upon appeal in the absence of a showing that prejudice resulted therefrom to the extent that the party aggrieved was deprived of a substantial right or placed in a position where it may be said that he was deprived of a fair trial. No such showing is here made. If defendants were faced with a new issue upon which they were unprepared, they had the right to move for a continuance upon that ground. Having made no such motion, they are in no position to complain. The record shows that the attorney for defendant stated in open court he did not wish a continuance when the matter was suggested. For these reasons we hold that the point is without merit. It is claimed that the trustee in bankruptcy had no authority to bring such an action. There is no merit in this contention. *Ury v. Van Every*, *supra*. The right of a trustee, under such circumstances, to pursue the property of the bankrupt is unquestioned. 7 Cal. Juris. 118.

[4, 5] The next question raised by appellants is that of the statute of limitations. It is claimed that the action is one to set aside the sale upon the ground of fraud; that the three-year limitation applies. We have pointed out that the cause of action is one to establish a trust, so far as the stock is concerned. The court found that the stock was sold under an agreement that defendant was to hold the same in trust for the bankrupt, Rice. This was an express trust, and the statute of limitations did not commence to run until the same was repudiated by the trustee. *Lezinsky v. Mason Malt Co.*, 185 Cal. 240, 196 P. 884. The repudiation first took place in the instant case when defendant Wolf filed his answer. The action, therefore, was commenced within the time provided by law.

It is contended that the findings upon the issues relating to the execution of the note, the pledging of the stock, and the sale of said stock are in favor of appellants, and that they should have judgment upon such findings. This question presents some

unique features. It will be observed that the court found that the whole transaction up to the time of the sale under the pledge was bona fide, but that the sale was made with the secret understanding that Wolf was to hold the stock in trust for the bankrupt, Rice. The argument of appellants is that the court having found that the steps leading up to the sale were valid, it must necessarily follow that the sale was in good faith, and that the finding that the sale was made with a secret understanding, creating a trust, must be disregarded. As authority, they refer to the case of *Pierce v. Pierce*, 16 Cal. App. 375, 117 P. 580. In that case the trial court upheld a mortgage as executed in good faith, but set aside a foreclosure sale upon the ground of fraud. The judgment was reversed upon the ground that there was no evidence to show any attempt to conceal property, and no agreement between the parties to that effect, and no evidence that any creditor of the mortgagor was making any demands upon him at the time of said sale. The case turned upon the sufficiency of evidence, and not upon the doctrine that a sale under such circumstances cannot be annulled upon sufficient evidence.

[6, 7] A more serious question arises in this case as to the extent that a judgment can go under these findings. The judgment, in effect, restores the stock to the trustee, absolutely, and yet it is found that the execution of the note and the pledge were proceedings in good faith; hence, the pledge was valid. The effect of the findings is to leave the stock in the hands of the pledgee, while the trustee in bankruptcy is the legal owner thereof. It is at once apparent that the judgment is too far-reaching in its terms, and should be modified to conform to the findings. No recovery of possession of the said shares of stock could be had until the debt was paid. "Unless otherwise agreed, a pledgee has a right to retain possession of pledged property until the debt or obligation for which it was given as security is paid. He is precisely in the position occupied by a mortgagee in possession, and cannot be required to surrender the property until the debt is satisfied, even though it is barred by the statute of limitations, and no affirmative action can be taken to enforce it." 21 Cal. Juris. 330.

The sufficiency of the findings is attacked in many particulars. The "business" ventures of the bankrupt are spread over hundreds of pages of the transcript. His schedule of indebtedness was about \$360,000. His assets were listed at \$125, but claimed as exempt. At the time of the execution of said note to Wolf, his creditors were legion. Many of these were judgment creditors. Numerous corporations were organized by him, and the stock was traded back and forth. His gyrations in a corporate way are

almost impossible to follow. Always, however, he was the whole corporation; the matter of control by a directorate being but a fiction. After the "sale" of said stock under the pledge, he continued just as he always did in the conduct of the corporation. The purported owner of the stock, for a period of some five years, shows by his testimony that he did not know what was going on, so far as the affairs of the corporation in which he held all the stock were concerned. We are satisfied that there is ample evidence in the record to support the findings.

The judgment is modified so that paragraph 4 thereof will read as follows: "4. That plaintiff as such trustee in bankruptcy is the owner of said J. C. Rice Company, a corporation, and of all of its assets and property of every kind and nature whatsoever, provided, however, that it is hereby adjudged that the said 247 shares of stock are subject to a pledge as security for the payment of the promissory note for \$21,458.79, executed by J. C. Rice to defendant M. Y. Wolf."

As so modified, the judgment is affirmed; appellants to recover their costs herein.

SEAWELL, J.

I dissent. The record presents as unusual case. J. C. Rice, the bankrupt, at the time of and for many years prior to filing his petition in bankruptcy, had been very actively engaged in the business of buying, selling, trading, and exchanging real property and dealing in stocks and bonds in the city and suburban districts of San Diego. The J. C. Rice Company was organized through the efforts of Mr. Rice as successor of the Rice-Landswick Company about February 1, 1915. All of the property owned by the Central Mortgage & Investment Company and the Rice-Landswick Company was absorbed by the J. C. Rice Company, whereupon said corporations ceased to function. Stock in the J. C. Rice Company was issued to various parties who held claims against corporations of which J. C. Rice was the owner. The Rice-Landswick Company, of which Rice was the principal stockholder, became insolvent. The capital stock issued by the J. C. Rice Company, consisting of 250 shares, was, excepting two or three shares, gradually acquired by J. C. Rice, although but one share stood upon the books of the corporation in his name. Rice, Wolf, and R. E. Harrison had been mutually interested in several other corporations and were associated in speculative real estate and stock investments. Wolf's business experience and knowledge of values in San Diego real property and stocks was very limited compared with the long experience of Rice and Harrison, who seemed to be men possessed of much daring, drive, and business energy. Rice seemed to be the ruling char-

acter. Harrison had known Rice from childhood, and no doubt acceded to his judgment in important business transactions. Wolf had not resided nearly so long in San Diego as either Rice or Harrison, and was nothing like as resourceful as either. He had not had the experience of either in the organization of corporations for business convenience or as holding concerns, nor did he seem to possess the initiative or business acumen of either of the other two. The relationship that existed between the three during Rice's rise and fall in business circles cannot be definitely determined, but that a relationship or understanding existed there can be no doubt. Rice, who had long been active in putting over large deals, was, and it seems during his long business career had been, constantly pressed for ready money, and his obligations far exceeded his ability to pay. His liabilities at the time of filing his petition in bankruptcy approximated \$360,000, with practically no assets. His insolvency had existed for many years before he executed the Wolf note, dated November 21, 1918, in the sum of \$21,458.79, payable five years after its date, to secure a pre-existing indebtedness, and gave said 247 shares of the J. C. Rice Company's stock, and some other stocks, as security for its payment. The court having upheld the bona fides of the pre-existing indebtedness and having held that the sale of the stock given as collateral to secure the same, made in compliance with the terms of the pledge, was void so far as it affected the right of the trustee in bankruptcy to apply the property described as standing in the name of the J. C. Rice Company and others, to the payment of the debts of the bankrupt, J. C. Rice, presents, in the view of appellants, an irreconcilable conflict, in that, if the said promissory note was given for a valuable consideration and the sale of said security was made in accordance with the provisions of said pledge, the purchaser of said stocks, which constituted practically the entire stock issue of said corporations, was, it is argued, entitled to have the real and personal property belonging to the J. C. Rice Company preserved as assets of said corporation. On the other hand, it is the claim of plaintiff that, while said sale had the semblance of a bona fide transaction, it was nevertheless a mere sham proceeding, another step taken in furtherance of a well-laid plan on the part of J. C. Rice, assisted by M. Y. Wolf, to conceal his assets from his creditors by and through corporation manipulations to his ultimate gain. The J. C. Rice Company was in fact a one-man corporation during its entire existence. The same policy was in vogue in every allied corporation in which Rice was interested. While they were corporations in name and forms of law, they were but intermediaries which responded obsequiously to the will of the owner, without a very strict regard for the observance of laws prescribing the meth-

ods by which corporations may transact business.

The record of J. C. Rice's activities in the J. C. Rice Company dates from the organization of said corporation, February 1, 1915, and shows him to have been the sole and absolutely dominant figure in the corporation from the first, even when he appeared upon the books as the owner of but one share of stock. He and Harrison, the latter also the owner of one share of stock, were directors, while Rice became the president and manager. We pass from the earlier stage of the corporation's existence to the pledging and sale of Rice's 247 shares of stock to Wolf as security for a pre-existing indebtedness at a time when Rice was known to be insolvent. The court found that the sale was collusive and it was not intended thereby to vest title to said stock in Wolf, but to give the appearance that the entire stock issue of 247 shares, save one or two shares, one of which was owned by Harrison, had passed out of Rice to Wolf, which made Wolf the owner of the corporation, which was the ostensible owner of much of the real and personal property in suit.

The rationale of the situation argues strongly in support of the court's finding that the sale was one only in form and was given the appearance of good faith with the fraudulent purpose of protecting Rice's property against the claims of his numerous creditors, a plan to which Wolf had wittingly lent himself. While the indebtedness secured by the note was found by the court to have been lawfully incurred, there may be seen, in the light of the most unusual transactions between Rice and Wolf, a design on the part of both to give to a sham transaction a legal aspect, thereby enabling them to profit to the detriment of creditors, by deceitful and unfair methods. If Wolf was a party to such a scheme as the court found he was, the law will not concern itself with the burden of releasing him from the consequences of his voluntary act. The question for this court's determination is whether the evidence is sufficient to sustain the court's finding that there was fraudulent participation in such a plan by Wolf. We think the evidence was sufficient to sustain the express and implied finding of the court upon that issue.

The methods of doing business, as irregular as they appear to have been, continued after said sale precisely as they had existed before. The management of the corporation remained under the sole direction of Mr. Rice. He signed all checks without counter signature; received all moneys and made deposits of the same; made entries on the stubs and deposit slips; negotiated purchases and sales of real and personal property amounting in one instance to the sum of \$50,000 and aggregating a large amount; and pledged the corporation's chattels for moneys borrowed on

his personal account. Wolf, who claims to have been the owner of all of the stock except one share owned by Rice and one owned by Harrison, by virtue of said sale, took no part in the business transactions of the corporation or its business policy, and was rarely, if ever, consulted on any matter, great or small, and in fact was not aware of the volume of business carried on by Rice, who acted without restraint or approval of any superior governing body. His admission is that only a part of the 93,011 shares of the stock of the Castle Range Mining Company, which were included in the J. C. Rice Company stock pledge, were ever delivered to Mr. Wolf. Wolf exercised no authority whatsoever in the management of the corporation, and manifested a startling lack of acquaintance with the business of the corporation and its acquisition of the real property described in the complaint.

More than five years elapsed from the day he became the purchaser of said stock, September 9, 1919, to the day he became even a director of said corporation, to wit, February 16, 1925. This was the day before Rice filed his petition in bankruptcy. On that day Mr. Wolf was elected president of the corporation, vice J. C. Rice, resigned, and Rice, ostensibly the owner of but one share of stock, was thereupon elected vice president. On January 3, 1920, in lieu of the powers that were vested in Rice, its president since said corporation began to function, directors J. C. Rice and R. E. Harrison, each the owner of one share of stock, met pursuant to call—Wolf, the owner of 247 or 248 shares, being absent—and passed the following resolution conferring upon Rice plenary powers, under which resolution the business of the corporation was thereafter conducted:

"Be it, and it is hereby resolved that the president or the vice-president of this corporation be, and each of them is, hereby authorized to borrow on behalf of and in the name of this corporation any and all sums of money necessary for carrying on the business of the corporation, or incidental to the business of the corporation, and make any and all sales, exchanges, or other manner of disposition of the real and personal property of the corporation, except the business and franchise of the corporation as a whole, and enter into any and all agreements for the securing of such loans or the giving of security therefor, or the selling, exchanging or disposition of said real or personal property, and that in the name of, and on behalf of, this corporation, said president or vice-president execute and deliver such notes, mortgages, trust deeds, deeds, agreements, assignments or other instruments as may be proper to complete such transactions, and that the secretary of this corporation attest the same with his signature and the corporate seal of this corporation, and that so far as third parties are concerned, any

instrument of the nature above described executed in the name of this corporation, by its president or vice-president and attested by its secretary with the corporate seal affixed shall be conclusive in favor of such third persons that the act done or agreed to be done has been fully authorized by this corporation."

The only person who assumed any authority under the foregoing resolution was Rice. The only meeting of the directors that Wolf ever attended was the one at which he became a director and president, held on the day before Rice filed his petition in bankruptcy. He assumed no authority, and the business continued to be conducted by Rice as it always had been conducted by him. There was nothing about Wolf's conduct to suggest to the business public in the smallest way that he had any authority in the premises. The presumption (section 1963, Code Civ. Proc.) that a person takes ordinary care of his own concerns cannot, in the absence of substantial rebuttal evidence, be wholly ignored. The books of the corporation, so far as furnishing a record of the business, are negligible. The stock was carried on the books of the corporation from the first in the names of persons other than J. C. Rice. During all the period covered from and before the execution of the Wolf promissory note, November 21, 1918, to the filing of the petition in bankruptcy, February 17, 1925, Rice was heavily in debt and had suffered several judgments to be taken against him. His financial embarrassment must have been, and we understand was, known by Wolf.

We think there is ample support in the evidence for the court's finding that said corporation was used as a vehicle by Rice for the purpose of concealing his assets from his creditors. That he was the master of its destinies at all times is not to be doubted. A court of equity will look through the form of a corporation to ascertain its actual purpose and intent. If the purpose and intent are bad, its corporate entity will be no cover for wrong, fraud, or bad faith. "Where an individual is the owner of all the corporate capital stock and uses the corporation merely as an instrumentality through which he transacts business, the separate entities will be disregarded when necessary to prevent fraud and to protect the rights of third persons." *Clark v. Millsap*, 197 Cal. 765, 242 P. 918, 924; *Minifie v. Rowley*, 187 Cal. 481, 202 P. 673; *Wenban Estate, Inc., v. Hewlett*, 193 Cal. 675, 227 P. 723. When such a situation exists, the law will hold such corporation obligated for the acts of the sole owner of the corporation to the same extent and just as he would be bound in the absence of the existence of the corporation. *Wenban Estate, Inc., v. Hewlett*, supra.

Sufficient reasons are to be found in the record of the instant case, as there were in *Minifie v. Rowley*, 187 Cal. 481-488, 202 P. 673, to

sustain the court's finding that the J. C. Rice Company, corporation, was but the alter ego of said J. C. Rice. Some emphasis is given to the circumstance that all of the stock owned by Rice—which was practically all of the stock issued by said corporation—was, on the day following its sale under the pledge, to wit, September 10, 1919, entered upon the books of the corporation in the name of Wolf. In passing, it may be said that the promptness in making this entry is in conspicuous contrast with the general course of omission to make entries in other important business transactions. In the light of the facts and circumstances of this case, it is not strange that the chancellor did not accept the incredible contention of appellants that by said sale it was intended that Wolf should become and remain the dormant owner of said corporation for a period of approximately six years and then only assert proprietorship in anticipation of a move on the part of the bankruptcy court to apply the property that stood in the corporation's name to Rice's indebtedness.

It is claimed by Wolf that some time after he purchased the stock of the corporation he employed Rice to continue the business as he had theretofore conducted it at an agreed salary of \$2,000 per year. In corroboration of this claim of Wolf, it is shown that Rice, some two or three months after said alleged employment began, drew his entire annual salary. This item of advancement, as was the case in other withdrawals of moneys made by Mr. Rice, naturally could not be explained by Mr. Wolf, who had no actual knowledge as to the affairs of the corporation. Appellants rest their contentions mainly upon the finding of the court as to the bona fides of Rice's indebtedness to Wolf and the pledging of the shares of stock as security therefor and the finding that the law's forms had been regularly pursued in the sale. It is their contention that there exists an irreconcilable conflict between the findings last mentioned and the finding that said sale was collusive between Wolf and Rice and was made with the secret understanding that Wolf was to be the purchaser of said stock and was to hold the same for the benefit of Rice and said sale was made with the intent to aid and assist said Rice in fraudulently concealing his assets from his creditors. It will be remembered that Wolf was the only bidder at said sale; the amount of his bid being \$15,000 for stocks appraised by himself and Rice at \$75,000 less than a year prior to the sale, and, having sold said stocks to himself, credited Rice's note with the amount of the purchase price, to wit, \$15,000.

The theory upon which the case was tried and decided was that it was not intended by the sale of stock to transfer the title of the property standing in the name of the corporation to Wolf, but that it was a mere sham pro-

ceeding designed to better carry out the plan of deception as to the true owner of the property standing in the name of the corporation. We have reviewed the evidence in the case, and find that there is an abundance of evidence to justify such a conclusion. Going no further back than the making of the promissory note and from there following the various transactions of the parties inter se, and with third persons down to the day the petition in insolvency was filed, and since, a most unusual course of conduct is presented.

It is such a wide departure from the natural and usual course of action as to create more than a mere suspicion in the mind of the chancellor as to the ulterior purposes of the actors. In such circumstances the conduct and probable motives of the persons who are responsible for bringing about an equivocal situation, and who attempt to unduly profit at a cost to innocent persons, should be carefully scrutinized by the chancellor, in view of the advantage sought to be taken of such a situation.

This case was twice considered by the District Court of Appeal, Tuttle, Justice pro tempore, writing the opinion in each instance. Upon the first consideration, paragraph 4 of the judgment of the trial court was modified to read as follows: "That plaintiff as such trustee in bankruptcy is the owner of said J. C. Rice Company, a corporation, and of all of its assets and property of every kind and nature whatsoever, provided, however, that it is hereby adjudged that the said 247 shares of stock are subject to a pledge as security for the payment of the promissory note for \$21,458.79, executed by J. C. Rice to defendant W. Y. Wolf."

Upon the second consideration the judgment was affirmed without modification. Aside from certain injunctive relief, the prayer of the amended complaint is that the trustee in bankruptcy be adjudged the owner in trust of all property standing in the name of the J. C. Rice Company, or in which said company may have an interest, and all property standing in the name of said company or held in trust for said J. C. Rice. The court was not asked to make any decree as to the ownership of the stock. It is true that the court did, nevertheless, find that M. Y. Wolf held said stock in trust for said J. C. Rice and that "said M. Y. Wolf does now hold said stock in trust for said plaintiff as trustee in bankruptcy of said J. C. Rice, and that the claim of said M. Y. Wolf to said stock of said J. C. Rice Company is without any right whatever as against *this plaintiff*." (Italics supplied.) This finding, of doubtful meaning, probably was intended to mean that the sale was a mere pretense, and it did not convey to Wolf a real interest in any property standing in the corporate name. The judgment does not decree that the trustee has any right or claim in or to said pledged stocks. It de-

scribes the property in suit, and holds that plaintiff as trustee in bankruptcy is the owner of the J. C. Rice Company and all of its assets, and quiets the title to said described property as against the claims of M. Y. Wolf by reason of said sale. The sale was held to be fraudulent and collusive, and was therefore not effective to accomplish the fraudulent purpose, and, as a sequence, the title of said property remained in the corporation as the alter ego of Rice. Such is the effect of the judgment.

Appellants' theory is that, the court having found that the sale of the stock was conducted in the manner and according to the forms of law, the trial court was concluded from finding that said sale was a part of a plan devised by Rice and Wolf to mislead and deceive the creditors of Rice as to the real owners of the property standing in the corporation's name. If the plan and purpose was as found by the trial court, there was no sale of said stocks in the sense that title to said property became vested in Wolf, inasmuch as he was a party to the fraudulent transaction. In all of the history of the transaction, whether in matters now claimed to be corporate or individual, Wolf dealt with but one person, Rice.

That a legal remedy may be wrongfully used as an instrumentality of oppression or in the commission of a fraud, there is no doubt, and it is equally clear that when so used a court of equity will extend its hand in assistance to the person sought to be oppressed or defrauded by the attempted wrongful diversion. The distinctive office of equity is to grant relief in cases wherein by reason of the inflexibility of the law none would be afforded. This is an equity case, and I am of the view, unless equity is to be honored only in theory and not in practice, that appellant Wolf should be held to have forfeited his so-called lien by reason of aiding and assisting Rice through a series of years in conducting the transactions herein related.

Appellants have cited numerous cases wherein the statutes of limitations have been held to bar actions, and have sought to bring the instant case within the rule as therein announced. They also call to our attention that a debtor may in certain circumstances prefer one creditor to the exclusion of others. We need not pause to consider the principles

announced in those cases which are decided upon an entirely different state of facts. As to the three years' bar of the statute urged by appellants, we may say in passing that we would hesitate to hold, in view of the dual and covert manner in which Mr. Rice conducted the business of himself and the corporation, interlinked and intermixed as it is, continuing throughout a series of years, that the persons with whom he had business transactions should have made discovery of the fraudulent purpose charged within the prescribed limits of the statute, and, having failed to commence suits within that period, their causes were barred. In our view of the case, that question was not a controlling issue.

Appellants have laid much emphasis upon two letters written by Mr. Wolf to Mr. Rice, the first of which is dated August 6, 1919, demanding additional security for Rice's indebtedness to him and threatening to take steps to protect the same if additional security was not forthcoming. The second, dated September 3, 1919, notified Rice that, inasmuch as he had failed to furnish additional security, he would proceed to sell said stocks at public auction. The entire situation as recorded within the six-year period following those letters was before the trial court, and, upon weighing the case as made against such evidentiary value as the letters contained the trial court found that at least the subsequent relations that existed between Wolf and Rice had for their object the concealment of the latter's property from his creditors. Where one entangles himself in the meshes of a transaction designed to deceive others, equity will not exert itself in his behalf.

It is not necessary in this proceeding to pass upon the validity of any claim Wolf may assert against the bankrupt's estate as a creditor on account of any undischarged indebtedness arising out of the note transaction. I am of the opinion, however, that the property described in the judgment is subject to the payment of Rice's indebtedness.

The decision of the District Court of Appeal upon rehearing, affirming the judgment of the trial court without modification, is, in my view, the decision which should stand.

I concur: RICHARDS, J.

PEOPLE v. OSAKI et al.

Cr. 3270.

Supreme Court of California.

March 26, 1930.

Petition for Rehearing Withdrawn April 18, 1930.

1. Aliens ⇨7 — Common law — Real property — Acquisition.

At common law, alien could not acquire real property by operation of law, but he could take by purchase.

2. Aliens ⇨10 — Constitutional law ⇨311 — Criminal prosecution — Citizenship — Burden of proof — Constitutionality of statute.

Law providing negative allegation of indictment requires defendants to prove citizenship *held* not denial of due process (Const. U. S. Amend. 14; Const. art. 1, § 13; Code Civ. Proc. § 1983, as added by St. 1927, p. 434; Alien Land Law, §§ 9a, 9b, as added by St. 1927, p. 881).

3. Conspiracy ⇨44½ — Criminal prosecution — Citizenship — Eligibility — Burden of proof.

In prosecution for conspiracy to violate Alien Land Act, allegations that defendant was alien not eligible to citizenship are taken as true, absent contrary proof (Alien Land Act 1921, as amended).

Under the Alien Land Act (St. 1921, p. lxxxiii, as amended by St. 1923, p. 1020, and St. 1927, p. 880), the state was required to prove that accused was a member of a race ineligible to citizenship, and that he had acquired real property and interest therein.

4. Constitutional law ⇨199 — Criminal prosecution — Alien Land Law — Ex post facto laws.

In prosecution for conspiracy to violate Alien Land Law, contention that counts rested on ex post facto laws because offenses were committed before amendment *held* without merit (Alien Land Act 1921, as amended).

The amendments by St. 1927, p. 880, of the Alien Land Act (St. 1921, p. lxxxiii), did not make any act committed prior thereto a crime which was otherwise innocent, nor aggravate the crime, nor impose greater punishment, nor alter the legal rules of evidence.

5. Criminal law ⇨1173(2) — Alien Land Act — Burden of proof — Failure to instruct — Prejudicial error.

Failure to instruct people must prove defendant member of alien race ineligible to citizenship *held* not prejudicial (Alien Land Act 1921, as amended).

The prosecution was for conspiracy to violate the Alien Land Act (St. 1921, p.

lxxxiii, as amended by St. 1923, p. 1020, and St. 1927, p. 880). The record showed that the case was tried on the theory that defendant was of alien ineligible blood.

6. Criminal law ⇨1163(4) — Instruction — Erroneous fact statement — Presumptions on appeal.

If neither court nor counsel noticed erroneous fact statement in instruction, it will not be presumed jury was more alert.

In Bank.

Appeal from Superior Court, Sutter County; K. S. Mahon, Judge.

K. Osaki and K. Yoshioka were convicted of conspiracy to violate the Alien Land Law, and they appeal.

Affirmed.

Superseding opinions, 278 P. 252, 934.

Brobeck, Phleger & Harrison, of San Francisco, and Lloyd E. Hewitt, of Yuba City, for appellants.

U. S. Webb, Atty. Gen., and Frank English and J. Charles Jones, Deputy Attys. Gen., for the People.

SEAWELL, J.

The defendants were jointly convicted upon five separate counts of an indictment containing six counts filed in the superior court of the county of Sutter, charging them with the crime of conspiring to violate the Alien Land Act of the state. St. 1921, p. lxxxiii; amended by St. 1923, p. 1020; St. 1927, pp. 880, 881.

The indictment charged that K. Yoshioka, a native of the Hawaiian Islands, but admittedly of Japanese lineage, and K. Osaki, an alleged alien not eligible to citizenship under the laws of the United States, conspired together with the object and to the end that said ineligible alien, Osaki, should have an interest in and a beneficial use of the parcels of land described in said several counts and should possess, enjoy, use, cultivate, and occupy said real property in a manner and to an extent and for purposes otherwise than prescribed by any treaty existing between the government of the United States and the nation of which said alien was a citizen or subject, and pursuant to said conspiracy said alien, Osaki, did acquire, possess, enjoy, use, cultivate, and occupy said described real property in a manner and for purposes otherwise than prescribed by any treaty existing between the United States of America and the nation and country of which a said alien, K. Osaki, was a citizen and subject. The fifth count of said indictment was dismissed. The lands described in the several counts of the indictment are agricultural lands, and were possessed and occupied by defendants for agricultural uses.

[1, 2] The constitutionality of the amendment of the Alien Land Act approved May 16, 1927 (St. 1927, p. 880), and section 1983, Code of Civil Procedure, as added in 1927 (St. 1927, p. 434), are challenged by the appellants upon several grounds, mainly that the alienage of Osaki, being an essential element of the offense charged—a part of the corpus delicti—his ineligibility must be proved by the prosecution and that burden cannot be shifted to the defendant by force of a mere negative allegation of the indictment to the effect that the defendant is an ineligible alien, and an attempt to do so must fail as being in conflict with the due process clauses of section 13, article 1, of the state Constitution and the 14th amendment to the federal Constitution.

Said amendments of the Alien Land Act and Code section brought into question by appellants provide:

"Section 1. A new section to be known as section 9a is hereby added to the act cited in the title thereof and to read as follows:

"Section 9a. In any action or proceeding, civil or criminal, by the State of California, or the people thereof, under any of the provisions of this act, when the proof introduced by the state, or the people thereof, establishes the acquisition, possession, enjoyment, use, cultivation, occupation, or transferring of real property or any interest therein, or the having in whole or in part the beneficial use thereof by any defendant, or any of such fact, and the complaint, indictment or information alleges the alienage and ineligibility to United States citizenship of such defendant, the burden of proving citizenship or eligibility to citizenship shall thereupon devolve upon such defendant.

"Section 2. A new section, to be known as section 9b, is hereby added to said act and to read as follows:

"Section 9b. In any action or proceeding, civil or criminal, by the State of California, or the people thereof, under any of the provisions of this act, when the complaint, indictment or information, alleges the alienage and ineligibility to United States citizenship of any defendant, proof by the state, or the people thereof, of the acquisition, possession, enjoyment, use, cultivation, occupation or transferring of real property or any interest therein, or the having in whole or in part of the beneficial use thereof by such defendant, or of any such facts, and in addition proof that such defendant is a member of a race ineligible to citizenship under the naturalization laws of the United States, shall create a prima facie presumption of the ineligibility to citizenship of such defendant, and the burden of proving citizenship or eligibility to citizenship as a defense to any such action or proceeding shall thereupon devolve upon such defendant.

"The Legislature hereby declares that its purpose in adopting this section is not to modify, limit, or affect in any manner the provisions of section 9a of this act." St. 1927, p. 880.

Section 1983, Code of Civil Procedure, as added in 1927, is as follows:

"Whenever in any action or proceeding, civil or criminal, brought by, or in the name of, the state or the people thereof, or by or in the name of any political subdivision or agency of the state, or by any public board or officer on behalf of any thereof, to enforce any law which denies any right, privilege or license to any person not a citizen of the United States, or not eligible to become such citizen, or to a person not a citizen or resident of this state, and whenever in any action or proceeding in which the state or any political subdivision or agency thereof, or any public board or officer acting on behalf thereof, is or becomes a party, it is alleged in the pleading therein filed on behalf of the state, the people thereof, political subdivision or agency, or of such board or officer, that such right, privilege or license has been exercised by a person not a citizen of the United States, or not eligible to become such citizen, or by a person not a citizen or resident of this state, as the case may be, the burden shall be upon the party for or on whose behalf such pleading was filed to establish the fact that such right, privilege or license was exercised by the person alleged to have exercised the same, and upon such fact being so established the burden shall be upon such person, or upon any person, firm or corporation claiming under or through the exercise of such right, privilege, or license, to establish the fact that the person alleged to have exercised such right, privilege or license was, at the time of so exercising the same, a citizen of the United States, or eligible to become such citizen, or was a citizen or resident of this state, as the case may require, and was at said time legally entitled to exercise such right, privilege or license." St. 1927, p. 434.

The proofs made at the trial fully sustain the implied finding of the jury that the defendant Osaki, in common with his codefendant Yoshioka, had an interest in and enjoyed a beneficial use of said described parcels of land and occupied the same in a manner and to an extent and for purposes otherwise than prescribed by any treaty existing between this country and the empire of Japan.

No evidence was offered by either side pointedly directed to the citizenship of said alleged lien. If the Alien Land Acts, which cast upon said alleged alien the burden of proving his citizenship or eligibility to citizenship under the naturalization laws of this country as a prerequisite to the enjoyment

of the rights which the evidence shows he undoubtedly exercised, are not in conflict with the due process provisions of the state and federal Constitutions, the judgments of conviction must stand.

Said Osaki gave testimony in his own behalf with the assistance of an interpreter of the Japanese language, but gave no evidence as to the country of his nativity. His associates were persons of the Japanese race. His racial appearance and characteristics were before the jury and trial judge. That he was a member of the Japanese race appears to have been conceded from the following questions propounded to witnesses on cross-examination by his counsel, and the answers received thereto without objection or comment:

"Q. You knew, of course, he [Osaki] was a Japanese when you did so [rented cabins for housing purposes]? A. Yes, I knew he was a Japanese." * * *

"Q. So far as Japanese were concerned, which ones did you meet there at that time? A. Osaki." * * *

"Q. Is Osaki the only Japanese you saw there at that time? A. No, I saw a number of Japanese there, but he was the only one I talked to." * * *

"Q. Did you see any other Japanese except Osaki there at that time? A. No." * * *

"Q. Did you leave the lease or a copy of it with Osaki? A. Yes." * * *

"Q. Were you to see him again? A. Yes, we made an appointment with Osaki."

The statutes before us test the extent to which a state may go in safeguarding itself against evasions of its policies enacted into laws, to promote the safety, peace, and good order of its people. That such powers, known as powers of police, were reserved to each state at the time of the adoption of the federal Constitution, and that "in the exercise of such powers the state has wide discretion in determining its own public policy and what measures are necessary for its own protection and properly to promote the safety, peace and good order of its people" (*Terrace v. Thompson*, 263 U. S. 197, 217, 44 S. Ct. 15, 18, 68 L. Ed. 255; *Porterfield v. Webb*, 195 Cal. 71, 231 P. 554), is definitely put at rest by the decisions of the highest courts of our land. By the common law, an alien could not acquire real property by operation of law, as by descent, but he could take by purchase. *Story, J., in Fairfax's Devisee v. Hunter's Lessee*, 7 Cranch, 603, 608, 619, 620, 3 L. Ed. 453, said: "In the language of the ancient law, the alien has the capacity to take, but not to hold lands, and they may be seized into the hands of the sovereign."

The treaty between the United States and Japan is "a treaty of commerce and navigation" and was entered into for the purpose of

establishing the rules to govern commercial intercourse between the countries, and it gives no rights to the subjects of Japan to own or lease lands for agricultural purposes. *Terrace v. Thompson*, supra. That the Alien Land Acts which the Legislature attempted to strengthen and render more effective by the amendatory statutes under attack are of transcendent importance to the safety and peace of the state and nation is thus forcibly stated in *Terrace v. Thompson*, supra: "The quality and allegiance of those who own, occupy and use the farm lands within its borders are matters of highest importance and affect the safety and power of the state itself."

We have emphasized the importance of the object sought to be accomplished by said amendments as bearing favorable comparison with a long list of regulatory and prohibitive acts which affect internal welfare, but which do not, as do the amendments before us, so directly affect national safety, and are, therefore, of less importance, so far as immediately and vitally affecting the safety of the state is concerned, to which judicial approval was given—even in the absence of authorizing statutes—to the application of the general rule that when the negative of an issue does not permit direct proof, or where the facts come more immediately within the knowledge of the defendant, the onus probandi rests upon him. Our own courts are among the long list of courts which have given their sanction to the rule in appropriate cases. While the subjects to which the rule has been applied are numerous, only the following will be mentioned: The regulation of the practice of medicine, dentistry, and optometry; acts affecting public morals and the marital status, as bigamy, abortion; the right to take fish and game; violation of an act interdicting commercial intercourse between this country and Great Britain, its colonies, and dependencies, and providing against the importation of British goods into this country except when brought in by neutral vessels; the rule as to the burden of proof being placed upon the defendant when the issue of insanity in criminal cases is offered as an excuse for the commission of crime; section 190, Penal Code, providing that the death penalty shall not be imposed upon any person for murder committed before such person shall have reached the age of eighteen years, and providing, further, that the burden of proof as to the age of said person shall be upon the defendant. To this list may be added numerous regulatory acts and ordinances making it an offense to exercise certain acts or engage in certain businesses or callings without first having obtained a license or franchise to do so. In practically all of such cases where the negative of an issue does not permit direct proof, or where the facts come more immediately within the knowledge of the defendant,

the general rule that the onus probandi rests upon him has been applied. Nor is this rule an innovation or a creation of modernists. It was recognized at common law and applied by the very able American and English jurists, beginning with an early period in the history of both. In the earlier treatises and decisions, the necessity of negating an exception in an indictment depended upon the distinction between a proviso, not referred to in the enacting clause of the statute, and a reference in that clause to exceptions subsequently enumerated.

In *Fleming v. People*, 27 N. Y. 329, the indictment contained none of the statutory exceptions which rendered a subsequent marriage valid. The eminent Chief Justice Denio, in 1863, in a separate opinion, expressed the view that the indictment, which failed to negative the exceptions, was formally defective in a technical sense, but, within the meaning of the Revised Statutes, which in terms are strikingly similar to our article 6, section 4½, state Constitution, and provided "that no indictment shall be deemed invalid, nor shall any trial, judgment, or other proceeding thereon, be affected by reason of any defect or imperfection in matters of form, other than those which are enumerated, which shall not tend to the prejudice of the defendant," the defect was not a substantial defect, and cited several New York cases in support of his view. To show more fully the formal character of the defect, the jurist continues: " * * * It will be material to state that the prosecution was under no necessity of giving evidence to show that the case was not within any of the exceptions. That was matter of defence, to be made out by the prisoner, if he was able to do it. Mr. Archbold's treatise, already referred to, which, without doubt, conforms to the existing practice on criminal trials in England, lays down what evidence it is necessary for the prosecution to produce upon indictments for bigamy, and what the defendant may show in his defence. * * * (Archb. 595.) It is, moreover, a general rule of evidence, that where the negative of an issue does not permit direct proof, or where the facts come more immediately within the knowledge of the defendant, the onus probandi rests upon him. The cases upon this principle are referred to in Cowen & Hill's Notes (p. 490, note 383, Ed. of 1843). Among the cases are the familiar ones of a physician practicing without a license, and the selling of spirituous liquors without license. The prosecution need not prove the want of the qualification. The circumstances referred to in the 9th section of the bigamy act are *highly exceptional* and of *rare occurrence*, and rest peculiarly in the knowledge of the defendant." (Italics supplied.) The concluding portions of the opinion are to the effect that upon proof of successive marriages of the defendant, and

that the first husband or wife was living when the second marriage took place, the case of the prosecution is *prima facie* made out, and it then lies with the defendant to show that he is protected by one or the other of the exceptions and that the defendant was misled by allegations of an indictment which plainly stated all that the prosecution was bound to prove, though it did not negative the existence of circumstances which the defendant was at liberty to bring forward in his defense.

The main opinion holds that the clause contained in the section defining the offense of bigamy is rather in the nature of a proviso than an exception. Continuing, it is said: "The statute does not make the condition or the character of either party to the first or second marriage a part of the offence. It makes every second marriage, during the life of the first or second wife, a crime, but provides that the statute shall not apply to certain cases enumerated in another section, and which are cases of desertion [etc.] The averment and the proof to justify a second marriage in any such case are to come from the defendant. Hawkins' Criminal Law (b. 2, ch. 25, § 113) gives the rule that there is no need to allege, in an indictment, that the defendant is not within the benefit of the provisos of a statute, whereon it is founded, and this even as to those statutes which in their purview expressly take notice of the provisos, as by saying none shall do the thing prohibited, otherwise than in such special cases, etc., as are expressed in the act. So Chitty's Criminal Law (283), says it is not necessary to allege that the defendant is not within the benefit of the provisos of the statute, though the purview should expressly notice them, as by saying that none shall do the act prohibited, except in the cases thereafter excepted." Citing a case in which the indictment was laid upon a statute (2, Eliz.) containing an exception the judges there resolved that the better course was to omit the exception in the indictment "notwithstanding it be comprised in the body of the act, in the same manner as if it had been only in a proviso; in which case it is for the prisoner to help himself, as in cases of such a proviso, if he can do it; for the words 'other than,' etc., are but as referring to the provision subsequent in the statute, in which case this matter shall be used but as the proviso itself shall be. * * *

The act of March 1, 1809, chapter 91, section 2 (2 Story's Laws, 1114), prohibited all importation of goods from British ports into the United States. The act of 1814 (3 Stat. 123) excepted importations from British ports in neutral vessels. In a prosecution for an importation of goods in a vessel not neutral (*U. S. v. Hayward*, 26 Fed. Cas. 240, No. 15336), the question arose as to the necessity of negating in the information the neutral-

ity of the vessel in which the goods were brought into the United States. Justice Story, in deciding the point, said:

"The first objection depends upon the solution of the point, upon whom the burthen of proof rested, as to the neutrality of the vessel, in which the goods were imported. It is very doubtful, whether it was necessary, in the count, to allege that the goods were imported in a vessel not neutral; for the general rule of law is, that it is sufficient to negative the exceptions in the enacting clause of a statute, and exceptions, which come in by way of proviso, or in subsequent statutes, are properly matter of defence for the defendant. [Citation of cases omitted.] The present case seems to fall within the rule, and is not easily, if at all, distinguishable. But it is not necessary to decide this point, because the count does, in fact, negative the vessel's being neutral. * * *

"From the evidence in the case it does not appear, that the plaintiffs knew in what vessel the importation was made, but this was a fact peculiarly within the knowledge of the defendant. Besides, the fact of importation being proved, from a British port into the port of Orrington (which must be taken as a necessary preliminary, so far as respects this part of the charge of the court), the case fell within the general words of the act of 1809, and the exception, that they were imported in a neutral ship, was properly matter of defence. The law did not presume that the vessel was neutral in favor of the defendant. The charge was not against the defendant personally of a criminal neglect of duty, but against the goods only, as a positive act, to wit, an illegal importation. And to call upon the plaintiffs to prove that the vessel was not neutral, was to require the proof of a negative allegation, which the plaintiffs had no means in their power to prove, and proofs of the contrary of which, if they existed, were within the reach of the defendant. I cannot distinguish the present case in principle from those, which have been decided on the game laws. There, the declaration must allege, that the defendant is not duly qualified, negating specifically all the exceptions of the statute; and yet it seems admitted, that if the act of killing game be proved, the burthen of proof of his being within the exceptions of the statute is thrown on the defendant. It is perhaps not easy to reconcile with these decisions some of the general doctrines stated in some of the authorities. Such, for instance, as the doctrine, that wherever the charge involves criminality, the law will not easily suppose it; and therefore, if the charge contains a negative, the law will presume the affirmative without proof. If this were universally true, then, under the game laws, the proof of the not being qualified ought to be shown by the plaintiff, for the charge is clearly of a criminal nature. Without pretending

to reconcile all the dicta in the books, it seems to me, that in respect to negative allegations, the reasonable rule is, that the burthen of proof shall rest on the party, who holds the affirmative; and especially where the facts are peculiarly within his privity and cognizance; and that this rule applies more strongly, where the party seeks to shelter himself under an exception, which was not incorporated into the original prohibition of the statute creating the offence. See *Attorney General v. Sheriff, Forrest*, 43. An exception may, perhaps, properly hold, where the charge substantially consists in a criminal neglect or omission of duty. It seems to me, therefore, that the burthen of proof, in the case at bar, that the vessel in which the goods were imported was neutral, lay on the claimant and not on the United States, and that in this respect the charge of the learned judge was erroneous. * * *

"It is very doubtful," the eminent justice continues, "whether it was necessary, in the count, to allege that the goods were imported in a vessel not neutral; for the general rule of law is, that it is sufficient to negative the exceptions in the enacting clause of a statute, and exceptions, which come in by way of proviso, or in subsequent statutes, are properly matter of defence for the defendant." (*Italics supplied.*)

Section 1 of the Alien Land Act provides:

"All aliens eligible to citizenship under the laws of the United States may acquire, possess, enjoy * * * real property, or any interest therein, in this state, in the same manner and to the same extent as citizens of the United States, except as otherwise provided by the laws of this state."

Section 2 provides:

"All aliens other than those mentioned in section one of this act may acquire, possess, enjoy and transfer real property * * * in the manner and to the extent and for the purpose prescribed by any treaty now existing between the government of the United States and the nation or country of which such alien is a citizen or subject, and not otherwise."

By the foregoing sections, all aliens eligible to citizenship may acquire real property on equal terms with citizens, except as otherwise provided by the laws of the state. By section 2, persons not eligible to citizenship are limited in this respect to such rights as are conferred by treaty. A rearrangement of language would not alter the sense or purpose of the act. The disturbing question of whether the exception is in the enacting clause or in a subsequent clause, or subsequent section of the clause, led to such refinement as to justly provoke the observation made in *State v. Abbey*, 29 Vt. 60, 67 Am. Dec. 754, that "there seems to be many shadowy distinctions, the sound reason and good sense

of which are not easily discoverable." State v. Abbey was a prosecution for bigamy. It is true that the court held that the exceptions contained in the penal act were such as need not be negatived, but it also recognizes the rule of convenience in the following significant language: "The difficulty and impracticability arising from a different construction of the act, is itself a good reason why it should not be adopted; particularly as all the matters embraced in those exceptions are peculiarly within the knowledge of the respondent." An examination of the authorities will show that the reason stated in the above quotation is practically the reason that rules all the cases where the question of negative allegations is present.

Discussing the subject of negative allegations, Justice Story (U. S. v. Hayward, *supra*) observed: "It is very doubtful, whether it was necessary, in the count, to allege that the goods were imported in a vessel not neutral; for the general rule of law is, that it is sufficient to negative the exceptions in the enacting clause of a statute, and exceptions, which come in by way of proviso, or in *subsequent statutes*, are properly matter of defence for the defendant." (Italics supplied.)

In the instant case, subsequent statutes by express language place upon the defendant—who, in the instant case, if not conceded to be a member of an ineligible race is proved to be such—the burden of showing that he is a citizen of this country by birth. The intent and effect of this subsequent legislation is too obvious to admit of doubt. The judicial rule which the people would apply to the instant case, and which has become a statute of this state, had its origin in the early period of our judicial history. It received the express sanction of this court in *People v. Boo Doo Hong*, 122 Cal. 607, 55 P. 402, 403. The prosecution therein was conducted under the State Medical Act, the defendant being charged with the crime of practicing medicine without first having procured a certificate to so practice. No evidence was introduced on either side tending to show that the defendant had or had not a certificate to so practice. The court instructed the jury that the burden was upon the defendant to establish that he had a certificate to so practice medicine as provided by law, and, if he failed to prove that he had such a certificate, then it must be taken as true that he had not procured a certificate. The judgment of conviction was approved, the court adopting as the basis of its decision a paragraph taken from *Greenleaf on Evidence*. We quote the court's foreword as well as said paragraph:

"Mr. Greenleaf, in his work on Evidence (volume 1, § 79), under the heading 'Negative Allegations,' says: 'But, when the subject-matter of a negative averment lies peculiarly within the knowledge of the other party, the averment is taken as true, unless dis-

proved by that party. Such is the case in civil or criminal prosecutions for a penalty for doing an act which the statutes do not permit to be done by any persons, except those who are duly licensed therefor; as, for selling liquors, exercising a trade or profession, and the like. Here the party, if licensed, can immediately show it without the least inconvenience; whereas, if proof of the negative were required, the inconvenience would be very great,' citing a large number of cases. See, also, 3 Rice on Ev. § 260, where the same rule is declared."

People v. Fortch, 13 Cal. App. 770, 110 P. 823, a dental case, and *People v. T. Wah Hing*, 47 Cal. App. 327, 190 P. 662; *People v. Goscinsky*, 52 Cal. App. 62, 198 P. 40, and *People v. Saunders*, 61 Cal. App. 341, 215 P. 120, medical cases, followed by direct reference *People v. Boo Doo Hong*, *supra*. Many additional cases covering the same and other subjects, notably the regulation and prohibition of the manufacture, sale, and transportation of intoxicating liquors, could be cited in large numbers which follow the rule approved by Justice Story to the effect "that in respect to negative allegations, the reasonable rule is, that the burden of proof shall rest on the party who holds the affirmative; and especially where the facts are peculiarly within his privity and cognizance," etc.

The reasons for applying the principle approved in the medical, dental, optometry, intoxicating liquor, and certain other concrete cases obviously do not rest upon firmer grounds of public necessity, urgency, or convenience than do those which support the application of the rule in cases in which the question of eligibility to citizenship and the right of ownership of the soil is directly involved. The enactment and enforcement of laws which have to do with public morals and police regulations are powers which primarily inhere in citizenship. Unless the evidence as to the right to exercise the prerogatives of a citizen comes from the defendant who indisputably is in possession of the facts which may be furnished by him without causing him any great inconvenience, a search with uncertain results must be made by the state of a multitude of records extending to the four corners of the United States and its possessions, and into foreign lands, while the right to practice medicine may be readily determined by an inspection of a register to be found in the custody of a single officer. We doubt not that the same courts which gave being to the rule would have unhesitatingly applied it to the facts of the instant case, as illustrative of the principle announced, had such a case arisen. The views expressed by Justice Story in *U. S. v. Hayward*, *supra*, which are included in our quotation from that case, precludes any other conclusion.

The common-law rule, which has come to be known as the "rule of convenience," has

been recognized and applied by our federal and state courts in large numbers, in the absence of a statute to that effect. We will not attempt to list the numerous cases. The state of Missouri adopted an act making it an offense for any person not standing in the relation of husband or wife, parent or child, grandparent or grandchild, brother or sister, to aid and assist another to escape arrest. One Miller was indicted and convicted of having aided and assisted Grant Woodward in escaping arrest. The indictment negatived the existence of relationship, but the state did not offer evidence to show that the defendant was not within the degree of relationship to the person assisted, which constituted the exceptions. In treating the subject, the Supreme Court of Missouri, in *State v. Miller*, 182 Mo. 370, 81 S. W. 867, 873, restates the rule which has received the approval of a great majority of the courts of the Union, Professor Wigmore and other text writers. It is there said:

"While it is true this exception of relations in certain degrees appears in the enacting clause of this statute, and therefore it was necessary for the grand jury to negative such a relationship, yet it is also true that, if such a relation existed, it was an absolute defense, whether Woodward was guilty or not, and it is a reasonable presumption in the practical administration of justice that a man is acquainted with his own relatives, or at least knows of his relationship to those within the degrees fixed by the statute, and when, as in this case, the defendant was shown to have sworn he did not know who Grant Woodward was, it would have been a work of supererogation for the state to have gone further in proving the negative. It is true the defendant did not have to prove his innocence; but, if there was any such relationship as would have excused him in aiding Woodward to make his escape, it was peculiarly within his own knowledge, and he has not availed himself of it. * * *

"While we think the grand jury was required to negative the relationship of Woodward and defendant, we hold that the knowledge of such a relationship as would, under the statute, excuse defendant for aiding and assisting Woodward escaping arrest, was within the peculiar knowledge of defendant, and could have been established without any inconvenience, and upon the authority of our own decisions, as well as those quoted from the common-law authorities, the burden was on him to show the relationship, which would itself have entitled him to an acquittal."

In *State v. Evans*, 50 N. C. 250, a liquor case, the judgment was reversed on the ground that the evidence was as fully within the knowledge of an accessible third person as it was within the knowledge of the defendant, and on that ground a reversal was entered. The decision recognizes the rule of

necessity as founded alike on reason and authority. In that case, under the facts above referred to, the court said: "We think it best to adhere to the general rule until the Legislature may think proper to alter it." Here, also, is a recognition by the court of the power of the Legislature to adopt a statute such as we have before us.

Many cases may be found in the books in which the rule of convenience or necessity was applied, even where there seemed to be no rational connection between the fact proved and the fact presumed. In other cases, the presumption doctrine and the rule of necessity or convenience are both applied with approval. *Casey v. United States*, 276 U. S. 413, 48 S. Ct. 373, 374, 72 L. Ed. 632, is a typical case. Casey was convicted upon an indictment charging him with the purchase of a certain quantity of morphine not in or from the original stamped package. No testimony was introduced directly concerning the purchase, and the government relied in part at least upon the presumption of a violation of the act which the statute purported to create. Mr. Justice Holmes delivered the opinion of the court and Justice Butler placed a dissent on a ground which is also urged here, that the corpus delicti had not been proved. Justice Holmes, discussing presumptions and the rule of convenience or necessity, said:

"With regard to the presumption of the purchase of a thing manifestly not produced by the possessor, there is a 'rational connection between the fact proved and the ultimate facts presumed.' (*Luria v. United States*, 231 U. S. 9, 25, 34 S. Ct. 10, 58 L. Ed. 101; *Yee Hem v. United States*, 268 U. S. 178, 183, 45 S. Ct. 470, 69 L. Ed. 904). Furthermore, there are presumptions that are not evidence in a proper sense but simply regulations of the burden of proof. *Greer v. United States*, 245 U. S. 559, 38 S. Ct. 209, 62 L. Ed. 469. The statute here talks of prima facie evidence, but it means only that the burden shall be upon the party found in possession to explain and justify it when accused of the crime that the statute creates. 4 Wigmore, Evidence, § 2494. It is consistent with all the constitutional protections of accused men to throw on them the burden of proving facts peculiarly within their knowledge and hidden from discovery by the Government. 4 Wigmore, Evidence, § 2486. In dealing with a poison not commonly used except upon a doctor's prescription easily proved, or for a debauch only possible by a breach of law, it seems reasonable to call on a person possessing it in a form that warrants suspicion to show that he obtained it in a mode permitted by the law. The petitioner cannot complain of the statute except as it affects him."

The case of *Yee Hem v. U. S.*, 268 U. S. 178, 45 S. Ct. 470, 69 L. Ed. 904, is an instructive case as to questions of the power of

the state to create presumptions and acts which it is argued contravene the due process of law clauses of the federal and state Constitutions. We quote somewhat fully from that decision for the reason that it has a bearing upon a number of questions raised by appellants, including the objection that the law compels an accused person to be a witness against himself. Yee Hem was convicted of concealing a quantity of smoking opium after importation, with knowledge that it had been imported in violation of an act of Congress prohibiting its importation except for certain designated purposes only. It further provided that whenever the defendant on trial is shown to have, or to have had, possession of such opium, such possession shall be deemed sufficient evidence to authorize conviction, unless the defendant shall explain the possession to the satisfaction of the jury. It was also provided that all opium prepared for smoking found within the United States shall be presumed to have been unlawfully imported, and the burden of proof shall be on the accused to rebut such presumption. Possession and concealment were proved, and the lower court instructed the jury in accordance with the language of the statute. The court, speaking through Mr. Justice Sutherland, said:

"The authority of Congress to prohibit the importation of opium in any form and, as a measure reasonably calculated to aid in the enforcement of the prohibition, to make its concealment with knowledge of its unlawful importation a criminal offense, is not open to doubt. * * *

"In *Mobile, etc., R. R. v. Turnipseed*, 219 U. S. 35, 42, 43, 31 S. Ct. 136, 137, 138, 55 L. Ed. 78, 32 L. R. A. (N. S.) 226, Ann. Cas. 1912A, 463, this court, speaking through Mr. Justice Lurton, said:

"The law of evidence is full of presumptions either of fact or law. The former are, of course, disputable, and the strength of any inference of one fact from proof of another depends upon the generality of the experience upon which it is founded. * * *

"Legislation providing that proof of one fact shall constitute prima facie evidence of the main fact in issue is but to enact a rule of evidence, and quite within the general power of government. Statutes, national and state, dealing with such methods of proof in both civil and criminal cases abound, and the decisions upholding them are numerous. * * *

"Every accused person, of course, enters upon his trial clothed with the presumption of innocence. But that presumption may be overcome, not only by direct proof, but, in many cases, when the facts standing alone are not enough, by the additional weight of a countervailing legislative presumption. If the effect of the legislative act is to give to the facts from which the presumption is

drawn an artificial value to some extent, it is no more than happens in respect of a great variety of presumptions not resting upon statute. See *Dunlop v. United States*, 165 U. S. 486, 502, 503, 17 S. Ct. 375, 41 L. Ed. 799; *Wilson v. United States*, 162 U. S. 613, 619, 16 S. Ct. 895, 40 L. Ed. 1090. In the *Wilson* Case the accused, charged with murder, was found, soon after the homicide, in possession of property that had belonged to the dead man. This court upheld a charge of the trial court to the effect that such possession required the accused to account for it, to show that as far as he was concerned the possession was innocent and honest, and that if not so accounted for it became 'the foundation for a presumption of guilt against the defendant.'

"The point that the practical effect of the statute creating the presumption is to compel the accused person to be a witness against himself may be put aside with slight discussion. The statute compels nothing. It does no more than to make possession of the prohibited article prima facie evidence of guilt. It leaves the accused entirely free to testify or not as he chooses. If the accused happens to be the only repository of the facts necessary to negative the presumption arising from his possession, that is a misfortune which the statute under review does not create but which is inherent in the case. The same situation might present itself if there were no statutory presumption and a prima facie case of concealment with knowledge of unlawful importation were made by the evidence. The necessity of an explanation by the accused would be quite as compelling in that case as in this; but the constraint upon him to give testimony would arise there, as it arises here, simply from the force of circumstances and not from any form of compulsion forbidden by the Constitution."

In practically every criminal prosecution the defendant is required, from necessity, to rebut the effect of the evidence offered against him, and, frequently, where there is no other rebutting witness but himself, to an incriminating fact or circumstance, the necessity of the situation compels him to take the witness chair.

It would serve no purpose to cite an accumulation of authorities as to the general rule that the burden of proof lies on the person who wishes to support his cause by a particular fact which lies more peculiarly within his knowledge, or as to the broad power which inheres in legislative bodies to create by statute presumptions, as observed, *supra*, by Mr. Justice Sutherland, in aid of the enforcement of important state policies.

With the foregoing decisions and treatises furnishing the background of the legislation here challenged as being in violation of the due process clause of the organic law of the state and nation, we proceed to a considera-

tion of the decisions of this state upon which appellants rely for a reversal. The principal case is *People v. Quarez*, 196 Cal. 404, 238 P. 363, 366. The statute under which that case (St. 1923, c. 339, p. 695) was decided provided that no unnaturalized foreign-born person and no person who had suffered a prior conviction of a felony against the person or property of another, or against the federal government or state government, shall own or have in his possession or under his custody or control any pistol, revolver, or other firearm capable of being concealed upon the person. The firearms capable of being concealed include such as have a barrel less than twelve inches in length. The penalty prescribed for a violation of the act is imprisonment in the state prison for not less than one nor more than five years.

The Quarez Case was decided in July, 1925, and the amendments here under consideration were adopted at the first session of the Legislature convening thereafter. It is manifest that said amendments were adopted with the purpose of embodying in the law in concrete form an act providing that the burden is upon persons who are members of alien races ineligible to citizenship and who are exercising rights of a proprietary character with respect to real property, to make proof of their eligibility in cases where their dealings with real property are conducted in a covert manner or otherwise disclose circumstances sufficient to "warrant the suspicion" that their right of ownership or occupancy is not permitted by law. (*Casey v. United States*, supra.) The Quarez Case was decided largely, if not entirely, upon the authority of *People v. Frey*, 165 Cal. 140, 131 P. 127, 129, a decision in which three of the justices, for reasons not revealed, took no part. The defendant in the case was convicted under section 476a, Penal Code, on a charge of drawing a check upon a bank in which he had no sufficient funds or credit to meet said check, all of which he well knew. There was no evidence in the case that the defendant had no funds in or credit with the bank, except the confession of the defendant. The check was deposited by the payee in a local bank and forwarded to the bank on which the check was drawn. In due time, it was returned with the words "No account" written across its face. No evidence was offered to show by whom the words "No account" were written. In the decision it was said:

"We are aware of the fact that many cases properly hold very slight proof of the corpus delicti to be sufficient basis for the admission of a defendant's confession, but we know of none which sustains proof of the corpus delicti upon purely hearsay testimony. *People v. Spencer*, 16 Cal. App. 759, 117 P. 1039, is cited with apparent confidence by the Attorney General, but that was a case in which the appellant contended that his want of

credit with the bank was not sufficiently shown. The court held that such a fact might be proved by circumstantial as well as by direct evidence. * * *

The decision expressly states that the fact as to whether the defendant had funds in the bank was as clearly and fully within the knowledge of the bank officials as it was within the knowledge of the defendant. The name and location of the bank was definitely stated in the information, and there was absolutely no theory upon which the rule of convenience could have been invoked. All that was said on that subject may be regarded as obiter dicta. It is not held, even by way of dicta, or otherwise, that the rule is applicable *only* to prosecutions, such as practicing some profession, or following some calling, without the license provided therefor by law. It is true that it is said that it is a special rule applicable to such cases "*and the like*," but no fixed limitation is placed upon the application of the rule. The clause disposing of the cases reads: "The ruling of the court in permitting proof of the confession before proper proof of the corpus delicti was error for which a reversal must be ordered."

The rule of convenience was not intended to and it is not now contended that it should have been applied to the Frey Case, for the obvious reason that the bank in which defendant represented he had money on deposit was as well within the knowledge of the prosecution as it was within the knowledge of the defendant, and the prosecution, having offered no competent evidence tending to establish that fact, failed under all rules of law to prove its case, the confession alone having been held insufficient to prove the corpus delicti. The rule of convenience was neither a factor in that case, the Frey Case, nor in the other cited case, *People v. White-man*, 114 Cal. 338, 46 P. 99. The Quarez Case, however, recognizes the rule in the following language: "It is a well settled rule of law that where the negative of an issue does not permit of direct proof, or where the facts come more immediately within the knowledge of the defendant, the onus probandi rests upon him. This doctrine is illustrated in cases of practicing medicine without a license or of selling spirituous liquors without a license." (Italics supplied.) It does not recite the fact that the rule was applied years before a license was required to practice medicine. That medical cases are cited as apt illustrations of the rule by no means limits its application to such cases only, and no case so holds. The books, reports, and law texts contain a multitude of cases which furnish their own refutation of the claim that the rule is not applicable to any other specific offenses. If the refusal to apply the rule in the instant case can be soundly based upon the theory that every part of a statutory

offense must be affirmatively proved, and the burden cannot under any circumstances be shifted to the defendant, by what process of reasoning can it be made to appear just or logical to apply it to medical and license cases, as to which the knowledge of the accused as to whether he is licensed to practice medicine is not more intimately and peculiarly within his knowledge than is the fact of citizenship within the knowledge of one who asserts prerogatives which are only accorded to citizens of the country?

The Quarez Case quotes with seeming approval from 16 Corpus Juris, page 630:

"Where the subject-matter of a negative averment in the indictment, or a fact relied upon by defendant as a justification or excuse, relates to him personally [as citizenship] or otherwise lies peculiarly within his knowledge, the *general* rule is that the burden of proof as to such averment or fact is on him." (Also citing 22 Cor. Jur., p. 81.) (*Italics supplied.*)

If every element of a statutory offense, both negative and affirmative, must be proved by the prosecution, and the burden cannot, in any case, be placed upon the defendant, on the theory that every element descriptive of the offense is an essential part of the corpus delicti, and must be affirmatively proved, the rule created by courts in the first instance upon considerations of necessity and public policy, and adopted by this state as a statute, will be completely nullified.

[3] In the instant case, the statute requires that the people prove all the facts which the law-making body determined were reasonably within the power of the people to prove, to wit, first, that the accused is a member of a race ineligible to citizenship, and, second, that he has acquired real property, or an interest therein, both of which are provable by facts, records, and documents existent within the limits of the locality and state in which the land is situate, while the place of birth may be anywhere upon the globe, known only to the accused. If in the practical and reasonable administration of the law any situation could exist which would justify the application of the rule *ab inconvenienti*, none could be more appropriate for its application than the determination of the question of foreign birth, a fact intimately and peculiarly within the knowledge of the person, who, by the exercise of certain rights, has assumed to be native born. Conceding, as contended by appellants, that foreign nativity forms a part of the corpus delicti, the allegations of the indictment that the defendant was an alien not eligible to citizenship must be taken as true in the absence of proof to the contrary.

The rule of convenience was expressly held applicable to this class of cases in *People v. Velasquez*, 70 Cal. App. 362, 233 P. 359, 361, Mr. Justice Curtis, then a justice of the Dis-

trict Court of Appeal, Second District, Division 1, writing the opinion of the court. One of the questions discussed was as to the method of proving whether or not the defendant, who was charged with the unlawful possession of a firearm capable of being concealed—the same offense charged in the Quarez Case—had been naturalized by the courts of this country. The rule of convenience is thus treated:

"This rule is applied in the main to prosecutions of persons charged with the violation of statutes making it illegal to engage in certain businesses or to follow certain professions without first obtaining a license so to do. In most, if not in all of the cases of which we have any knowledge, the statute designates the particular board or officer from which such a license is to be obtained. The inconvenience in such a case of procuring evidence that the accused had no such license as required by the statute can hardly be compared with that cast upon the prosecution in an action like the present, if required to prove that the defendant had not been naturalized. In the former class of cases, it would only be necessary to examine the records of one board, or the books of one officer, to ascertain whether the required license had been issued or not, and to have as a witness one person from the office of such a board, or officer, to prove the fact that no license had been issued to the accused. In an action like that before us, owing to the fact that the defendant might have been naturalized in any one of a large number of courts, it would be necessary to have as witnesses at the trial representatives or officers from all of said courts, and possibly the records themselves to show, if such were the fact, that the defendant had never been naturalized in any of said courts. Such a requirement would cast upon the prosecution an interminable amount of labor and the greatest of inconvenience. On the other hand, to require the defendant to show that he was naturalized casts no unreasonable burden upon him. If he has had conferred upon him, by any court of competent jurisdiction, the privilege of citizenship, he either has his naturalization papers, or, if they have been lost, properly authenticated copies thereof might be procured with little trouble or expense from the court which granted the original. We are therefore of the opinion that this exception to the general rule, relative to the burden of proof, should apply to actions like the present, and that it was not obligatory on the part of the prosecution to prove that the defendant had not been naturalized. His naturalization, if such were the fact, was peculiarly within his own knowledge and could have been proven by him with but little inconvenience."

All of the California cases cited by appellants were decided prior to any legislative

enactment similar in purport to the amendments under consideration. This brings us to the power of the Legislature to enact sections 9a and 9b of the Alien Land Act and section 1983, Code of Civil Procedure. We need not repeat the language used by the United States Supreme Court in *Terrace v. Thompson*, supra, as to the broad powers vested in sovereignty in determining what measures are necessary for its own protection and properly promote the safety, peace, and good order of its people in legislating upon this particular subject. *Cockrill v. People of State of California*, 268 U. S. 258, 45 S. Ct. 490, 69 L. Ed. 944. The general power of the Legislature to create legal presumptions of evidence and also presumptions that are not evidence in a proper sense, but simply regulations of the burden of proof, are fully considered in *Casey v. United States* and cases cited therein. The law, as therein observed, is full of presumptions. Nor are we forced, in sustaining the legislation in the instant case, to go as far as courts may properly go, as was said in *Yee Hem v. United States*, supra:

"If the effect of the legislative act is to give to the facts from which the presumption is drawn an artificial value to some extent, it is no more than happens in respect of a great variety of presumptions not resting upon statute." Citing *Dunlop v. U. S.*, 165 S. 486, 17 S. Ct. 375, 41 L. Ed. 799; *Wilson v. U. S.*, 162 U. S. 613, 16 S. Ct. 895, 40 L. Ed. 1090.

Appellants contend, and cite numerous cases as authority in support of their contention, that a rational connection between the fact proved and the ultimate fact presumed must exist. In most all of the cases cited to the point, there is no semblance of rationality between the fact proved and the fact presumed. Appellants rely with seeming assurance upon two comparatively recent decisions of the United States Supreme Court, *Manley v. Georgia*, 279 U. S. 1, 49 S. Ct. 215, 217, 73 L. Ed. 575, and *Western & Atlantic Railroad v. Henderson*, 279 U. S. 639, 49 S. Ct. 445, 446, 73 L. Ed. 884. The first of these cases was upon a statute of Georgia which provided that every insolvency of a bank should be deemed fraudulent and the president and directors should be punished by imprisonment and labor in the state penitentiary for not less than one or more than ten years, provided that the defendant might repel the presumption of fraud by showing that the affairs of the bank had been fairly and legally administered. The indictment merely alleged that the appellant, being president of a certain bank, and he and two others being directors and the accused being by law charged with the fair and legal administration of the business and affairs of said bank, then and there pending, and during the official charge and responsibility of the

accused said bank became fraudulently insolvent. The court, upon considering the facts to be presumed, held that they were vague and uncertain and the connection between the fact proved and that presumed was not sufficient, expressing itself as follows: "Unforeseen demands in excess of the reserves required do not tend to show that the crime created by section 28 has been committed. The same may be said as to the other conditions defined as insolvency. The connection between the fact proved and that presumed is not sufficient." The rule of convenience was not discussed. The other case rested upon a Georgia statute, which provided: "A railroad company shall be liable for any damages done to persons, stock, or other property by the running of the locomotives, or cars, or other machinery of such company, or for damage done by any person in the employment and service of such company, unless the company shall make it appear that their agents have exercised all ordinary and reasonable care and diligence, the presumption in all cases being against the company."

In condemning the statute, the court remarked that a statute creating a presumption that is arbitrary, or that operates to deny a *fair opportunity to repel it*, violates the due process clause of the Fourteenth Amendment. In this case, no reference was made to the rule of convenience, and obviously there was no room for its application for the reason that the facts were as accessible to appellees as they were to appellants.

Those cases and others cited by appellants, in which the connection between the facts proved and the fact presumed is more arbitrary and irrational than disclosed by said cases, do not change the rule approved by numerous judicial pronouncements which have been and which may readily be cited.

In appraising the validity of the amendments and statute in suit, courts cannot put aside the historical controversies which preceded the adoption of the Alien Land Acts and the reasons which impelled their adoption. Neither can we put aside the various difficulties which the state has experienced in its attempt to enforce said acts. These difficulties arise in no small measure from the difficulty of identifying one member of the several ineligible alien races from another by reason of racial similitudes. They speak in Oriental languages which have no basic relation or resemblance to the English or Latin languages, and, because of their Oriental forms of worship and their lack of knowledge of and interest in our national and ancestral traditions and future objectives, they live in groups or communities having no social, civic, or political intercourse with the citizens of the country, or those eligible to become citizens, hedged in by impenetrable privacy and secrecy as to

their status as citizens and affairs generally to a degree that nowhere else obtains.

In the instant case, the evidence shows Osaki to be a member of an alien race ineligible to citizenship. His companions and associates in business were of that race. He was unable to speak the English language, and testified with the assistance of an interpreter of the Japanese language. If alien born, he was ineligible to citizenship and, if native born, he was not entitled to exercise the right of franchise under the laws of the state. No alien shall be naturalized or admitted as a citizen of the United States who cannot speak the English language. (U. S. Code Annot., Aliens and Citizenship, title 8, sec. 365, p. 415 [8 USCA § 365]). His physical appearance was before the court, and a number of witnesses testified that he was a Japanese and to other facts which tended to show beyond doubt that he was of that race. In testifying, he made no denial of this obvious fact, nor did he testify as to the place of his nativity, but contented himself with the denial of being the owner of or in any way interested in the real property described in the indictment, over which he exercised indisputable rights of a proprietor. One of the difficulties, as this case well illustrates, is to show the interest of the accused where ineligibility in fact exists. Professor Wigmore, in speaking of the applicability of the rule of convenience, says it is "merely a question of policy and fairness based on experience in the different situations." Said amendments are both fair, and are based on experience.

That the state might in the exercise of its powers adopt a system or establish a bureau by which all persons who are members of a race ineligible to citizenship, whether native or alien born, should be required to conform to registration laws, and those failing to do so would be presumed to be alien born, would be but to adopt an artificial means of doing that which is done in a more direct way by the present law. That the state has not seen fit to adopt one method rather than another is no concern of courts, unless it has transcended its powers in the premises.

It is not intended by what we have said to extend the rule of convenience or burden of proof to common-law crimes generally designated as *malum in se*, nor to all crimes *malum prohibitum*. We go no further than to apply the rule to the particular situation in accordance with the express mandate of said amendments.

[4] Appellants complain that the fourth and sixth counts of the indictment rest upon laws which are *ex post facto*, the offenses therein alleged having been committed prior to the adoption of said amendments and statute of 1927. We think there is no merit in this contention. The amendments do not make any act committed prior to the adoption

of said amendments and statutes a crime which was innocent if done prior thereto, nor aggravate the crime, nor impose a greater punishment than was annexed to the crime when committed, nor alter the legal rules of evidence and receive less or different testimony than the law required at the time of the commission of the offense. We are of the view that the better reason supports the conclusion that the burden, in cases involving questions of naturalization and alienage, has always been upon the defendant, who has intimate and peculiar knowledge of the fact.

[5] Appellants further complain that no specific instruction was given to the jury informing them that the burden was upon the people to prove that Osaki was a member of an alien race ineligible to citizenship. It would have been better practice for the court to have read the law to the jury in full. However, in this case, we are unable to see that the appellants were injured by the failure of the court to instruct on this issue. As we read the record, the case was tried on the theory that Osaki was of alien ineligible blood. It was the country of his nativity, to which no direct testimony was offered, as well as the denial that he was the owner of or had any interest in the real property described in the indictment, which were the issues upon which the case was tried. The jury found Osaki guilty. It could not have done so unless it found also that he was a member of an alien race ineligible to citizenship.

[6] An instruction was read to the jury which was prepared by and given upon the request of *appellants*, as follows, the italics being to call attention to the criticized portion:

"Before you can find either of the defendants in this action guilty of a conspiracy to violate the Alien Land Law, under any of the counts named in the indictment, it must appear from the evidence beyond a reasonable doubt, and to a moral certainty, that some agreement was made or some understanding had by and between the defendant Yoshioka, who is admitted to be an American citizen, and the defendant Osaki, *who is an alien ineligible to citizenship*, under and by which they conspired together to secure leases of agricultural or farming land and property. * * *

Why such an instruction was offered by the appellants, and how it passed the notice of court and counsel for appellants again upon being read to the jury, is not easily understood. If neither the court nor counsel were awakened by the erroneous statement of fact when made, it will not be presumed that the jury was more alert than the trained expounders of the law, but, rather, that the instruction in the respect pointed out made but little, if any, impression upon any one.

However this may be, the instructions as a whole, and the admissions and contentions of counsel, make it clear beyond doubt that there was no admission, or claim made that it was an accepted fact, that Osaki was "an alien ineligible to citizenship."

Judgments and orders appealed from are affirmed.

We concur: WASTE, O. J.; RICHARDS, J.; CURTIS, J.; SHENK, J.; PRESTON, J.; LANGDON, J.

WASTE, O. J.

Pursuant to stipulation petition for rehearing withdrawn and remittitur ordered to issue forthwith.

209 Cal. 783

The PEOPLE of the State of California, Plaintiff and Respondent, v. German GUZMAN, Defendant and Appellant.

Cr. 3290.

Supreme Court of California.

March 23, 1930.

In Bank.

Appeal from Superior Court, Riverside County; O. K. Morton, Judge.

Trujillo & Eriksson and Albert Trujillo, all of San Bernardino, for appellant.

U. S. Webb, Atty. Gen., John L. Flynn, Deputy Atty. Gen., and Albert Ford, Dist. Atty., Robert E. Nelson, Deputy Dist. Atty., and W. Earl Redwine, Chief Deputy Dist. Atty., all of Riverside, for the People.

PER OURIAM.

The defendant, in company with two other men, was discovered by the police in the city of Riverside, county of Riverside, at about the hour of six o'clock a. m., January 1, 1929, in a condition which indicated that they were under the influence of intoxicating liquor. Upon being accosted by said officers, the defendant was seen to take an instrument from his pocket and lay it behind a small bush. The instrument which he had attempted to conceal was a pistol having a barrel less than twelve inches in length and capable of being concealed upon the person. By the information filed against him, he was charged with having unlawfully in his possession a firearm having a barrel less than twelve inches in length and capable of being concealed upon the person, he being then and there a foreign-born person and not a naturalized citizen of the United States. St. 1923, chap. 339, p. 696. He waived a trial by jury, and was found guilty by the court of the crime charged in the indictment. The defendant offered no evidence either as to the country of his nativity or as to his naturalization. The power of the Legislature to enact section 1983, Code of Civil Procedure, is challenged. This is the only question raised

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by the appellant. We have, in the case of People v. Osaki and Yoshioka, 286 P. 1025, this day filed, passed upon the validity of said section, as well as upon all other questions which are germane to the point raised by appellant's appeal.

Placing our decision upon the grounds stated in that case, which are applicable to the instant case, it follows that the judgment and orders appealed from must be affirmed. It is so ordered.

209 Cal. 782

The PEOPLE of the State of California, Plaintiff and Respondent, v. Joe BRUNO, Defendant and Appellant.

Cr. 3274.

Supreme Court of California.

March 26, 1930.

Superseding opinion 279 P. 175.

In Bank.

Appeal from Superior Court, Los Angeles County; Charles S. Fricke, Judge.

S. S. Hahn and Dan J. Heyfron, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., John L. Flynn, Deputy Atty. Gen., and William F. Cleary, Deputy Atty. Gen., and Buron Fitts, Dist. Atty., and Tracy Chatfield Becker, Deputy Dist. Atty., both of Los Angeles, for the People.

PER CURIAM.

The defendant and appellant was charged, tried, and convicted in the superior court of the county of Los Angeles of the crime of unlawfully having in his possession and under his control a firearm having a barrel less than twelve inches in length, to wit, a .38-caliber Colt's automatic pistol. St. 1923, chap. 339, p. 696.

The objections made as to the validity of the judgment are, in the main, the same as those urged in the case of People v. Guzman (Cal. Sup.) 286 P. 1037, this day filed, with the additional assignment of the introduction in evidence of the extrajudicial statement, made at the time of his arrest, that he was of foreign birth. Whether or not this statement was admissible is not important in view of section 1983, Code of Civil Procedure, which placed the burden upon him to prove that he was a citizen of the United States and was, therefore, entitled to exercise all of the prerogatives of citizenship. The appellant offered no evidence whatever as to that issue. The instruction of the court, as to the burden of proof, was in line with the section of the code above cited. Upon the authority of People v. Osaki and Yoshioka (Cal. Sup.) 286 P. 1025, and People v. Guzman (Cal. Sup.) 286 P. 1037, both this day filed, the judgment and orders from which the appeal is taken are affirmed. It is so ordered.

209 Cal. 256

COMEAU v. KEENE.**L. A. 12130.**

Supreme Court of California.

April 1, 1930.

1. Corporations ⚡474 — Pledge of bonds — Order for sale — Contract — Termination.

Order for sale of bonds pledged with corporation terminated contract of pledge and created new contract extinguishing liabilities under original contract.

2. Corporations ⚡244(2) — Stockholder's liability — Pledge of bonds — Order of sale — Proceeds.

Stockholder parting with stock before plaintiff ordered sale of bonds pledged with corporation held not liable for proceeds on corporation's default.

Plaintiff pledged bonds with corporation to secure indebtedness and thereafter ordered corporation to sell bonds. Defendant was stockholder in company when bonds were pledged, but had parted with stock before order for sale of bonds was made. Bonds were sold, and corporation failed to account for proceeds of sale to plaintiff.

In Bank.

Appeal from Superior Court, Kern County; J. W. Mahon, Judge.

Action by W. A. Comeau against A. M. Keene. Judgment for defendant, and plaintiff appeals.

Affirmed.

See, also, 286 P. 1040, 1041, 1043.

Wiley & Harvey and Harvey & Heard, all of Bakersfield, for appellant.

Dorsey & Campbell, of Bakersfield, for respondent.

CURTIS, J.

Appellant brought this action to enforce an asserted stockholder's liability against the respondent, as a stockholder of Wm. H. Reid & Co., Inc., a corporation. The trial court, upon sufficient competent evidence, found as follows:

"That on or about the 29th day of December, 1923, the plaintiff herein agreed with said Wm. H. Reid & Co. to open a trading account with the said Wm. H. Reid & Co., whereby the said Wm. H. Reid & Co., as ordered by the plaintiff, would buy or sell for the account of plaintiff, stock, bonds and securities. That for the purpose of securing the payment by plaintiff of any sums for which he might become obligated in so purchasing and selling stocks, bonds and securities through the agency of the said Wm. H. Reid & Co., the

plaintiff deposited with the said Wm. H. Reid & Co., five bonds of Brandram-Henderson Company, a corporation, two of said bonds being in the denomination of Five Hundred (\$500.00) Dollars each, and three of said bonds being in the denomination of One Thousand Dollars (\$1,000.00) each. That no other or different special contract or agreement other than the order of sale hereinafter mentioned was made between plaintiff and the said Wm. H. Reid & Co., of and concerning the said bonds than as heretofore in this paragraph set forth. That on said date, to-wit: the 29th day of December, 1923, no formal subscription to the stock of the said Wm. H. Reid & Co. had been made by any person, but it had been understood and agreed between Wm. H. Reid, A. T. Connard and A. M. Keene that each of said persons would subscribe equally to the capital stock of said corporation, Wm. H. Reid & Co., and on said date, by virtue of such understanding, the entire capital stock of said corporation had been in fact subscribed by Wm. H. Reid, A. T. Connard and A. M. Keene in equal parts.

"That on the 11th day of March, 1924, there was issued to him, the said A. M. Keene, one thousand (1,000) shares of the capital stock of said Wm. H. Reid & Co., Inc., a corporation, being the total number of shares to which he had subscribed and that he, the said A. M. Keene, immediately thereafter and while the said bonds of the said Brandram-Henderson Company remained on deposit, as security as aforesaid, and on or about the 11th day of March, 1924, endorsed the said one thousand (1,000) shares of the capital stock of said Wm. H. Reid & Co., Inc., and for a good and valuable consideration transferred the same, together with all interest he had, or might have had, in said Wm. H. Reid & Co., Inc., unto the said Wm. H. Reid who thereupon received and retained the same.

"That thereafter and in the month of June, 1924, pursuant to an order given to the said Wm. H. Reid & Co., Inc., by the plaintiff in the above entitled action, the said bonds of Brandram-Henderson Company were by the said Wm. H. Reid & Co., Inc., sold and disposed of; that the said Wm. H. Reid & Co. sold and disposed of said bonds for the sum of Three Thousand Five Hundred Eighty-six and 38/100 Dollars. That at said time the plaintiff owed to the said Wm. H. Reid & Co. on account of said trading account a balance of Two Hundred Forty-Nine and 67/100 Dollars (\$249.67). That the said Wm. H. Reid & Co. has not accounted to or paid over to plaintiff the balance of the selling price of said bonds, to-wit: the sum of Three Thousand Three Hundred Thirty-six and 61/100 dollars (\$3,336.61), or any part thereof."

Appellant questions the sufficiency of the evidence to support the findings of the court

as to the proportionate amount of the stock of the Wm. H. Reid & Co., Inc., owned by A. M. Keene, and also that the bonds deposited by the plaintiff with said corporation were sold "pursuant to an order given to Wm. H. Reid & Co., Inc., by the plaintiff." We think there is substantial evidence in the record to support each of these findings, and we deem it unnecessary to discuss in detail the testimony of the various witnesses bearing upon the issues involved in said findings.

The facts as found by the court, to state them briefly, show that on December 29, 1923, when the plaintiff opened a trading account with said corporation, and deposited the five bonds of the Brandram-Henderson Company, a corporation, with Wm. H. Reid & Co., Inc., for the purpose of securing the payment of any sums of money that might become due from him, A. M. Keene was at least the equitable owner of 1,000 shares of the capital stock of said corporation; that on March 11, 1924, the said Keene sold, assigned, and transferred all of his stock in said corporation to Wm. H. Reid; and thereafter, and in the month of June of the same year, the said corporation sold said bonds of the Brandram-Henderson Company, deposited by the plaintiff, and, after paying an indebtedness then owing by the plaintiff to said corporation, there remained in the hands of said corporation the sum of \$3,336.61, which sum of money was the property of the plaintiff, but said corporation failed to account to or pay over to the plaintiff said sum of money or any part thereof. The conclusion of law drawn by the trial court from these facts was that the liability of said corporation to account to the plaintiff for the proceeds of said sale of stock was created in the month of June, 1924, and not before. It accordingly held that, as Keene was not then a stockholder in said corporation, he was not liable for the payment of any part of said sum of \$3,336.61, which the corporation failed to account for or pay over to the plaintiff.

Appellant, the plaintiff in this action, contends that the trial court is in error in arriving at such conclusion, and claims that the liability of said corporation to account to plaintiff for the proceeds of said sale of stock accrued and was created on December 29, 1923, at the date said bonds were deposited with said corporation. Appellant relies upon the two cases of Coulter Dry Goods Co. v. Wentworth, 171 Cal. 500, 153 P. 939, and Chambers v. Farnham, 182 Cal. 191, 187 P. 732, as supporting his contention that the liability which is the basis of this action accrued at the date of the original agreement between him and said corporation, which was December 29, 1923.

These cases hold that the liability of the corporation for which the stockholders become responsible under the Constitution and statutes of this state is created at the time

the corporation enters into contractual relations with third persons, and not upon the breach of the contract by the corporation, and therefore those stockholders are liable under the contract who were such at the time the corporation executed the contract.

[1, 2] The trial court, however, further found that Wm. H. Reid & Co., Inc., sold the Brandram-Henderson Company bonds belonging to the plaintiff pursuant to an order given to said corporation by the plaintiff. It appears from this finding that the sale of said bonds was not made under the contract of pledge by which Wm. H. Reid & Co. originally held said bonds, but by virtue of the order of plaintiff given to Wm. H. Reid & Co. in June, 1924. This order of sale from plaintiff and its acceptance by Wm. H. Reid & Co. as shown by the sale of said bonds created a new and independent contract between the parties and different from the original contract between them when the bonds were deposited with Wm. H. Reid & Co. by plaintiff as security for the latter's indebtedness. This original contract of pledge was terminated by the order of sale given by the plaintiff. Any liability created thereunder was extinguished by the later dealings of the parties. Whatever liability the corporation was thereafter under to the plaintiff was the liability growing out of or arising from the sale of said bonds by Wm. H. Reid & Co., under the express order of the plaintiff. This liability was, of course, to account to plaintiff for the proceeds of said sale. At the time plaintiff gave said order of sale in June, 1924, the defendant was not a stockholder of said company; he having parted with all of his said stock in said company, according to the court's finding, on March 11, 1924. The defendant was not, therefore, liable for any part of the indebtedness resulting from the sale of said bonds and the failure of Wm. H. Reid & Co. to account to the plaintiff for the proceeds of such sale.

The two cases of Coulter Dry Goods Co. v. Wentworth, *supra*, and Chambers v. Farnham, *supra*, are not applicable to the facts in this case. On the other hand, the principles of law governing the questions involved in the present action are more like those enunciated in the following decisions from the courts of this state: Yule v. Bishop, 133 Cal. 574, 62 P. 68, 65 P. 1094; Davies v. Torrance, 188 Cal. 179, 204 P. 820; McCann Co. v. Denny (Cal. Sup.) 270 P. 190; Finch v. Finch, 68 Cal. App. 72, 228 P. 553; and Kempton v. Floribel Land & Imp. Co., 46 Cal. App. 456, 189 P. 478, 479. While none of these cases is directly in point, still they lay down general principles which shed considerable light upon the question presented in the present action. For instance, in the case of Kempton v. Floribel Land & Imp. Co., *supra*, the plaintiffs sued the corporation and two stockholders, the corporation for money theretofore paid by

the plaintiffs to the corporation on account of the purchase price of certain lands, which the corporation had agreed to convey to the plaintiffs but had refused to do so, and the stockholders for the proportionate share of said money due from them respectively by reason of their ownership of stock in said corporation. It seems that plaintiffs had entered into a contract with said corporation in the year 1911 whereby the corporation had agreed to sell and convey to plaintiffs certain described land in Marin county. Under this contract, plaintiffs made certain payments called for by the contract and on July 16, 1917, tendered to the corporation the balance due on the contract and demanded a deed to the land from the corporation, which the corporation refused to deliver. The plaintiffs, upon such refusal, treated the contract as rescinded, and sued for the recovery of the money paid thereunder. In the opinion in that case, the court said: "When it becomes clear that the vendor will not or cannot convey in accordance with the terms of his contract, the vendee may sue for damages for the breach, or he may sue in equity for specific performance or alternative damages, or he may treat the contract as rescinded by consent and sue at law for the money theretofore paid on account of the purchase price of the land, to be recovered, not as damages, but as money had and received by the defendant to the use of the plaintiff. If the plaintiff is willing to waive all claims for equitable relief and for damages, the contract is extinguished as fully as it might have been by full performance. Civ. Code §§ 1689, 1691. * * * In such a case the action is not on the original contract upon which the obligation of the stockholders, as well as of the corporation, was fixed at its date, but upon an entirely new obligation to repay the plaintiffs' money which was not incurred until the plaintiffs elected to relieve the corporation from the old obligation. * * * These authorities show that the present case is within the reason of the rule announced in *Yule v. Bishop*, 133 Cal. 574, 62 P. 68, 65 P. 1094, and not within that on which *Chambers v. Farnham*, 182 Cal. 191, 187 P. 732, was decided. The action was not on the old obligation to convey, but on the new obligation to repay money to which the plaintiffs were entitled."

So, in the present action, the old obligation whereby the corporation was to hold said bonds as security for plaintiff's indebtedness was extinguished by his order directing the corporation to sell said securities. The present action is not based upon the old obligation, but upon the new one resulting from the order of plaintiff directing the sale of said bonds. As we have seen, the defendant was not then a stockholder of said corporation, and therefore he was not legally liable to the plaintiff upon the obligation incurred by the corporation at the time it undertook the sale of plaintiff's said securities.

The case of *Fry v. Baltimore Hotel Co.*, 80 Cal. App. 415, 252 P. 752, 755, is in many respects similar to the present action. It was there held that, "where an entirely new, different, and distinct agreement is subsequently made, based upon a new and valuable consideration, even though some of the provisions of the former document are incorporated, or referred to and made a part of the new contract, where it is apparent that the purpose of the parties was not to renew or extend the former one, but rather to completely change and alter certain covenants therein contained, it is apparent that the execution of the latter document will create a new obligation on the part of both the corporation and the stockholders, from the date of which their liability will begin to run."

The judgment is therefore affirmed.

We concur: WASTE, C. J.; RICHARDS, J.; SHENK, J.; PRESTON, J.; SEAWELL, J.

209 Cal. 785

W. A. COMEAU, Plaintiff and Appellant, v. BANK OF ITALY (a Corporation), Executor of the Last Will and Testament of A. T. Connard, Deceased, Defendant and Respondent.

L. A. 11731.

Supreme Court of California.

April 1, 1930.

In Bank.

Appeal from Superior Court, Kern County; J. W. Mahon, Judge.

See, also, 279 P. 188; 286 P. 1041, 1043.

Harvey & Heard and Wiley & Harvey, all of Bakersfield, for appellant.

F. E. Borton, James Petrini, and Borton & Petrini, all of Bakersfield, for respondent.

PER CURIAM.

In this case, one A. T. Connard was the owner of 1,000 shares of the capital stock of the Wm. H. Reid & Co., Inc., a corporation, at the time the plaintiff herein deposited with said corporation certain bonds of the Brandram-Henderson Company, as particularly set forth and described in the opinion this day rendered in the case of *Comeau v. Keene* (Cal. Sup.) 286 P. 1038. On February 28, 1925, the said A. T. Connard died, and the defendant herein, the Bank of Italy, was, on or about the 30th day of April 1925, duly appointed executor of the last will and testament of said A. T. Connard, deceased. In all other respects the facts in the present action are precisely like those in said action of *Comeau v. Keene*.

Upon the authority of said case, and for the reasons set forth therein, the judgment herein is affirmed.

209 Cal. 263

WASS v. KEENE.

L. A. 12149.

Supreme Court of California.

April 1, 1930.

I. Brokers ⇨24(1) — Trading agreement — Liability — Deposit.

Agreement to open trading account with stockbroker's corporation created no liability until deposit of property thereunder.

The agreement provided that plaintiff might order, through and by corporation, sale or purchase of corporate stocks and bonds as he might designate to corporation, and corporation would purchase or sell for account of plaintiff such stocks and bonds, and that plaintiff would, from time to time, deliver to corporation such sums of money as were demanded of him to guarantee corporation against loss, and further authorized corporation to close plaintiff's account whenever either party desired to do so.

2. Corporations ⇨244(2) — Stockholder's liability — Trading agreement — Deposit.

Stockholder in stockbroker's corporation when trading agreement was entered into but not when deposit was made held not liable on corporation's failure to return deposit.

In Bank.

Appeal from Superior Court, Kern County; Erwin W. Owen, Judge.

Action by W. H. Wass against A. M. Keene. Judgment for plaintiff, and defendant appeals.

Reversed.

See, also, 286 P. 1038, 1040, 1043.

Dorsey & Campbell, of Bakersfield, for appellant.

Wiley & Harvey and Harvey & Heard, all of Bakersfield, for respondent.

CURTIS, J.

This action was brought to recover against the defendant on his alleged liability as a stockholder of the Wm. H. Reid & Co., Inc., a corporation. The facts in this case are in many respects similar to those in the case of Comeau v. Keene (Cal. Sup.) 236 P. 1038, this day decided. The Wm. H. Reid & Co., Inc., was a corporation carrying on a stock brokerage business, and defendant, one A. T. Connard, and Wm. M. Reid were its sole stockholders. This corporation and these persons and the relations they sustained to the creditors of said corporation are set forth and referred to in the opinion rendered in the case of Comeau v. Keene, supra, and the defendant herein is the same person who is defendant

in said action, and this action is predicated upon his ownership of the same stock in said corporation which was made the basis of said action of Comeau v. Keene.

The findings in the present action present the following state of facts: In January, 1924, the plaintiff entered into a tentative agreement to open a trading account with the Wm. H. Reid & Co., Inc. At that time the defendant was a stockholder of said corporation. In pursuance of said agreement, plaintiff, in the latter part of the month of March, delivered and deposited with said corporation the sum of \$3,350 "as a guarantee to said company for the full performance of his selling and purchasing orders to said company"; that on May 26, 1924, it was mutually agreed between said parties that said agreement should cease and terminate; that said sum of \$3,350 was never withdrawn, nor was it ever paid to the plaintiff, although frequent demands therefor had been made by the plaintiff on said corporation for its payment; and that, at the time the plaintiff entered into said agreement, the defendant, Keene, was the owner of 1,000 shares of the capital stock of said corporation. Upon these findings of fact, judgment was rendered in favor of the plaintiff, and the defendant has appealed.

It will be noted that, while the court found that defendant was a stockholder in said corporation at the time said agreement was entered into, that is, in January, 1924, there is no finding as to whether defendant owned any stock in said corporation on the 29th and 31st days of March, 1924, the dates on which the plaintiff delivered and deposited with said corporation said sum of \$3,350. The findings show that said sum of \$3,350 was deposited with said company by plaintiff in two equal amounts on the two dates last mentioned. In the brief filed by counsel for the plaintiff it is asserted that both Keene and Connard transferred their stock in said corporation to Wm. H. Reid on March 11, 1924. This appears to be an admitted fact in the case. We take it, therefore, that the position of the plaintiff is that, by the agreement entered into between the plaintiff and the Wm. H. Reid & Co., Inc., in January, 1924, a liability was then created against said corporation and in favor of the plaintiff to pay to the plaintiff any money that might thereafter become due him in any transaction having its inception in said agreement, and accordingly that the stockholders of said company who were such at the date of said agreement were responsible for their proportionate share of any indebtedness that might thereafter be incurred by said corporation under said agreement.

The correctness of this position will depend in a large measure upon the character of the agreement upon which the plaintiff relies. We will therefore set out in full the finding

of the court embodying said agreement. It is as follows: "That in or about the month of January, 1924; plaintiff herein entered into an agreement with said Wm. H. Reid & Co., Inc., hereinafter called the Company, wherein and whereby it was agreed between the plaintiff and said Company, that plaintiff might order through and by said Company the sale or purchase of such corporate stocks and bonds as he might designate to said Company and that said Company would purchase or sell for the account of said plaintiff such corporate stocks and bonds and that plaintiff should from time to time, as demanded of him by said Company, or as desired by said plaintiff in excess of such demands, deliver to said Company such sum or sums of money, or such corporate stocks and bonds in such value as in the judgment of said Company would guarantee it against loss through the failure of plaintiff to pay said Company the full purchase price of such corporate stocks and bonds as he might order through and by it, or through his failure to deliver or cause to be delivered to the purchasers such corporate stocks and bonds as he might order sold by said Company, and that whenever plaintiff or said Company desired to close plaintiff's account with said Company, or whenever said agreement should terminate, said Company should return to said plaintiff all sums of money and all corporate stocks and bonds which plaintiff might have deposited with said Company, or might have left in the possession of said Company as a guarantee for the full performance of its purchasing and selling orders as aforesaid."

[1] Did the mere making of this agreement without the deposit of any money or other property thereunder, or until acted upon in some manner by the parties thereto, create any liability for or against said corporation? A most cursory reading thereof compels a negative answer to the question. At most, it was but a tentative agreement upon which the parties would transact business in case they should thereafter conclude to deal with each other. The plaintiff was under no obligation, after the making of said agreement, to open a trading account with said corporation, or to transact any business whatever with the Wm. H. Reid & Co., Inc. Neither was the corporation under any obligation to the plaintiff until the latter had in some manner acted under said agreement either by placing with the company an order for the purchase of stocks or bonds, or by depositing money or property with said corporation for some purpose enumerated in the agreement. Until some action was taken by plaintiff thereunder, the corporation could with perfect propriety and without violating any rights of the plaintiff have recalled the agreement and ended all negotiations with the plaintiff. Until acted upon by the plaintiff,

it was a mere offer of the corporation, and could be withdrawn at any time.

This may have been the type of agreement referred to by Mr. Justice Olney in his concurring opinion in the case of *Chambers v. Farnham*, 182 Cal. 191, 197, 187 P. 732, 734, wherein he says: "I think, however, it should be said, in addition, that the statement that the date of the incurrence of the contractual obligation by a corporation is the date of the contract has reference only to those cases wherein an obligation, either absolute or contingent, is assumed by the corporation by the very making of the contract itself. This is true in the great generality of cases, but there are not infrequently cases where it is not true. Instances are not uncommon of contracts which, when made, are purely unilateral and under which one of the parties assumes no obligation whatever until the happening of some event entirely within the control of such party. An example is where a contract is made to sell upon certain fixed terms such specified goods or articles as the vendee may subsequently order. Under such a contract no obligation is incurred by the vendee until an order for the goods is given, and if the vendee is a corporation, the statute of limitations as to the liability of its stockholders for the price of the goods will begin to run from the date of the order and not from the date of the original contract."

The same principle is involved in actions of a depositor against stockholders of a bank. In such case it is held that the liability is created, not when the account is opened, but when the particular deposit is made. *Gardiner v. Royer*, 167 Cal. 238, 139 P. 75; *Jones v. Goldtree Bros. Co.*, 142 Cal. 383, 77 P. 939; *Wells v. Black*, 117 Cal. 157, 48 P. 1090, 37 L. R. A. 619, 59 Am. St. Rep. 162.

The principles of law governing the case of *Comeau v. Keene*, *supra*, are applicable to the facts in the present case. In the former case, a trading agreement had been entered into between the corporation and the plaintiff in said action, and said plaintiff had made a deposit of bonds to secure any indebtedness that might arise under said agreement. This was all done while the defendant Keene was a stockholder of the corporation. But, after Keene had disposed of his stock, the plaintiff in said action directed the corporation to sell said bonds, thus terminating the original contract under which said bonds were held as security and creating a new relation between the parties, a new and different obligation than that which existed under the original agreement. We accordingly held, as the liability of the corporation to account for the proceeds of said sale had its inception in the order of sale, and at a time when the defendant therein was not a stockholder of said corporation, that said defendant was not lia-

able as a stockholder of said corporation, for any part of the debt of the corporation resulting from the sale of said bonds, and the failure of the corporation to pay to the plaintiff therein the proceeds of such sale.

[2] In this action it was the deposit of the money with the corporation, and the receipt thereof by the corporation, which created the liability upon which the plaintiff herein must recover, if recovery is to be had. At the date of said deposit and receipt, the defendant, Keene, was not a stockholder in said corporation. He is not, therefore, liable for any portion of the indebtedness arising out of said transaction.

The judgment is reversed.

We concur: WASTE, C. J.; RICHARDS, J.; SHENK, J.; PRESTON, J.; SEAWELL, J.

209 Cal. 786

W. H. WASS, Plaintiff and Respondent, v. BANK OF ITALY (a Corporation), Executor of the Last Will and Testament of A. T. Connard, Deceased, Defendant and Appellant.

L. A. 11171.

Supreme Court of California.

April 1, 1930.

In Bank.

Appeal from Superior Court, Kern County; Erwin W. Owen, Judge.

See, also, 286 P. 1038, 1040.

F. E. Borton and James Petrini, both of Bakersfield, for appellant.

Harvey & Heard and Wiley & Harvey, all of Bakersfield, for respondent.

PER CURIAM.

Upon the authority of *Wass v. Keene* (Cal. Sup.) 286 P. 1041, this day decided, and for the reasons stated therein, the judgment in the present action is hereby reversed.

104 Cal. App. 259

Ex parte BERMAN.

Cr. 1943.

District Court of Appeal, Second District, Division 2, California.

March 1, 1930.

1. Criminal law §296 — Plea of double jeopardy — Right to immediate decision.

Petitioner presenting facts necessary to decision of his plea of double jeopardy, had right to immediate decision.

The facts upon which the plea was based were stipulated to be that offense of brib-

ery charged in indictment under which petitioner was then held was also charged in prior indictment upon which petitioner had been tried and acquitted.

2. Criminal law §200(6) — Indictment for conspiracy to bribe — Subsequent indictment for bribery — Double jeopardy.

Defendant, dismissed under indictment charging conspiracy to bribe in language adequately charging bribery, subsequently indicted for bribery, was subjected to double jeopardy (Pen. Code, § 1099).

The first indictment charged defendant with conspiracy to commit crime of giving bribe in violation of Pen. Code, § 67, and crime of asking and receiving a bribe in violation of section 68. At the trial, the charge against defendant was dismissed pursuant to Pen. Code, § 1099, authorizing court on application of district attorney to discharge one of two or more defendants, before defense has been gone into, in order that he might be witness for people.

Application by Jacob Berman for a writ of habeas corpus against the Sheriff of Los Angeles County to secure release of petitioner, being detained in custody upon a charge of bribery.

Petitioner discharged.

Otto Christensen, of Los Angeles, for petitioner.

Buron Fitts, Dist. Atty., and R. P. Stewart and Wm. R. McKay, Deputy Dist. Attys., all of Los Angeles, for respondent.

CRAIG, J.

[1] The petitioner seeks to be released from custody of the sheriff of Los Angeles county through a writ of habeas corpus. A plea of once in jeopardy and acquittal was interposed in the superior court, and thereafter a motion to dismiss was made and was denied. The facts upon which the plea was based were stipulated to be that the substantive offense of bribery charged in the indictment under which the petitioner is now held (being herein referred to as indictment No. 35221) is also pleaded and charged in another indictment (herein referred to as indictment No. 35361) upon which the petitioner was tried and acquitted. The charge under indictment No. 35361 was tried, and pursuant to section 1099 of the Penal Code was dismissed as to the defendant Berman.

It appeared that indictment No. 35361 charged the defendant with "conspiracy to commit the crime of giving and offering a bribe in violation of the provisions of section 67 of the Penal Code, a felony, and the crime of asking, receiving and agreeing to receive a bribe in violation of the provisions of section

68 of the Penal Code." Indictment No. 35227 charges the petitioner and others with the crime of bribery. The facts necessary to a disposition of the plea of double jeopardy having been before the court, it only remained to pass upon the legal issue thus presented, and it was the right of the defendants to have a ruling thereon at once.

[2] In passing upon the petition for a hearing the Supreme Court in *People v. Keyes et al.*, 284 P. 1105, held that, although the defendant Keyes was improperly charged with having conspired with other defendants to give and offer a bribe, and although it was held that there is "no room for the operation of a charge of conspiracy" as between the person who asks and one who offers a bribe because "bribery requires for its consummation the unlawful concert of one or more persons acting with one or more other persons having a different motive or purpose," still under such an indictment, and that particular indictment, in view of the existence in said indictment No. 35361 of allegations showing an unlawful and felonious agreement on the part of Keyes to accept a bribe, the defendant Keyes was legally convicted of the substantive offense of accepting a bribe from the other defendants. It follows that this petitioner, one of the defendants in the last-mentioned indictment, might have been convicted of the substantive offense of bribery under the allegations which were ample in charging an unlawful and felonious agreement upon his part to give and offer the same bribe charged as a substantive offense in indictment No. 35227. In view of the language of the Supreme Court to which we have adverted, it is unnecessary and inappropriate to consider other authorities cited in argument and apparently relied upon by the trial court.

It is ordered that the petitioner be discharged.

We concur: WORKS, P. J.; IRA F. THOMPSON, J.

104 Cal. App. 261

Ex parte GETZOFF.
Cr. 1942.

District Court of Appeal, Second District,
Division 2, California.

March 1, 1930.

1. Criminal law §296 — Plea of double jeopardy — Right to immediate decision.

Petitioner seeking release from charge of bribery, interposing plea of double jeopardy and prior conviction, was entitled to immediate ruling.

2. Criminal law §878(2) — Charging several acts in indictment — General verdict.

Mere general verdict of guilty is finding that defendant is guilty of each and all of unlawful acts charged in indictment.

3. Criminal law §200(6) — Indictment for conspiracy to bribe — Subsequent indictment for bribery — Double jeopardy.

After dismissal of indictment for conspiracy to bribe, in language adequate to charge bribery, subsequent indictment for bribery constituted double jeopardy.

Application by Ben Getzoff for a writ of habeas corpus against the Sheriff of Los Angeles County to secure release of petitioner, being detained in custody upon a charge of bribery.

Petitioner discharged.

Mark F. Jones and G. J. Opegard, both of Los Angeles, for petitioner.

Buron Fitts, Dist. Atty., and Robert P. Stewart and Wm. R. McKay, Deputy Dist. Atty., all of Los Angeles, for respondent.

CRAIG, J.

[1, 2] The situation here presented is the same as that this day passed upon by this court in *Re Berman*, 286 P. 1043, except that the plea interposed and upon which the motion to dismiss was made and denied was double jeopardy and a prior conviction of the offense charged in indictment No. 35227. As in the other case, the defendant was then entitled to a ruling upon his motion to dismiss. Where, as was the case in the trial of the charge contained in indictment No. 35361, a general verdict of guilty is rendered, and no special verdict returned by the jury to indicate the exact offense of which the defendant is convicted, such verdict is a finding that the defendant is guilty of each and all of the unlawful acts charged in the indictment. *People v. Gayle*, 202 Cal. 159, 259 P. 750.

[3] Under the decision of the Supreme Court in *People v. Keyes et al.*, 284 P. 1105, the conviction of Getzoff, like that of Keyes, could have been sustained as one of the substantive offenses charged in indictment No. 35361, which was set up as one of the overt acts in the charge of conspiracy, but sufficiently pleaded to show an unlawful and felonious offer and gift of a bribe.

We think the plea should have been sustained, and the petitioner is ordered released.

We concur: WORKS, P. J.; IRA F. THOMPSON, J.

105 Cal. App. 65

LOUDEN v. INDUSTRIAL ACCIDENT COMMISSION et al.
Civ. 3860.

District Court of Appeal, Third District, California.

April 2, 1930.

1. Master and servant — §416 — Workman's compensation — Dependency — Marriage — Good faith — Commission's finding.

Claimant *held* entitled to definite finding on whether her marriage with deceased employee "Indian way" was in good faith (Workman's Compensation Act, § 14(c), as amended by St. 1919, p. 917, § 5).

Workman's Compensation Act, § 14(c), St. 1917, p. 844, as amended by St. 1919, p. 917, § 5, provides that no person shall be considered dependent of any deceased employee unless in good faith a member of family or household of such employee or unless such person bears to employee relation of husband or wife, child, etc.

2. Master and servant — §416 — Workman's compensation — Commission's finding — Construction — Dependency — Member of household.

Commission's finding claimant was not wife of deceased employee and not dependent on him within statute was not finding claimant was not in good faith member of employee's household (Workman's Compensation Act, § 14(c), as amended by St. 1919, p. 917, § 5).

3. Master and servant — §383 — Workman's compensation — Dependency — Marriage — "Indian way."

If marriage between claimant and deceased employee "Indian way" was in good faith, claimant was entitled to compensation (Workman's Compensation Act, § 14(c), as amended by St. 1919, p. 917, § 5).

Certiorari to Industrial Accident Commission.

Petition by Winnie Gilmore Louden against the Industrial Accident Commission of California and another, for an order annulling an award made in determining the dependents of John Louden, deceased.

Award annulled, and cause remanded.

Eugene S. Salvage, of Eureka, for petitioner.

Edward O. Allen, of San Francisco, for respondents.

PLUMMER, J.

This cause is before us upon the petition of the above named, praying for an order of this court annulling the award heretofore

made in determining the dependents of John Louden, deceased.

The facts show that John Louden, an Indian, 47 years of age, while employed by the respondent Pacific Lumber Company, a corporation, was killed on or about the 27th day of March, 1928; that his death occurred in the course of and arose out of his employment. The respondent lumber company was self-insured, and both employer and employee were subject to the provisions of the Workmen's Compensation Act (St. 1917, p. 831, as amended). The award of the Commission was to the effect that five minor children of the deceased were his sole dependents and entitled to share in the death benefit, found to be the sum of \$5,000. Finding No. 4 of the Commission, affecting the petitioner herein, is as follows: "4. Winnie Gilmore Louden was not the wife of said employee on said date, and was not dependent on the decedent within the meaning of said act." The minor children above referred to were the children of a wife of the decedent from whom he had been divorced, and, so far as the record shows, were being wholly supported and educated in an Indian school maintained by the United States government. The deceased contributed practically nothing to the support of the minor children, the testimony showing that for the year previous to his decease only the sum of \$20 was contributed by the deceased for such purpose. A rehearing was granted by the Commission, and in the petition for rehearing the question as to the petitioner's marriage and being a member of the household of the deceased in good faith was tendered by the following allegation contained in the petition, to wit: "That the evidence does not justify the findings of fact, and in this regard your petitioner alleges that she was married to John Louden under the customs and laws of Indians living in the county of Humboldt, state of California, and was in good faith a member of the household of said John Louden, the deceased employee of the defendant company." The rehearing resulted in an affirmation of the Commission's previous award.

The record further shows that the petitioner was a member of the Humboldt Tribe of Indians, which resides in and about the bay, in Humboldt county; that the deceased, John Louden, was a member of the Siskiyou Tribe of Indians; that both the petitioner and the deceased spent most of their time in and about the city of Eureka, and without any distinct tribal associations, though their association, so far as shown, was with other Indians living in and about the city of Eureka. The record further shows that the petitioner herein was first married in January, 1897, to a white man named Richard Rossig. This marriage appears to have been solemnized first in the "Indian way" and then according

to the method prescribed by the Civil Code, in taking out a license and having a ceremony performed by a justice of the peace. In the year 1901 the petitioner obtained a decree of divorce from Richard Rossig in the superior court of Humboldt county, and for some years after the obtaining of this divorce it appears that the petitioner lived with an Indian aunt in or near the city of Eureka and participated in Indian tribal relations only to a very limited extent.

The record shows, as we have stated, that John Louden was married to a woman other than the petitioner in what was called the "white man's way," and that a decree of divorce had been entered years previous to his death, dissolving said marriage. On March 16, 1925, the petitioner and John Louden were married "Indian way." This consisted of John Louden paying to the aunt of the petitioner the sum of \$150 and placing a ring upon one of the fingers of the petitioner, and thereafter the two lived together as husband and wife. The petitioner testified that in her first marriage she was married "Indian way," and as she had married a white man who wanted the marriage solemnized according to the white man's method, a license was obtained and a ceremony performed by a justice of the peace, as herein stated.

The record contains a great deal of testimony to the effect that members of the two Indian tribes referred to considered marriages performed "Indian way" just as binding and effective as marriages solemnized "white man's way." The record contains much testimony to the effect that the neighbors and friends of the deceased and the petitioner considered them husband and wife, and some testimony to the effect that the deceased had said he was not married to the petitioner, and also that the petitioner had said that the deceased was not her husband, but was "her man." This testimony, however, quoting deceased, was given by a witness who apparently had a personal grudge against the petitioner.

The record likewise shows that the deceased and the petitioner, for at least twenty-five years, had lived among white people, worked for them in such employment as could be obtained, and were familiar with the customs of white people in relation to contracting marriages.

Based upon these facts, the Commission found that the petitioner was not the wife of the deceased, and was not a dependent within the meaning of the Workmen's Compensation Act. Upon finding No. 4, set out herein, it is contended by counsel for respondents that the Commission has determined that the petitioner not only was not the wife of John Louden, deceased, but was not a member of his household in good faith within the meaning of the language contained in subdivision

(c) of section 14 of the Workmen's Compensation Act, St. 1917, p. 844, as amended by St. 1919, p. 917, § 5. In other words, that the following language, "and was not dependent on the deceased, within the meaning of said act," includes, by way of implication, a finding or conclusion to the effect that petitioner was not in good faith a member of the household of the decedent.

It may be here stated that the record shows beyond contradiction that from the date of the marriage, "Indian way," of the deceased and the petitioner, the petitioner maintained a residence in which the two lived together, and that the deceased paid all the expenses of the household, and that the petitioner was, in fact, dependent upon the deceased for her maintenance during said period of time and at the date of the death of the deceased. The question of good faith as to the relationship between the petitioner and the deceased being practically the only fact for determination.

The authorities cited by counsel for the petitioner show that the decisions of courts are almost unanimous in supporting marriages between Indians solemnized "Indian way," notwithstanding the fact that departmental officers of the government having to do with the affairs of Indian reservations and with Indians coming under their jurisdiction have sought, by rules and regulations, to discourage and prevent such marriages, and that such marriages are becoming less and less frequent.

Counsel for petitioner calls our attention to the case of *Temescal Rock Co. v. Industrial Accident Commission*, 180 Cal. 637, 182 P. 447, 13 A. L. R. 683, wherein it is held, in substance that the actual legality of the assumed marital relation does not determine whether a woman is or is not embraced within subdivision (c) of section 14 of the Workmen's Compensation Act; that if the marriage was not legally solemnized, but if the parties in good faith assumed the relationship of husband and wife under the conviction that they were married, that the woman, in such instance, should be considered in good faith a member of the household of the deceased and entitled to compensation.

To the same effect, though involving minors, is the case of *Moore Shipbuilding Corp. v. Industrial Accident Commission*, 185 Cal. 200, 196 P. 257, 13 A. L. R. 676. As opposed to these cases, counsel for respondent cites the case of *Francisco v. Industrial Accident Commission*, 192 Cal. 635, 221 P. 373. That case appears to be based upon the decision in *Anderson v. Mathews*, 174 Cal. 537, 163 P. 902, where an Indian was involved who was not a member of any known or recognized tribe having communal laws, customs, or institutions of its own, etc. The Indian involved having conformed his ways of living to the habits of American citizens, married accord-

ing to the white man's laws, and, living among them, was held subject to the laws relating to the statute of limitations, the same as any other person. The question of good faith, however, which is involved in this action, does not appear to have been considered therein, and therefore is not an authority against the contentions of the petitioner.

[1-3] If the question of wifehood only had been involved in the issues presented to the Commission, then the finding of the Commission that the petitioner, Winnie Gilmore Loudon, was not the wife of the employee at the date of his death would be determinative of this case, but as the issue of good faith also was involved, the petitioner was entitled to a definite finding upon that fact. Counsel for the Commission advances the argument that this question, by implication, has been decided by the Commission. Our attention in this behalf is again called to finding No. 4, which reads: "Winnie Gilmore Loudon was not the wife of said employee on said date, and was not dependent on the decedent within the meaning of said act." The contention being that by this language the Commission has found that the petitioner, having been married only "Indian way," was not the wife of the decedent, and that the words "was not dependent on the decedent," within the meaning of said act, may, by implication, be construed as a finding that the petitioner was not in good faith a member of the household of the decedent at the time of his death.

As against this interpretation of the finding it is just as consistent to read it with the interpretation contended for by the petitioner, to wit: "Winnie Gilmore Loudon was not the wife of said employee on said date, and, therefore, was not dependent on the decedent within the meaning of said act." We do not very well perceive how the conclusion in the finding can be separated from the premise upon which it is based, to wit: "That Winnie Gilmore Loudon was not the wife of the employee on said date." That is the burden of the finding. The remaining portion of the finding is a part of the same sentence, is connected therewith in thought, and to separate the conclusion from the statement upon which it is based appears to us to do violence to all rules of construction adopted by courts, and we must conclude that finding No. 4 must be read as a whole, and to the effect that the petitioner was not a dependent on the decedent within the meaning of the act, because she was not the wife of the decedent at the time of his death. Counsel for the Commission admit the marriage "Indian way"; that the decedent and the petitioner lived together thereafter until the date of John Loudon's death, and during all of said time John Loudon provided a home for the petitioner, paid all bills, and that the petitioner was dependent in fact upon the

decedent for support. The whole theory of the findings of the Commission and the argument of counsel is to the effect that as the parties involved knew of the "white man's way" of contracting marriage, therefore it was necessary for them to be married "white man's way." On the contrary, the cases which we have cited show that if the marriage, though not performed "white man's way," is entered into in good faith, and the testimony in this case is overwhelming that Indians regard their own way of marriage as binding as "white man's way," there remains no basis upon which to predicate either a finding or a conclusion of lack of good faith, and if the marriage between the petitioner and the decedent, "Indian way," was in good faith, then the petitioner was entitled to her share of the award.

It is true that the first clause of subdivision (c) of section 67 of the Workmen's Compensation Act (St. 1917, p. 876) reads: "The findings and conclusions of the Commission on questions of fact shall be conclusive and final and shall not be subject to review."

In *Clarke v. Industrial Accident Commission*, 87 Cal. App. 766, 262 P. 471, the court had before it a finding of the commission which was in the form of a conclusion, and it was there held that a conclusion by the Industrial Accident Commission as to "serious and willful misconduct of employers constitutes a finding of fact not subject to review, if supported by substantial evidence," citing *Myers v. Industrial Accident Commission*, 191 Cal. 673, 218 P. 11. To the same effect is the case of *General Petroleum Corporation v. Industrial Accident Commission*, 90 Cal. App. 101, 265 P. 508.

It also appears to be the law that whatever is implied within the terms of the findings and conclusions of the Commission may be considered in supporting an award. *Standard Varnish Works v. Industrial Accident Commission*, 197 Cal. 143, 239 P. 1067. While we recognize the force of these cases, they are not applicable to the questions here presented, because there is in the record no specific conclusion that the petitioner was not in good faith a member of the household of the decedent. This vital fact, upon which the right of the petitioner depends, cannot be said to be within the findings of the Commission or the conclusions of the Commission only by importing into a finding something which is not there or only by dividing a conclusion from the premise upon which it is founded, and dividing a sentence into two portions, so as to make it cover two issues instead of one, which we think only was within the mind of the Commission at the time it made finding No. 4. The whole record, as we read it, indicates the fairness of the petitioner's claims and her right, though an Indian woman, to be regarded as occupying the same status of

a white woman whose marriage ceremony was in some particulars defective but entered into in good faith. At least the petitioner is entitled to such a finding, as her rights depend thereon, and not upon whether she was or was not, technically speaking, the wife of the decedent.

The award of the Commission is annulled, and the cause remanded for further proceedings.

We concur: FINCH, P. J.; R. L. THOMPSON, J.

105 Cal. App. 110

COOVER v. PAINLESS PARKER, DENTIST.
Civ. 38.

District Court of Appeal, Fourth District,
California.

April 7, 1930.

1. Physicians and surgeons ⇨18(9) — Malpractice — Proximate cause — Question for jury.

Conflicting evidence in action against dentist for malpractice whether plaintiff's nervousness was caused by X-ray burns held for jury.

In action for personal injuries sustained by woman as result of overexposure in taking of dental X-ray photographs of her by defendant, there was evidence that plaintiff's nervousness could have been caused by X-ray burns and other evidence that same may have been otherwise contributed to in part.

2. Appeal and error ⇨1004(3) — Review — Disturbing damage award — Requirement.

Reviewing court cannot disturb jury's award of damages approved by trial court unless award shocks conscience and raises presumption of passion, prejudice, or corruption of jury.

3. Physicians and surgeons ⇨18(11) — Malpractice — Damages — Excessiveness.

\$10,250 for X-ray burns on woman's face, necessitating guarding against cancer, held not excessive.

Appeal from Superior Court, San Diego County; Charles C. Haines, Judge.

Action by Rowena Coover against Painless Parker, Dentist, a corporation. Judgment for plaintiff, and defendant appeals.

Affirmed.

A. S. Humphreys, of San Francisco, and Sweet & Plank, of San Diego, for appellant.

Sample & Harden and Harden & Green, all of San Diego, for respondent.

BARNARD, J.

This was an action for damages for personal injuries sustained by the plaintiff, as a result of overexposure in the taking of dental X-ray photographs of the plaintiff, by the defendant. From a judgment for \$10,250, based upon the verdict of a jury, the defendant has appealed.

The sole ground of the appeal is that the amount of the verdict, in view of the injuries sustained, is grossly excessive, and suggests passion or prejudice on the part of the jury. The plaintiff testified that, as a result of the burns in question, she suffered torture, the terrible suffering lasting for three months, during which time she was unable to sleep "without they gave me something," that she spent most of the first three months in bed, and that at the time of the trial, something over a year after the burns, she was still extremely nervous. In reply to the question whether she still had very much pain, she replied: "Well, I am suffering—I am just so awfully nervous, there is a tingling sensation in my face." She also gave the following testimony:

"Q. Have you noticed any changed condition in your eyes? A. A decided change in my eyes.

"Q. What kind of a change? A. It was about—it must have been three weeks after the burn, my eyelids began to draw, the under lids began to draw away from the eyes, and my eyelids turned wrong side outward, I was blinded, and that was when they called Dr. Thomas in, and he put me in a dark room, put goggles on and a shade over my eyes, and kept medicine in my eyes constantly, trying to keep my eyelids from turning wrong side out and leaving the eyeballs, and I have never been able to see well since."

One physician testified he examined the plaintiff shortly after the burns were inflicted and again a few days before the trial. He describes her condition the first time he saw her as follows: "Her face was red, a dark purple red, around both the upper and the lower jaw, it was swollen, and her right eye was swollen and the skin around it was swollen, also the skin on her neck on both sides was thickened and swollen and a dusky red."

In respect to her condition just before the trial, he testified as follows:

"Q. What did you discover her condition to be at that time? A. Well, her original X-ray reaction had disappeared, and in place of it there are the usual sequeli that follow. She had an atrophy of the skin, that is shrinking and toughening and shriveling of the skin over her right cheek, she had tanning on her neck on both sides, tanning of her skin over her lower jaw and the little blood vessels springing up all over the end of her nose in the atrophied area in her right cheek.

"Q. Would you say this condition was the result of the X-ray burn? A. As a result of over X-ray exposure, yes.

"Q. How long would you say that condition would continue with her? A. These are probably permanent things. The tanning may fade somewhat, the atrophy will stay, the blood vessels—the new blood vessels may increase somewhat in size, the blotching of her right cheek may increase somewhat in the next few months."

When asked if she would continue to suffer pain, he replied: "Well, she will be hypersensitive to sunburn, she will be hypersensitive to the steam in her kitchen, and things of that sort, her skin will burn up and tingle and make her uncomfortable, I do not say it will cause her pain."

In regard to her nervous condition, he testified that the plaintiff had passed through the shock of from two to three months of severe pain and suffering, and to that extent she had diminished her nervous reserve, and that in his opinion this X-ray burn could of itself cause her nervous condition, although at another time he testified that her nervous condition was in part contributed to by another factor, not connected with the burns in question.

Another physician testified that he treated the plaintiff during a period of a little more than three months following the taking of the last X-ray picture. In reference to her condition at first, he testified as follows:

"The face was badly swollen, red, livid color, almost cyanotic—it was cyanotic.

"The Court: What do you mean by that? A. Black—a very dark red. What I mean by cyanosis, Judge, is more of a congestion of the skin, and she was suffering acutely.

"Q. And how long did you continue to treat her? A. Well, I saw Mrs. Coover—the last time that I saw Mrs. Coover was the last of July, the 30th of July. * * *

"Q. What was her condition during that interval? A. Well, for days she suffered very, very acutely, as they do from X-ray burns. There is no dermatological condition in which one suffers more than they do from an X-ray dermatitis or an X-ray burn, and there is very little which you can do to alleviate that. About the second or third day after I first saw Mrs. Coover, her face blistered, some blistering, these blisters ruptured, leaving a necrotic base.

"Q. What do you mean by that, Doctor? Necrotic base, did you say? A. Yes, the tissues were dead, the blood vessels were cut off, the superficial blood vessels were cut off."

In reference to her condition on the day of the trial, he testified as follows:

"Q. And what condition is it in today, Doctor? A. Over the areas that ulcerated, that

is, they broke down and were necrotic, shows a senile condition of the skin. * * *

"A. It is on the right side, it is in here, extending up to the border of the hair, and there is some little loss of hair in that area, then down, up to the corner of the eye the skin is soft and of a deadwhite color. When you get a senile condition of the skin following an X-ray burn, the hair follicles and sebaceous follicles are destroyed. The light has destroyed these hair follicles—you have a skin that is not functioning and our medical literature is full of cases of cancer—carcinoma that have developed upon a senile skin following an X-ray burn.

"Q. You give your professional opinion to the effect that Mrs. Coover at this time might be in danger of a cancerous growth? A. I do not say that she has a cancerous growth, she has not, but a cancer may develop on this area—it is common."

He also testified:

"Q. Her face is slightly scarred at this time? A. Yes.

"Q. Will that be permanent? A. That will be permanent, and there may possibly be some further changes in the skin. On this senile skin not infrequently develops new growths, little neoplasm, warty growths, and from these warty growths, the carcinoma develops; sometimes that is a year, sometimes it is two years—sometimes it is three or four years before they develop."

He also testified that over the area affected the plaintiff has a skin that is predisposed to cancer, that she had some disturbance with the sensory nerves of her face, and then:

"Q. In the event the sensory nerves have been destroyed, in this portion of the face that is burned or impaired, what would be the natural consequence of such a condition. In other words, what effect would that have on Mrs. Coover? A. The most important sequela from a dermatological standpoint is the possibility of carcinoma—of a cancer."

In reply to questions by the court, he testified as follows:

"Q. I had more particular reference to the possibility of developing cancer. A. You say does it always? Not always.

"Q. It may happen that she can go on through life without that occurring, I suppose? A. It is possible, but we do find many times, carcinoma developing upon the scars of X-ray burns, in all of our literature they speak of that as very, very likely sequela, it is the thing to be guarded against and to be watched."

The plaintiff's husband testified as follows:

"Q. What have you noticed as to her nervous temperament or disposition since the X-ray burn? A. So much so that at night when she would retire possibly around seven

o'clock for the last fourteen or fifteen months, it would be twelve probably, to one or two o'clock in the morning before she would doze off at all, then at times she would wake up from the rest of the night with the movement of her arms, or twitching of her limbs to such extent it would wake her up again.

"Q. Does that condition continue down to this time? A. Even until last night."

[1] While there was evidence that the plaintiff's nervousness could have been caused by the X-ray burns and other evidence that the same may have been otherwise contributed to in part, any conflict arising therefrom was for the jury, and, if that was considered at all in arriving at the verdict, it could not be disturbed on appeal.

Appellant argues that the evidence as to the possibility of cancer is wholly conjectural and uncertain, and that that element could not have rightfully been considered by the jury. The court instructed the jury that they were to consider as elements of damage only such physical injury as they may find the plaintiff is certain to suffer in the near future. If we assume that respondent's skin condition was considered by the jury, it by no means follows that this was improper. While the actual condition of cancer may have been conjectural and uncertain, the record contains positive evidence that a condition actually exists which makes this dread disease much more likely. We think this predisposition in itself is some damage, and, when caused by the wrongful act of another, it is an interference with the normal and natural conditions and rights of the other, which must be held to be a real and not a fanciful element of damage. The necessity of constantly watching and guarding against cancer, as testified to by the physician, is an obligation and a burden that the defendant had no right to inflict upon the plaintiff.

The appellant further argues that the evidence shows the disfiguration of the plaintiff was slight. While it is true that one witness replied in the affirmative to the question, "Her face is slightly scarred at this time?" the other evidence above referred to is to the contrary, and we cannot hold, in the face of such other evidence, that the scar and disfiguration were not of considerable proportions. Not only was the conflict in the evidence one for the jury to decide, but the best evidence was before them. While the plaintiff is married and forty-five years of age, it does not follow that such disfiguration is not a material element in the damage she suffered. While advancing years, in spite of some other compensation, bring a change in the fact, and perhaps in the relative importance, of the appearance of the natural features, even a person of middle age has a substantial right not to have this change hastened or ag-

gravated by the wrongful act of another, and especially so when the result amounts to an actual disfiguration.

[2, 3] In the case of *Kelley v. Hodge Transportation System*, 197 Cal. 598, 242 P. 76, 81, the rule is set forth as follows: "Unless we are able to say that the award of damages made by the jury and sustained by the trial court were grossly disproportionate to any compensation reasonably warranted by the facts as presented to us on appeal as to shock the sense of justice and raise at once a presumption that it was the result of passion, prejudice, or corruption, rather than an honest and sober judgment, this court may not exercise the power of revision. 8 Cal. Jur. 834; *Holmes v. California Crushed Fruit Co.*, 69 Cal. App. 779, 232 P. 178; *Zibbell v. Southern Pacific Co.*, 160 Cal. 237, 116 P. 513."

From the record before us we are unable to say that the amount of the verdict is such as to shock the sense of justice, or to raise any presumption that the same was the result of passion or prejudice on the part of the jury.

The judgment appealed from is affirmed.

We concur: MARKS, Acting P. J., BEAUMONT, Justice pro tem.

105 Cal. App. 60

H. W. SMITH, Inc., v. SWENSON.

Civ. 3841.

District Court of Appeal, Third District.
California.

April 2, 1930.

1. Trial $\S$ 366 — General verdict — Acquiescence — Waiver.

Objection to absence of general verdict was waived by failure to object when trial court announced only special issues would be submitted.

2. Corporations $\S$ 80(11) — Corporation's agent — Evidence — Sufficiency — Sale of stock.

Jury was warranted in finding person inducing sale of stock who appeared with dividend check following letter from corporation was company's agent.

The letter from the company stated that the dividend check would be delivered by representative who would not only deliver the check but would tell the defendant of the success of the company.

3. Corporations $\S$ 80(5) — Sale of stock — Representation of fact — Future dividends.

Representation of corporation's agent selling stock that corporation on following

February would declare 15 per cent. dividend constituted representation of fact.

The statement that there would be second dividend of 15 per cent. in three months after a 4 per cent. dividend had been declared implied that the speaker was in possession of knowledge on which to base his assertion, and, if believed, constituted a persuasive selling point, and plaintiff, suing on note given for the price of the stock, should not be permitted to avoid defense of fraud on ground that statement was merely a promise.

4. Fraud ⇨12 — Representations — As to future — Speaker's knowledge.

Liability for fraud may be based on statements relating to future intended and accepted as representations of fact and involving matters peculiarly within speaker's knowledge.

5. Corporations ⇨80(10) — Sale of stock — Laches.

Purchaser of stock, when sued on note, was not precluded by laches from setting up fraudulent representations.

6. Witnesses ⇨374(1) — Interest — Evidence — Admissibility.

Evidence that former holder, who was important witness, had assigned note to plaintiff for collection on fifty-fifty basis, *held* admissible to show witness' interest.

Appeal from Superior Court, Butte County; H. D. Gregory, Judge.

Action by H. W. Smith, Inc., against P. J. Swenson. Judgment for defendant, and plaintiff appeals.

Affirmed.

Fabian D. Brown, of San Francisco, for appellant.

George F. Jones, of Oroville, for respondent.

FINCH, P. J.

The plaintiff brought this action to recover the amount of three promissory notes given by the defendant to the A. Meister Sons Company in part payment of the purchase price of 30 shares of the capital stock of that company. The only defense relied on by the defendant is that he was induced to purchase the stock by fraudulent representations made to him by the company and its agent, John Blackburn. Judgment was entered in favor of the defendant, and the plaintiff has appealed.

[1] The trial court submitted special issues to the jury, but no general verdict was returned. Appellant contends that this was

error. The plaintiff did not demand a jury. At the beginning of the trial, the court announced that only special issues would be submitted to the jury. Neither party made any objection to the procedure announced, and therefore it must be held that the objection here urged by the appellant was waived by the plaintiff's acquiescence at the trial. *Dyer Bros. G. W. I. Wks. v. Central I. Wks.*, 72 Cal. App. 202, 205, 237 P. 386. The special issues seem to cover all matters in controversy, and therefore the plaintiff's rights were in no manner prejudiced by the course pursued.

[2] It is urged that there is no proof that Blackburn was the agent of the company. In the early part of December, 1922, the defendant, who then owned 15 shares of the capital stock, received a letter from the company containing, among other statements, the following:

"Your dividend check will be delivered to you by my personal representative, whom I am sending not only to deliver to you your check, but to tell you the 'How and Why' of the success of your company. * * * Your board of directors are about to take under consideration the matter of increasing our shares from a price of \$100 per share to a price of \$125 per share. This action is due to the profits earned as well as to the increase in assets in the form of future work already contracted for. * * * This advance in price would be very beneficial to your present holdings and we want you to be fully advised relative to same."

A few days after the receipt of this letter by the defendant, Blackburn appeared with the defendant's dividend check, and induced him to purchase the stock involved in this action. The company accepted the defendant's promissory notes, and issued the stock which Blackburn had sold to him, but the stock was not delivered. There is no substantial contradiction of the foregoing evidence relating to Blackburn's authority, and the logical inference therefrom is that he was the authorized agent of the company. Certainly such evidence warrants an inference of ostensible agency.

The jury found that Blackburn fraudulently represented to the defendant "that The A. Meister Sons Company was doing a tremendous business and that said company had the money available to do so and would declare a 15 per cent. dividend on its capital stock in February, 1923." The court adopted the findings of the jury and made additional findings, one of which is that Blackburn represented "that in February, 1923, there was to be a special dividend declared." There is not sufficient evidence to sustain the finding that the company was not doing a tremendous business, but there is ample evidence to show that Blackburn represented that the com-

pany "would declare a 15 per cent. dividend * * * in February, 1923," and that such representation was untrue. The defendant testified that Blackburn said that such dividend "was already voted," and that "it was to be declared in February." It is unnecessary to consider the technical distinction, if any, between "voting" a dividend and "declaring" one. The plain inference from the representation in question is that the company had definitely decided to declare a dividend of 15 per cent. in February, 1923. The evidence shows that the board of directors of the company, at its meeting in November, 1922, discussed the question of declaring a dividend in February, 1923, but came to no conclusion in the matter, and that at the February meeting it was decided not to declare a dividend. The only dividend the stockholders ever received was the one declared at the meeting of the board in November, 1922, the defendant's share of which was represented by the check in Blackburn's possession when he sold the 30 shares of stock to the defendant.

[3, 4] Appellant contends that Blackburn's statement to the defendant was a "promissory representation rather than a statement of fact." The representation, however, related to matters peculiarly within the knowledge of the company and of which the defendant was without knowledge. The statement that there would be a second dividend of 15 per cent. in three months after the one of 4 per cent. had been declared implied that the speaker was in possession of knowledge upon which to base the assertion, and, if believed, constituted a persuasive selling point, as it was doubtless intended. It is a matter of daily observation that the publication of a statement that a corporation will, at a stated future time, declare a large dividend is accepted by the buying public as the statement of a fact, and results in a great increase in sales of the corporation's capital stock. Such a statement is designed to create the belief that it is based upon facts within the knowledge of the person making it, and, after he has accomplished the designed purpose, he ought not to be permitted to escape liability on the mere ground that his fraudulent statement is not a representation of fact. "The fact that statements relate to the future will not preclude liability for fraud if such statements were intended and accepted as representations of fact and involved a matter peculiarly within the speaker's knowledge." 26 C. J. 1090. The representation under consideration is similar in principle to that involved in *California C. & C. Corp. v. Carpenter*, 77 Cal. App. 18, 28, 246 P. 126, 130, where-

in it is said that the representation that a packing plant would be located at Sacramento was "the representation of a material existing fact—the fact that the determination had then been fixed upon by the packing company to establish a packing house and stockyards at Sacramento." See, also, *Russ Lumber & Mill Co. v. Muscupiabe Land & Water Co.*, 120 Cal. 521, 529, 52 P. 995, 65 Am. St. Rep. 186, and *California Credit, etc., Corp. v. Goodin*, 76 Cal. App. 785, 796, 246 P. 121. The rule to be applied in a case such as this is analogous to that applicable where the issue is whether a given statement is a representation of fact or a mere expression of opinion. "It is the general and well-settled rule that, when a representation concerning the subject-matter of a transaction which might, ordinarily, be only the expression of an opinion is asserted as an existing fact, material to the transaction, and which has a reasonable tendency to induce one of the parties to the transaction to consider and rely upon such representation as a fact, the statement then becomes an assertion of an existing fact within the meaning of the general rule as to fraudulent representations." *Harris v. Miller*, 196 Cal. 8, 13, 235 P. 981, 983; *Neff v. Engler* (Cal. Sup.) 271 P. 744; *Antognini v. Grandi Co.*, 89 Cal. App. 628, 643, 265 P. 378; *Davis v. Monte*, 81 Cal. App. 164, 171, 253 P. 352; *Haserot v. Keller*, 67 Cal. App. 659, 670, 228 P. 383.

[5] Appellant contends that the defendant has been guilty of such laches as to bar his right to set up the defense of fraudulent representations. The contention is without merit. *Neff v. Engler*, supra; *J. B. Colt Co. v. Freitas*, 76 Cal. App. 278, 287, 244 P. 916.

[6] June 26, 1924, the A. Meister Sons Company was adjudged a bankrupt. Thereafter the trustee in bankruptcy sold all the assets of the company to Feigenberg Bros. Feigenberg Bros. assigned the promissory notes in suit to C. R. Woodruff, who was assistant to the president of the company at the time the notes were executed. Woodruff assigned the notes to the plaintiff for collection. Over the plaintiff's objection, the court admitted evidence to the effect that Woodruff had assigned the notes to the plaintiff for collection on a percentage of "fifty-fifty." Appellant urges that it was error to admit such evidence. Woodruff was an important witness in the case, and it was material to show that he was financially interested in the outcome of the suit.

The judgment is affirmed.

We concur: PLUMMER, J.; R. L. THOMPSON, J.

105 Cal. App. 133

**HOPKINS v. SUPERIOR COURT IN AND
FOR CITY AND COUNTY OF SAN
FRANCISCO et al.**
Civ. 7362.

District Court of Appeal, First District,
Division 2, California.

April 8, 1930.

1. Statutes $\S$ 231 — Construction — Conflict.

Sections of Code must be read in harmony if possible and if conflicting, one later enacted controls.

**2. Depositions $\S$ 19 — Manner of taking —
Nonresidents — Determination by trial court.**

Under statutes, trial court could determine that depositions of nonresident witnesses, which plaintiff sought to have taken upon oral interrogatories, should instead be taken upon written interrogatories (Code Civ. Proc. $\S$ § 2024, 2025, 2025½).

Mandamus proceeding by Arthur Hopkins against the Superior Court in and for the City and County of San Francisco and another, to compel respondent court to make an order directing that certain depositions of witnesses be taken upon oral interrogatories.

Writ denied.

Robert M. Searls, William F. Humphrey, and Morgan J. Doyle, all of San Francisco, for petitioner.

Morris M. Grupp, of San Francisco, and John A. Deweese, of Los Angeles, for respondents.

NOURSE, P. J.

This is an original proceeding in mandamus to require respondent superior court to make its order directing that certain depositions of witnesses be taken in the state of New York upon oral interrogatories.

Petitioner herein is plaintiff in an action pending before the respondent superior court in which action the respondent Woodward has appeared as one of the defendants. The plaintiff in said action gave to the defendant notice of his motion that the deposition of plaintiff and of one Lyons be taken in the city of New York upon oral interrogatories. Attached to the notice of motion was an affidavit in which the affiant gave as his opinion that these depositions could only be satisfactorily obtained through the use of oral interrogatories. Objections were filed on behalf of defendant Woodward showing that, by reason of a temporary restraining order obtained by the plaintiff in the action pending, the defendant had become insolvent and was without means to employ counsel in the city of New York to attend the taking of the

depositions. Other facts were stated which tended to show that the depositions might be taken by written interrogatories without prejudice to the plaintiff. After a full hearing upon the motion, the respondent court made its order that the depositions of these witnesses should be taken upon written interrogatories.

The question presented in this proceeding is whether the superior court has jurisdiction to determine in each particular case whether a deposition of a nonresident witness should be taken upon written interrogatories or upon oral examination. Section 2024, Code of Civil Procedure, provides that a deposition of a witness out of the state may be taken upon a commission issued by the court upon an order of the court on the application of either party upon five days' previous notice to the other. Section 2025, Code of Civil Procedure, provides that the party moving for the commission must attach to the notice of motion the interrogatories upon which he desires it to be taken, unless this is waived by the other party. Provision for the filing of cross-interrogatories and the settlement by the court follow, and the section concludes with: "When agreed upon or settled, the interrogatories must be annexed to the commission; or, when the parties agree to that mode, or the court on the application of either party, after a hearing had upon two days' notice to the opposite party, so directs, the examination must be without written interrogatories." Section 2025½ provides that when a party shall desire to take the evidence of a nonresident witness he "may have a commission directed in the same manner as provided in section two thousand and twenty-four, Code of Civil Procedure, to take such evidence, upon interrogatories to be propounded to the witness orally."

Section 2025½ was added in 1903. At the time this section was enacted the preceding section read (following provisions relating to the settlement of written interrogatories), "or, when the parties agree to that mode, * * * the examination must be without written interrogatories." It will be noted that when section 2025½ was enacted there was no provision of the Code authorizing the trial court to direct the taking of a deposition without written interrogatories, unless such method was agreed to by the parties in the action. However, by amendment approved in 1907, the Legislature changed the provisions of section 2025 by expressly giving to the court "on the application of either party" the power to direct examination to be without written interrogatories.

[1, 2] Following the well-accepted rule that all sections of the Code are to be read in harmony when possible, and that if there be any conflict in these sections the one later in

enactment shall control, we conclude that the clear purpose of the Legislature, in the matter of taking depositions of nonresident witnesses, is that either party may initiate a proceeding for the taking of a deposition of such a witness either upon written interrogatories or upon oral examination, but that in either case the trial court is vested with the discretion, after a hearing as provided in section 2025, to direct the mode in which the examination is to be taken. Here the only apparent conflict between the two sections would arise by reading the word "may" in section 2025½ as "must," so that the section would provide that whenever either party requested it the court *must* direct a commission upon oral examination no matter what the circumstances of the case might be. But it is not necessary that we thus alter the expression used by the Legislature in order to create a conflict between the two sections. Reading the section as enacted, it means that either party may move that such a commission be issued and that after a hearing as provided in section 2025, if the court so directs, then such examination must be without written interrogatories.

As we conclude that the trial court had jurisdiction to determine in what manner the examination was to be held, it is unnecessary to consider other points discussed in the briefs, because we are satisfied upon this record that the discretion imposed in the trial court has not been abused.

The writ is denied.

We concur: STURTEVANT, J.; BURROUGHS, Justice pro tem.

**MORGAN v. SUPERIOR COURT, IN AND
FOR KINGS COUNTY et al.★**
Civ. 300.

District Court of Appeal, Fourth District,
California.

March 29, 1930.

Rehearing Denied April 14, 1930. Hearing
Granted by Supreme Court May 27, 1930.

1. Justices of the peace ⇨125(2) — Statutory notice.

Statutory written notice of judgment in justice's court must be given before judgment becomes effective, unless it has been waived (Code Civ. Proc. § 893).

Code Civ. Proc. § 893, provides that judgment of justice's court shall have no effect for any purpose until it is entered by the justice of the peace and written notice of the rendition of judgment is given to the party in writing signed by the justice.

2. Justices of the peace ⇨125(2) — Judgment — Statutory notice — Waiver.

Oral statement of justice court's decision in presence of plaintiff did not waive statutory notice required before judgment became effective (Code Civ. Proc. § 893).

3. Justices of the peace ⇨125(2) — Judgment — Rendering — Entry — Docket.

Judgment in justice's court is not rendered until it is entered in docket.

4. Justices of the peace ⇨125(2) — Judgment — Statutory notice — Waiver.

Right of statutory notice of entry of justice court judgment was not waived by letter to justice giving amount of plaintiff's costs (Code Civ. Proc. §§ 893, 896, 911).

Code Civ. Proc. § 896, provides that justice must include in the judgment the costs allowed by law to the prevailing party, while section 911 of the same Code provides that the justice must enter in his docket the judgment which must specify the costs included therein.

5. Prohibition ⇨27 — Execution — Justice's court — Presumption of legality.

In absence of contrary showing, it must be assumed that justice issued execution legally (Code Civ. Proc. § 901).

6. Justices of the peace ⇨125(2) — Statutory notice — Waiver — Execution.

Taking out execution is waiver of statutory notice of entry of judgment (Code Civ. Proc. § 893).

7. Justices of the peace ⇨155(1) — Judgment — Appeal — Time.

Appeal could not be taken more than 30 days after suing out execution on judgment in justice's court which was waiver of notice of judgment (Code Civ. Proc. § 974).

Code Civ. Proc. § 974, authorizes appeal from justice's court judgment in civil action within 30 days from judgment.

Application for writ of prohibition by J. P. Morgan, directed to the Superior Court in and for Kings County and another.

Writ granted.

A. C. McClellan, of Corcoran, for petitioner.

Clarence H. Wilson, of Los Angeles, for respondents.

BARNARD, Acting P. J.

This is a petition for a writ of prohibition. The petition and the answer show the following facts: On September 17, 1929, an action was commenced in the justice's court of Corcoran township, in the county of Kings, to

collect \$95.25 from the defendant, the petitioner herein. A writ of attachment was issued and levied by the constable upon a crop of growing cotton belonging to said defendant. The action was tried on November 12, 1929, and at that time the justice of the peace orally stated that he would give judgment for the plaintiff, who was then present in court with his attorney. It does not appear when the judgment was actually entered.

Prior to the trial of the action, the plaintiff, acting for the constable, harvested the crop of cotton, which amounted to eight bales. On October 25, 1929, the justice's court made an order releasing from the attachment four bales of said cotton, which were turned over to the defendant without his paying any part of the cost of picking, ginning, hauling, and baling the same. On November 20, 1929, plaintiff's attorney wrote a letter to the justice of the peace, stating that his costs were \$6.75. On November 21, an execution was issued, and on November 22 the defendant in said action deposited in said court the sum of \$105.54, covering the amount of the judgment and costs. On November 27, 1929, the plaintiff filed a motion to modify said judgment and quash the execution issued, in order to have said judgment include as costs the sum of \$273.54, in lieu of the \$6.75, it being claimed that this additional amount was spent by him, under the direction of the constable, in harvesting, ginning, and baling said crop of cotton. Said motion was heard in the justice's court, and was denied on December 26, 1929. On the same day, plaintiff served and filed notice of appeal, with the requisite bond. Thereafter, in the superior court of Kings county, petitioner herein, being the defendant in said action, moved to dismiss said appeal on the ground that the same had not been taken within thirty days after notice of rendition of said judgment. Said motion was denied, and the plaintiff in said action then filed a notice of motion to set said cause for trial *de novo*. Petitioner is now seeking a writ of prohibition to prevent said superior court from proceeding with the trial of said action.

[1] Section 974 of the Code of Civil Procedure, as it now reads, provides that any party dissatisfied with the judgment rendered in a civil action in a justice's court may appeal therefrom at any time within thirty days after notice of the rendition of the judgment. Section 893 of the same Code provides that such judgment shall have no effect for any purpose until it is entered by the justice of the peace, and notice of the rendition of the judgment must be given to the parties in writing, signed by the justice. It is the general rule that, where a written notice is thus required by statute, it must be given, unless it has been waived by the party entitled to

claim the benefits of this provision. *Peterson v. Superior Court*, 30 Cal. App. 466, 158 P. 547, 548; *Mallory v. See*, 129 Cal. 356, 61 P. 1123. In the case of *Peterson v. Superior Court*, just cited, it was held that, under section 859 of the Code of Civil Procedure, the time within which application must be made for the relief provided for in said section begins to run from the time of service of the written notice. This same ruling is followed in the case of *Arbogast v. Superior Court*, 32 Cal. App. 372, 162 P. 909. Section 974 of the Code of Civil Procedure was amended in 1921 by changing the time within which an appeal might be taken from thirty days after rendition of the judgment to thirty days after notice of the rendition of the judgment. The rule thus earlier established for a similar situation was applied by this amendment to the time within which an appeal may be taken from the judgment in a justice's court, and this time does not begin to run until notice is given of the rendition of the judgment.

[2-4] It is conceded by all parties that in the instant case no notice was given, as required by section 893 of the Code of Civil Procedure. Petitioner, however, contends that this notice was waived, since the plaintiff was present in court when the decision was announced; that the attorney for the plaintiff admitted knowledge of said judgment by filing a memorandum of costs, being the letter of November 20, 1929, above referred to; and, therefore that the notice of appeal filed on December 26, 1929, was too late. The oral statement of the court's decision in the presence of the plaintiff did not waive such notice. A judgment in the justice's court is not rendered until it is entered in the docket. *Thomson v. Superior Court*, 161 Cal. 329, 119 P. 98; *Wright v. Superior Court*, 57 Cal. App. 749, 207 P. 910. The plaintiff was entitled to written notice after the judgment was actually entered by the justice of the peace. Nor was this right waived by the letter of November 20, giving the amount of his costs. In the case of *Hughes Mfg. Co. v. Elliott*, 167 Cal. 494, 140 P. 17, 18, the court said:

"The rule is that, in order to deprive an appellant of his right to written notice of the entry of an order or judgment, there must be facts of record clearly indicating a waiver of such notice. In *Mallory v. See*, 129 Cal. 359, 61 P. 1124, after reviewing the cases in which the conduct of appellants had been held to constitute waiver, this court said: 'The rule would therefore seem to be that written notice of filing of decision is in all cases required, unless waived by facts appearing in the records, files, or minutes of the court; and it follows that actual notice or knowledge, other than written notice, is insufficient in any case unless it appears, from facts thus evidenced, that written notice was waived.'"

In the case of *Nay v. Superior Court*, 72 Cal. App. 443, 237 P. 566, 567, the court uses this language:

"It has been decided a number of times that, where the statute requires written notice, actual notice is not sufficient, but these cases, and a number of authorities which might be cited, show that, where a party entitled to a written notice files a notice of appeal, or some paper necessitating further proceedings in the action, such proceeding constitutes a waiver on his part of the giving of the notice prescribed by the statute."

As the court said in *Peterson v. Superior Court*, supra:

"It is perfectly clear that the information obtained by Goldstein and the defendants of the entry of the judgment cannot be held to have amounted to the transmission to them of actual knowledge of the entry of said judgment. The information was the result of a mere hearsay statement, and, while it was doubtless sufficient to put the parties on their guard or to start them on an investigation which would lead to actual knowledge of the fact of the entry of the judgment, it did not, as stated, constitute actual knowledge. Nor did the mere preparation and verification of the affidavits by which the defendants intended to support their motion to vacate the judgment upon such information involve a waiver of notice of the entry of the judgment. The mere preparation and verification of the affidavits did not constitute 'a written admission' of knowledge, nor a 'motion to the court or other proceeding with reference to the decision, which presumed knowledge that the decision had been made.' The only motion or proceeding from which knowledge by the defendants of the entry of judgment may be presumed was the motion or application to be relieved from the default. And it was only when that application was filed that the waiver occurred, and consequently the time within which the defendants were required to make their motion and ask the action of the court thereon began to run from the date of the filing of said application."

[5-7] Section 896 of the Code of Civil Procedure provides that the justice must include in the judgment the costs allowed by law to

the prevailing party. Section 911 of the same Code provides that the justice must enter in his docket the judgment, which must specify the costs included therein. It cannot be held that in sending the amount of his costs to the justice on November 20, 1929, the plaintiff was doing anything other than furnishing information which might assist the justice in entering the amount of the judgment, and it cannot be assumed therefrom that he had knowledge that the judgment was entered, or that he waived the notice to which he was entitled. It does appear, however, that execution was issued on November 21, 1929. Section 901 of the Code of Civil Procedure provides that an execution may issue "on the application of the party entitled thereto." While the record does not show at whose request the execution was issued, under the statute the justice had the authority to issue the same only on the application of the plaintiff in that action. In the absence of any showing to the contrary, it must be assumed that the justice did his duty, and that the execution was legally issued. Having taken out the execution, the plaintiff knew of the judgment. Not only would this be actual notice, but the taking out of an execution is an act which necessarily presupposes knowledge of the entry of the judgment, as does the filing of a notice of appeal. See *Hughes v. De Mund*, 195 Cal. 242, 233 P. 94. Under the rules above set forth, the same must be held to be a waiver of the notice prescribed by the statute. The execution having been issued on November 21, 1929, the plaintiff had thirty days from that date within which to appeal. The appeal not having been taken within that time, it follows that the superior court has no jurisdiction to try the case.

We have reached this conclusion with reluctance, as the equities seem to favor the plaintiff in the original action. It was, however, incumbent upon him to comply with the positive rules of law, prescribing the time within which an appeal may be taken.

A peremptory writ of prohibition will issue as prayed for.

We concur: MARKS, J.; STROTHER, Justice pro tem.

105 Cal. App. 17

WYNNE v. WRIGHT.

Civ. 104.

District Court of Appeal, Fourth District, California.

March 31, 1930.

1. Appeal and error ⇨1010(1) — Review — Findings of trial court.

Judgment in favor of plaintiff would not be disturbed on appeal, if material evidence sustained findings of trial court.

2. Automobiles ⇨244(43) — Intersection collision — Contributory negligence.

Evidence held not to show that motorist suing for injuries struck at intersection by another approaching from right was contributorily negligent.

The evidence favorable to plaintiff motorist disclosed that he was proceeding at speed of not over fifteen miles an hour, at which speed he passed into intersection and that at time he entered intersection defendant motorist was approaching intersection at speed of from thirty-five to forty-five miles an hour, and there was nothing to obstruct plaintiff's view of defendant approaching one hundred and forty feet away from him.

3. Automobiles ⇨171(4) — Intersection — Right of way.

Under statute, motorist entering intersection when motorist on his right was 140 feet away from intersection traveling 35 miles per hour had right of way (California Vehicle Act, § 131).

California Vehicle Act, § 131 (St. 1925, p. 412), provides that, when two vehicles approach an intersection of public highways at approximately the same time, the vehicle approaching from the right shall have the right of way, provided such vehicle is traveling at a lawful speed.

4. Automobiles ⇨171(4) — Failure to yield right of way — Negligence per se.

Failure of motorist approaching from right at thirty-five to forty-five miles an hour to yield right of way to motorist in intersection would be negligence per se.

5. Automobiles ⇨244(35) — Intersection accident — Excessive speed — Negligence per se.

Motorist's speed of more than 40 miles per hour on city street at time of collision at intersection would be prima facie negligence per se.

6. Automobiles ⇨168(1) — Driving automobile — Failure to use due care.

Failure of motorist to see another in time to avoid accident did not excuse latter from

statutory duty regarding driving automobile at proper speed (California Vehicle Act, § 113).

California Vehicle Act, § 113 (St. 1927, p. 1436), imposes duty on driver of automobile to drive at a careful and prudent speed and at such speed as not to endanger the life, limb, or property of any person.

7. Automobiles ⇨245(1) — Evidence — Weight and sufficiency — Question for trial court.

Weight and sufficiency of evidence held for trial court trying action for damages arising out of automobile collision without a jury.

8. Automobiles ⇨245(1) — Credibility — Question for trial court.

Credibility of witnesses held for trial court trying action for damages from automobile collision without a jury.

9. Appeal and error ⇨1011(1) — Review — Findings — Conflicting evidence.

Judgment based on conflicting evidence would not be disturbed on appeal, where supported by competent and material evidence.

Appeal from Superior Court, Tulare County; Frank Lamberson, Judge.

Action by Arthur L. Wynne against Frank N. Wright. Judgment for plaintiff, and defendant appeals.

Affirmed.

Ray W. Hays, of Fresno, for appellant.

Logan Lindley, of Los Angeles, and J. Thomas Crowe, of Visalia, for respondent.

MARKS, Acting P. J.

This is an action for damages to personal property arising out of a collision between two automobiles at the corner of Frankwood and Manning avenues in Fresno county, Cal., at about 5 o'clock in the evening of February 14, 1928. The case was tried before the court without jury, and judgment was rendered in favor of the plaintiff for the sum of \$921.75. The sole question presented on this appeal is whether or not the evidence showed the plaintiff guilty of contributory negligence as a matter of law.

[1] The trial court found in favor of the plaintiff and, therefore, if there is any material evidence in the record sustaining its findings, the judgment will not be disturbed here.

The Supreme Court has aptly stated the law of contributory negligence, governing here, in the case of Zibbell v. Southern Pacific Co., 160 Cal. 237, 116 P. 513, 515, as follows:

"The law of this state is so well settled that it may be briefly summarized. Contributory

negligence is a defense the burden of proving which rests upon defendant. *Schneider v. Market St. Ry. Co.*, 134 Cal. 482, 66 P. 734; *Hutson v. Southern California Ry. Co.*, 150 Cal. 701, 89 P. 1093. Therefore in this state it is not incumbent upon the plaintiff—as it is in certain other jurisdictions—to establish affirmatively that he was free from negligence. It is incumbent upon the defendant to establish the existence of his [plaintiff's] contributory negligence. Again, the question of whether or not a plaintiff has been guilty of contributory negligence is usually one of fact for the jury's verdict.

"It is only where no fact is left in doubt, and no deduction or inference other than negligence can be drawn by the jury from the evidence, that the court can say as a matter of law that contributory negligence is established. Even where the facts are undisputed, if reasonable minds might draw different conclusions upon the question of negligence, the question is one of fact for the jury." *Johnson v. Southern Pacific R. R. Co.*, 154 Cal. 285, 97 P. 520; *Seller v. Market-St. Ry. Co.*, 139 Cal. 268, 72 P. 1006; *Herbert v. Southern Pacific Co.*, 121 Cal. 227, 53 P. 651."

With these rules in mind we will summarize the evidence favorable to the plaintiff and to which we must look to support the judgment, if it is to be supported. That the evidence was conflicting must be admitted, but, as the trial court has resolved all conflicts in favor of the plaintiff, we do not need to lengthen this opinion with a discussion of them.

Plaintiff was an automobile dealer, and on the day of the accident had secured a new car in Fresno which he was driving to his place of business in Dinuba. He was proceeding south on Frankwood avenue, and as he approached the north line of Manning avenue he slowed his car to a speed of not over fifteen miles an hour, at which speed he passed into the intersection and to the point of the collision. At a point on the west half of Frankwood avenue south of the center line of Manning avenue his car was struck on its right-hand side by the defendant's automobile. As the plaintiff was approaching the intersection he looked in both directions, but did not see the defendant's car, and did not know of its approach until the collision. The defendant was approaching the intersection at a rate of speed variously estimated at from thirty-five to forty-five miles per hour. At a point on Manning avenue between forty and sixty feet west of the intersection, the defendant's wife called his attention to plaintiff's car. As to its position at this time, defendant himself testified as follows:

"Q. Isn't it a fact, Mr. Wright, Mr. Wynne was actually in the intersection when you first saw him? A. Well, I couldn't tell you definitely, it looked to me, when I first saw him—whether he was closer there or not, I absolutely—

"Q. Wasn't he actually in the intersection when you first saw him; not when your wife first spoke, but when you first saw him, wasn't he right there in front of you? A. Yes. Yes, he was, at the time I saw him."

There were skid marks upon the road made by the tires of defendant's car for about forty feet from the point of impact showing that he had applied his brakes for that distance. When the plaintiff was entering the intersection the defendant's car was about one hundred forty feet west of the point of the collision. At the point where plaintiff testified he looked up and down Manning avenue, there was nothing to obstruct his view of defendant's car, and there was nothing to obstruct the defendant's view of plaintiff's car for more than the last one hundred forty feet of its course before the accident. While the testimony was far from conclusive, it, with the physical facts appearing at the time of the accident, would support the trial court in concluding that the defendant was approaching the intersection at a speed of considerably more than forty miles per hour up to the point where he applied his brakes and partially checked his speed.

[2] Upon the facts which we have stated we are asked to hold that the plaintiff was guilty of contributory negligence as a matter of law and cannot recover. The defendant invokes the doctrine that for one to look and fail to see that which is in sight is as neglectful as not to look at all. For the purpose of this decision, therefore, we will assume that when he was entering the intersection and looked, the plaintiff saw, or should have seen, the defendant's car one hundred and forty feet away from him, approaching from the west. Would this fact be sufficient to charge the plaintiff with contributory negligence? In other words, does the law require a person to stop his car upon reaching an intersection if he sees another automobile approaching from the right at a distance of one hundred forty feet away and permit such other car to pass, and, if he fails to stop, does he subject himself to the charge of contributing to an ensuing accident if the driver of the approaching car keeps on his course and runs the first car down? We do not believe that the law requires any such conduct. If such were the law, picture the condition at a busy intersection with traffic flowing in all directions. No one could enter the intersection without being guilty of contributory negligence.

Section 131 of the California Vehicle Act in effect at the time of this accident provided in part as follows: "When two vehicles approach an intersection of public highways at approximately the same time, the vehicle approaching from the right shall have the right of way, provided such vehicle is traveling at a lawful speed." St. 1925, p. 412.

[3-5] Under the language of this statute the plaintiff clearly had the right of way at this

intersection. *Lipp v. Moon* (Cal. App.) 280 P. 710. While the plaintiff was exercising ordinary care in the operation of his car, he had the right to assume that the defendant would also use ordinary care to avoid an accident and would obey the law and yield the right of way at the intersection. *Crabbe v. Rhoades* (Cal. App.) 282 P. 10. Besides failing to yield the right of way to plaintiff, which was in itself a violation of law under the circumstances of this case and therefore was negligence per se, the defendant's speed, if he was driving at more than forty miles per hour, was prima facie negligence per se. *Benjamin v. Noonan* (Cal. Sup.) 277 P. 1045; *Bugby v. Lewis* (Cal. App.) 283 P. 958. The physical facts appearing at the time of the accident support the testimony of one witness to the effect that the defendant's speed in approaching the intersection was in excess of forty miles per hour. As we have seen, his tires made skid marks on the roadway for about forty feet preceding the point of the collision. The force of the impact was sufficient to turn plaintiff's car over on its top with its wheels in the air. The defendant's car turned completely around so that when it came to rest it was facing in the direction from which it approached the intersection. The plaintiff's car traveled about forty feet from the point where it entered the intersection to the point of the collision and during the same time the defendant traveled one hundred and forty feet or more. The speed of the defendant must have been at least three times that of the plaintiff, and if, as urged by the defendant, the plaintiff was driving at more than fifteen miles per hour, the defendant's speed must have been considerably in excess of the rate fixed by law. When the plaintiff entered the intersection the distance of the defendant's car from him was such that a reasonably prudent person might have believed that the defendant would see what was in front of him and so control his car as to avoid a collision instead of driving straight into the plaintiff's automobile. *Commonwealth Ins. Co. v. Cement Co.*, 69 Cal. App. 165, 230 P. 995.

[6] If, as maintained by the defendant, a duty rested upon the plaintiff to look and see the defendant approaching the intersection, a like duty rested upon the defendant to look and see the plaintiff in the intersection. Because he failed to look, or failed to see the plaintiff in time to avoid running him down cannot excuse the defendant nor relieve him of the duty imposed upon him by law of driving his automobile "at a careful and prudent speed not greater than is reasonable and proper, having due regard to the traffic, surface and width of the highway," and at such speed as not to endanger the life, limb or property of any person. Section 113, California Vehicle Act, St. 1927, p. 1436.

[7-9] We are well aware that there is evidence in the record contradicting the facts we have set forth in this opinion. Upon the trial judge rested the responsibility and duty of determining the weight to be given to the evidence, its sufficiency, and the credibility of the witness. Where there is a conflict in the evidence there is no reason for disturbing a judgment when, as in this case, it is supported by competent and material evidence.

Judgment affirmed.

We concur: BARNARD, J.; BEAUMONT, Justice pro tem.

105 Cal. App. 142

ALLENBERG v. RAPKEN & CO., Limited.
Civ. 7188.

District Court of Appeal, First District, Division 1, California.

April 9, 1930.

Appeal and error ⇄ 766 — Record — Recitals in brief — Motion to affirm.

Portions of record recited in appellant's brief are presumed portions desired to be called to court's attention, precluding motion to affirm judgment (Code Civ. Proc. § 953a).

Appellee moved to affirm judgment on ground that appellant failed to point out or set forth, in brief in accordance with provisions of Code Civ. Proc. § 953a, any part of record sufficient to justify reversal or present issues before Court of Appeal.

Appeal from Superior Court, City and County of San Francisco; A. B. McKenzie, Judge.

Action by B. P. Allenberg against Rapken & Co., Limited. Judgment for plaintiff, and defendant appeals. On motion to affirm judgment.

Motion denied.

Lucius L. Solomons, of San Francisco, for appellant.

J. H. Sapiro, of San Francisco, for respondent.

TYLER, P. J.

Motion to affirm judgment on the ground that appellant has failed to point out or set forth in his brief or any supplement thereto, in accordance with the provisions of section 953a of the Code of Civil Procedure, any part of the record sufficient to justify a reversal or present any issues before this court as to which said appeal has been taken. An examination of appellant's brief reveals the fact that he has set forth in his brief certain por-

tions of the record. It will be presumed that they are the portions that he desires to call to the attention of the court. *Schurman v. Look*, 190 Cal. 113, 210 P. 816.

The motion is denied.

We concur: KNIGHT, J.; CASHIN, J.

105 Cal. App. 35

JAMES ROLPH & CO. v. KRUEGER.

Civ. 6987.

District Court of Appeal, First District, Division 1, California.

April 2, 1930.

1. Venue $\S$ 69 — Motion — Answer on file — Motion to retain jurisdiction.

If defendant before hearing on motion for change of venue files answer, court may entertain motion to retain case for convenience of witnesses (Judicial Council Rule XX6(a).

Rule XX 6(a) of the Judicial Council, in force at time of proceedings in question, required defendant, under possible penalty of default judgment, to file answer at same time demurrer was filed.

2. Venue $\S$ 40 — Motion.

Court must allow change of venue to defendant's residence, absent counter showing, if answer is not filed and moving papers are proper.

Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

Action by James Rolph & Co., a corporation, against C. G. Krueger. From an order granting plaintiff's motion to retain the cause in the San Francisco court on the ground of convenience of witnesses, and from an order denying defendant's motion for a change of venue, defendant appeals.

Orders affirmed.

Alfred C. Skaife, of San Francisco, and Walter E. Barry, of Los Angeles, for appellant.

Resleure & Hill, of San Francisco, for respondent.

McKENZIE, Justice pro tem.

Plaintiff commenced an action in the superior court of the city and county of San Francisco against the defendant. In due time defendant appeared in said action and filed a demurrer and answer to the complaint, and at the same time filed a notice of motion to the end that the action be transferred to Los Angeles county, his place of residence. Be-

fore the motion for change of venue came on for hearing, plaintiff filed a notice of motion to the end that the action be retained and tried in the San Francisco court on the ground of the convenience of witnesses. Defendant did not file any affidavit or make any showing in opposition to plaintiff's motion; nor did plaintiff in any way contest the sufficiency of defendant's showing in regard to having the case transferred to Los Angeles. Both motions came on for hearing at the same time and the trial court granted plaintiff's motion and denied that of the defendant. From both orders, the defendant appeals.

The issue presented to this court is free from technicalities and is directed solely to the question as to whether or not under rule XX6(a) of the Judicial Council (which was in force at the time the proceedings herein were had, and which required a defendant, under a possible penalty of a default judgment, to file an answer in the case at the same time as he filed a demurrer), operated to deprive a defendant of his right to have the cause of action moved to the county of his residence, by permitting the plaintiff to make a counter motion to retain the action for trial in the county in which it was brought, on the ground of the convenience of witnesses.

This rule of the Judicial Council has been abrogated; consequently, the decision in this case will not affect present practice.

[1] It is conceded that at all times from the beginning of California's systems of law up to the time when these motions were heard, it was the practice to entertain in the court where the action was commenced a motion to retain for trial in said court the action on the ground of convenience of witnesses, if the defendant had on file an answer prior to the time his motion for change of venue to his place of residence was heard.

[2] Appellant's position is that under the rule he was compelled to file an answer or risk the hazard of having a default judgment entered against his client. We think appellant was unduly apprehensive about what might follow if he had not filed his answer. Viewing the situation at its worst, the danger that appellant thought he was confronted with could be avoided with slight effort. If the answer had not been filed, the court was bound to grant his motion for change of venue to Los Angeles, providing his moving papers were in proper form and there was no counter showing. When his motion was granted he could have asked leave to file his answer. If the court refused, which is not likely, on the ground it had lost jurisdiction, he could have requested that the answer be annexed to the other papers. If this were refused he could get his answer to Los Angeles before the clerk

of the court could get the record there. There are a number of other ways *hazard* could be avoided without much effort. We are of the opinion that a long-established and well-understood rule of law should not be changed or disregarded by judicial construction for reasons guided by fancy rather than reason and experience.

The orders appealed from are affirmed.

We concur: TYLER, P. J.; CASHIN, J.

105 Cal. App. 145

PEOPLE v. VICUNIA.

Cr. 1925.

District Court of Appeal, Second District, Division 2. California.

April 9, 1930.

1. Homicide ⚡254 — Second degree murder — Evidence — Sufficiency.

Evidence *held* to sustain conviction for murder in the second degree.

2. Homicide ⚡228(1) — Corpus delicti — Basis of offense — Existence of criminal agency.

Corpus delicti in murder prosecution consists of proof of fact forming basis of offense and existence of criminal agency.

3. Homicide ⚡228(2) — Corpus delicti — Proof — Circumstances — Inference.

Corpus delicti in murder prosecution may be proved by circumstances shown in evidence, or by inference drawn from facts.

4. Homicide ⚡228(1) — Corpus delicti — Evidence — Sufficiency.

Evidence in murder prosecution *held* to sufficiently establish corpus delicti.

5. Homicide ⚡300(14) — Instruction — Self-defense — Fear of bodily injury.

Instruction on self-defense failing to include element of fear of great bodily injury, arising from circumstances justifying reasonable man in entertaining such fear, was properly refused.

6. Criminal law ⚡755½ — Instruction — Matters of fact.

Refusal of proposed instruction fundamentally an instruction as to matters of fact was not erroneous.

Appeal from Superior Court, Los Angeles County; Carlos S. Hardy, Judge.

Cruz Vicunia was convicted of murder in the second degree, and he appeals.

Affirmed.

Sigmund S'Renco, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Ralph O. Mar-ron, of San Francisco, for the People.

NORTON, Justice pro tem.

[1] The defendant in this case was convicted of murder in the second degree and appeals from the judgment of conviction and the order denying his motion for new trial. The killing of the deceased, Santiago Fuentes, by the defendant, was admitted by him, and briefly stated the evidence by the prosecution upon the trial of the case showed that in the morning of the 20th of September, 1929, two days before the deceased was slain by the defendant, he met the deceased's wife near the station of the Pacific Electric Company at Los Nietos, where she was waiting to board a street car for Los Angeles, and endeavored to induce her to enter his automobile, and proposed to her that she go with him for the purpose of having illicit relations. He taunted her with the accusation that her husband was familiar with his, Vicunia's wife, and when she refused to accede to his proposal he threatened her husband, stating that he hoped to deprive her of him and allow him to "roll in his own blood." On the evening of the Sunday following this threat by defendant, to take the life of deceased, while Mrs. Fuentes was in her home she heard five shots fired in rapid succession, and looking out the front door of her home she saw her husband struggling with the defendant for the possession of a pistol which was in the hands of the defendant. That her husband finally secured possession of the pistol and shortly thereafter the defendant was seen by her running into his own house from which he presently left, in his automobile. No more than five shots were fired. The deceased was taken to a hospital and at the hospital the pistol, together with the five exploded shells, was surrendered by him to a friend of his who brought him to the hospital. The pistol was a .38 caliber Colts, and was admitted by the defendant to be his. Mrs. Fuentes testified her husband did not own a pistol and that she saw but one pistol at the time of the struggle between her husband and Vicunia. An autopsy was held after the death of the deceased which disclosed that he was suffering from two wounds, a basal fracture of the skull and a gunshot wound in the abdomen which caused his death. The surgeon who performed the autopsy found a bullet from a .38 caliber pistol in the soft tissues of the hip where it had lodged after passing through the iliac crest. A bullet hole was found in the fence in front of the Fuentes home, which tended to corroborate her testimony that the shooting occurred in front of the Fuentes house instead of, as claimed by the defendant, in front of his house, which was located in the lot adjoining

that of the deceased. Defendant and his family gave a different account of the transaction from that of the witness for the prosecution, but it was the province of the jury to determine where the truth lay and there is ample evidence to support the verdict of the jury.

The chief ground for reversal urged by appellant is the refusal of the trial court to direct the jury to bring in an instructed verdict of not guilty on the ground that the people failed to prove the corpus delicti. As above stated, there was testimony to the effect that defendant threatened to kill deceased; the testimony of the wife of deceased is to the effect that she heard five shots fired in rapid succession and saw defendant and the deceased struggling in the front yard of her home; that the struggle immediately succeeded the firing of the shots and that during the struggle she saw a revolver in the hands of the defendant. Admittedly, the shooting took place in the yard of either defendant or deceased and not in the house of defendant, and at the end of the struggle it is admitted that deceased was in possession of the gun belonging to defendant, and from which five shots had been fired.

[2-4] In a trial where the charge is murder, the corpus delicti consists of proof of the fact forming the basis of the offense and the existence of a criminal agency as the cause of it, and it may be proved by circumstances shown in evidence or by inference drawn from the facts shown. *People v. Ford*, 85 Cal. App. 258, 258 P. 1111. Obviously, the testimony of the wife of deceased, if believed by the jury, together with the admitted facts above mentioned, would have justified the jury in concluding that a criminal agency was the cause of the admitted death of the deceased and it is the opinion of the court that the proposed instruction was properly refused by the trial judge.

[5, 6] Numerous objections are urged, some to the refusal of instructions refused by the trial judge and others to instructions which were actually given by the trial judge. As to those given by the trial judge, it is sufficient to say that this court finds no error in any thereof. The instructions refused are not numbered and it is necessary in identifying them to refer to the page in the clerk's transcript in which they are contained. Instruction, page 40, clerk's transcript, proposed by defendant, was properly refused by the court for the reason that it did not include as an element for the justification of killing in self-defense that the fear of great bodily injury on the part of defendant arose from circumstances which were such as to justify a reasonable man in entertaining such fear. Instruction, page 43, clerk's transcript, as proposed to the court, was clearly an instruction to the jury as to matters of fact which was not within the province of the court. It is true that

this instruction might have been altered and reframed so as to contain a correct statement of the law, but to do so would have required more than the correction of a mere clerical error. The instruction, as proposed, was fundamentally an instruction as to matters of fact and not an attempt to define the law applicable to the case, and this court believes that the trial judge was justified in refusing to give the instruction in the form in which it was proposed. It is also covered by instructions given by the court wherein the court fully and fairly instructed the jury as to when a defendant can act upon appearances and justify the killing of another in self-defense.

Other grounds are urged for a reversal of the judgment and after consideration of them we are of the opinion that they are relatively trivial and without any merit.

The judgment and order are affirmed.

We concur: CRAIG, Acting P. J.; IRA F. THOMPSON, J.

105 Cal. App. 149

GELBACH v. DEWEY.

Civ. 5746.

District Court of Appeal, Second District,
Division 2, California.

April 9, 1930.

1. Bills and notes ⇨495 — Comakers — Liability — Presumption.

Liability of comakers on joint and several note is presumed equal, absent evidence to contrary.

2. Contribution ⇨9(5) — Action — Accommodation maker — Pleading.

Plaintiff suing comaker of note for contribution, contending his wife was mere accommodation and not comaker, *held* required to so allege in complaint.

3. Contribution ⇨4 — Joint note — Comakers — Liability.

Comaker of joint and several note, if compelled to pay more than share, *held* entitled to contribution; agreement respecting comakers' liability between themselves not being binding on payee.

Appeal from Superior Court, Los Angeles County; Harry R. Archbald, Judge.

Action by Fred N. Gelbach against L. D. Dewey. Judgment for plaintiff, and defendant appeals.

Reversed.

Eugene C. Campbell, of Long Beach, for appellant.

Stephen H. Underwood, of Long Beach, for respondent.

NORTON, Justice pro tem.

In this action the plaintiff recovered judgment against defendant, who was one of the comakers with plaintiff of a joint and several promissory note executed and delivered by the makers to the California National Bank of Long Beach. The plaintiff alleged in his complaint and the court so found that on the second day of January, 1926, at Long Beach, Cal., the plaintiff, defendant Dewey, R. D. Marshall, and Susan Gelbach, who is the wife of plaintiff, made and delivered to the California National Bank of Long Beach their joint and several promissory note in writing in the sum of \$5,500, payable one hundred and twenty days after date; that at maturity of said note the said bank demanded payment of the note and the plaintiff did pay the full amount of the principal of the note and \$450 of accrued interest; that at the time of the execution of the note the defendant, the plaintiff, and Marshall each agreed to pay at maturity one-third of the principal and interest of said note. In accordance with these findings the court concluded that plaintiff was entitled to recover the sum of \$1,983.34, being one-third of the amount paid by plaintiff in satisfaction of the said note and judgment was entered accordingly.

[1, 2] The principal ground of appeal is that the finding that the defendant agreed to pay one-third of the principal and interest of the note is not supported by the evidence. A careful examination of the record in our opinion reveals no evidence to warrant this finding, and none has been called to our attention by the respondent which would justify it. The fact appears to be, and the plaintiff so testified, that at the time the note was signed "nothing was said about it." The conclusion is therefore compelling that there was no express agreement between the plaintiff, Dewey, and Marshall that each should pay one-third of the note which evidenced their common debt to the bank. The finding is also contrary to the evidence. From the facts shown by plaintiff upon the trial no implied promise arose upon the part of Dewey to pay in excess of one-fourth at most of the joint indebtedness. The note being the joint contract of the parties, their liability was presumed equal in the absence of evidence to the contrary. *Bunker v. Osborn*, 132 Cal. 480, 64 P. 853; *Owens v. Blackburn*, 161 App. Div. 827, 146 N. Y. S. 966. Respondent, however, contends that the evidence

shows that Susan Gelbach, the wife of plaintiff, was an accommodation maker for the other parties and therefore not liable to make contribution. There is slight, if any, evidence to sustain this contention, and such evidence as there is in the record can be said to merely create a suspicion that the fact is as claimed by plaintiff. Moreover, it was not made an issue by the pleadings and no finding in that regard was made by the court. If the plaintiff claimed that Susan Gelbach was a mere accommodation maker on the note, he should have so alleged in his complaint.

In view of the contention of appellant and the holding here that the finding of the trial court that the defendant agreed to pay one-third of the amount of the note is not supported by the evidence, it is unnecessary to consider appellant's argument in support of the claim that the payment of plaintiff of defendant's proportionate share of the note was voluntary.

The evidence was sufficient if believed by the court to support the finding that defendant did not sign the note as an accommodation maker and as surety for plaintiff. There is sufficient evidence in the record to support the finding and for the court to conclude that this loan was obtained by plaintiff, Dewey, and Marshall from the California National Bank of Long Beach for the use of an oil syndicate for which they were trustees and in which they were financially interested and not for the accommodation of plaintiff. The finding that the plaintiff did not agree to hold the defendant harmless of the payment of the note likewise finds sufficient evidence to support it.

[3] The action is an action for contribution; the agreement alleged to have been made at the time the note was made as to how the payment should be shared is not inconsistent with their joint liability. It was not binding upon the bank, as it was not party to it. The only purpose the agreement could have served was to acknowledge that plaintiff and defendants were cosureties to the extent of one-third of the debt. The parties to the note were still jointly liable to the bank for the full amount thereof, and, if any of them were compelled to pay more than his share, he was entitled to contribution from his associates who failed to pay. *Flickinger v. Price*, 165 Iowa, 570, 146 N. W. 738.

The judgment is reversed.

We concur: CRAIG, Acting P. J.; IRA F. THOMPSON, J.

105 Cal. App. 206

DELLA v. HOME BANK OF PORTERVILLE et al.
Civ. 91.

District Court of Appeal, Fourth District,
California.

April 7, 1930.

1. Fraudulent conveyances — §132(1) — Sale without transfer — Effect — Buyer trustee for creditors.

Debtor's attempted sale of cattle to bank without transferring possession was void, and bank held proceeds of resale in trust for creditors (Civ. Code, § 3440).

Civ. Code, § 3440, provides that transfers of personal property are presumed to be fraudulent and therefore void against those who are seller's creditors, where seller is in possession, and sale is not accompanied by immediate delivery and followed by an actual and continued change of possession of thing transferred.

2. Banks and banking — §136 — Lien on customer's property — Void sale to bank.

Where sale of cattle to bank was void, bank could not justify its use of proceeds from resale under banker's lien statute (Civ. Code, § 3054).

Civ. Code, § 3054, provides that banker has a general lien, dependent on possession, on all property in his hands belonging to customer, for balance due to him from such customer in course of business.

Appeal from Superior Court, Tulare County; J. A. Allen, Judge.

Action by A. Della against the Home Bank of Porterville and another, doing business under the name of Shepard Bros. and Shepard Bros. Meat Market. From the judgment, defendants appeal.

Affirmed.

Max B. Jamison, of Porterville, for appellants.

Waldo E. Burford, of Porterville, for respondent.

MARKS, J.

Respondent brought this action to recover the sum of \$505.75 from appellants. It is based on a judgment rendered January 24, 1927, against appellant R. A. Shepard, doing business under the name of Shepard Bros. and Shepard Bros. Meat Market. Execution was issued and served on the Home Bank of Porterville and returned unsatisfied.

On and prior to April 20, 1926, the appellant Shepard conducted a meat market in the city of Porterville, Cal. The business

venture was a failure. Besides the account on which the judgment of January 24, 1927, was rendered, he owed respondent \$61.20, and owed the appellant bank \$3,625, evidenced by three promissory notes. There were also a number of accounts due to other creditors. Shepard was insolvent on and after March 5, 1926.

On March 5, 1926, Shepard gave the appellant bank a bill of sale to twenty head of steers and fifteen head of stock cattle located in a pasture on a ranch leased and occupied by him. On the same day the bank wrote Shepard a letter agreeing to sell the cattle and credit the net proceeds upon his notes. It did not take possession of the cattle. Some were butchered by Shepard and others he sold to a third party. On April 20, 1926, the bank sold the remaining cattle for \$1,284.94, which money it retained, and credited Shepard's notes with \$1,300 in accordance with a verbal promise made to Shepard so to do.

On March 24, 1926, Shepard gave respondent the following bill of sale:

"I have this day sold to A. Della all hides and tallow I have in my hide vat and those that may accumulate until I have paid him (A. Della) the sum of \$495.00."

Della did not take possession of the hides or tallow, but subsequently sold the hides for \$284.20. Before this money was paid to Della it was taken under execution by another creditor of Shepard's, and respondent received no part of it.

Just prior to April 14, 1926, a notice of intention to place a chattel mortgage on the furnishings and fixtures in the meat market in favor of one of the creditors, not a party to this action, was recorded in the office of the county recorder of Tulare county. On April 15, 1926, there was recorded in the same office a notice that Shepard had sold to the Home Bank of Porterville all his stock in trade, furniture, furnishings, and fixtures in the meat market and fixing the Home Bank of Porterville and 9 o'clock a. m. on April 23, 1926, as the time and place of consummating such sale. A bill of sale transferring to the bank the property described in the notice was acknowledged by Shepard on April 14, 1926, and was recorded on April 16, 1926.

On April 20, 1926, there was a meeting of some of Shepard's creditors, which resulted in a written agreement which was signed by some of those participating in the meeting, including the appellant bank, by the terms of which the attempt to mortgage the market was abandoned and its sale to the bank approved, conditioned upon the bank's agreement to dispose of the meat market and its prorating the receipts therefrom among the creditors, which the bank proceeded to do. The cattle were not mentioned in this transaction and the bank did not place any portion

of the money received from their sale in this creditor's fund, but did participate as a creditor in its distribution of funds derived from the sale of the market. Respondent did not attend the creditors' meeting, and did not sign the creditors' agreement. He testified that he did not know of this agreement, and did not know of the sale of the cattle by Shepard or the bank until about April 28, 1926. He did know that the bank had taken over the meat market and filed his bill for \$61.20 with the attorney for the bank and received two dividends totaling \$13.77 on this bill. He did not file the bill involved in this case with the bank or its representatives, and received no payment upon it.

[1] In accordance with the foregoing facts, the trial court found that at the time of the attempted sale of the cattle to the bank they were in the possession of Shepard, and that the sale was void as against other creditors, for the reason that there was no immediate and continued change of possession of the cattle from Shepard to the bank, as required under the provisions of section 3440 of the Civil Code. Judgment was rendered in favor of respondent against both appellants.

There is no question in this case that there was no immediate or continued change of possession of the cattle from Shepard to the bank and that the attempted sale to the bank was fraudulent and void as to the other existing creditors of Shepard. The attempted sale must be treated as though it had never taken place, and the bank must be regarded as holding the money it received from the sale of the cattle in trust for the benefit of the creditors of Shepard. *Allee v. Shay*, 92 Cal. App. 749, 268 P. 962. In the case of *Ohio Electric Car Co. v. Duffet*, 48 Cal. App. 674, 192 P. 298, 299, it was held as follows:

"It has been held (*First National Bank v. Maxwell*, 123 Cal. 360, 69 Am. St. Rep. 64, 55 P. 980), that, so far as existing creditors are concerned, the title and ownership of the property conveyed with intent to defraud creditors remains in the fraudulent grantor as fully as though no transfer had been attempted, and the transfer being void as against them, a creditor may seize and sell the property under execution, and the sheriff's deed thereto transfers the legal title itself, and not a mere equity. Under such circumstances, then, in so far as this creditor was concerned, the property transferred was yet the property of its debtor. The creditor chose in this action to treat Josephine Duffet as a trustee of said property, holding for its debtor for the benefit of his creditors. In doing this it had the plain right to follow the trust property, regardless of the form in which it was found. It is quite immaterial in this equitable action whether the property was in the form of the house originally trans-

ferred, or whether it had been converted into improvements upon another house owned by Josephine Duffet. This being an equitable action, in which Josephine Duffet is sought to be held as a trustee, equity will follow the trust funds wherever they may be found."

To the same effect is the case of *Henderson v. D. S. Denchy Mercantile Co.*, 48 Cal. App. 41, 191 P. 558.

[2] The appellant bank attempts to justify its use of the money received from the sale of the cattle and its application on Shepard's notes under the provisions of section 3054 of the Civil Code, which provides as follows:

"A banker has a general lien, dependent on possession, upon all property in his hands belonging to a customer, for the balance due to him from such customer in the course of the business."

This contention cannot be maintained, as the very act under which the bank secured possession of the money for the cattle which it sold is the one held void in this action. As we have seen, the only right of possession of the money the bank had was as trustee for the benefit of the creditors of Shepard. Section 3054 of the Civil Code cannot be used to nullify the provisions of section 3440 of the same Code.

Judgment affirmed.

We concur: BARNARD, Acting P. J.; STROTHER, Justice pro tem.

105 Cal. App. 160

LODGE v. GENERAL ACC., FIRE & LIFE ASSUR. CORPORATION. ★
Civ. 276.

District Court of Appeal, Fourth District, California.

April 9, 1930.

Rehearing Denied May 6, 1930. Hearing Denied by Supreme Court June 5, 1930.

1. Insurance ☞579 — Payment conditioned upon release — Condition precedent — Recovery.

Insurer's offer to pay loss provided releases were given, contemplated payment simultaneous with releases, hence releases were not condition precedent to offeree's recovery of promised payment.

2. Insurance ☞579 — Insurer's offer to pay — Release — Acceptance construed.

Insurer's offer to pay loss, provided releases were given by offeree, her daughter, and son-in-law, held accepted, although offeree said only she would sign release.

The insurer had issued policy insuring automobile owner against claims made for injury to persons of others, and insured automobile was involved in accident with

another automobile containing three persons,—plaintiff, her daughter, and her son-in-law, plaintiff being only one injured. The insurer offered to pay certain amount but "in case the proposition is accepted it will be necessary for us to have releases" from all three persons. The plaintiff replied, accepting the offer, and stating that, on receiving payment, "I will sign a release."

3. Insurance — Settlement — Defective acceptance — Offerer's duty to give notice.

Defects in form of acceptance of releases under liability policy were waived where offerer did not communicate objection to offeree (Civ. Code, § 1501).

Appeal from Superior Court, Fresno County; C. E. Beaumont, Judge.

Action by Mae C. Lodge against the General Accident, Fire & Life Assurance Corporation. From a judgment for plaintiff, defendant appeals.

Affirmed.

Wakefield & Hansen, of Fresno, for appellant.

Harris & Hayhurst and Rue C. Gibson, all of Fresno, for respondent.

MARKS, Acting P. J.

[1] This action was brought by respondent to recover three hundred fifty dollars alleged to be due under a contract with appellant. On February 6, 1927, Chris Jensen was the owner of an automobile upon which appellant had written a policy insuring him against claims made for injury to the persons of others. On the day in question his wife was driving the car, with his consent, and it was involved in an accident with another automobile driven by A. J. Cromer, in which respondent, mother-in-law of Cromer, and Mrs. Cromer were passengers. Respondent suffered injuries which came within the terms of the insurance policy.

Shortly after the accident respondent entered into negotiations with appellant through A. B. Brown, its agent in Fresno, Cal., in an endeavor to settle her claim for the damages suffered by her. She was postmistress in the town of Auberry, about forty miles from Fresno, and her negotiations were carried on by letter. The record shows the following communications regarding the attempted settlement. On the 15th day of June, 1927, appellant sent to Mr. A. B. Brown, its Fresno agent, the following telegram:

"San Francisco, Calif. 15, 3.45P

"A. B. Brown, Care Pacific Coast Adjustment Bureau. Pacific Southwest Bldg. Fresno, Calif. Your telephone message Lodge ver-

sus Jensen stop Will not pay more than three hundred fifty dollars.

"William F. Murray, Manager Claims Dept."

On November 8, 1927, Brown wrote to Mrs. Lodge as follows:

"Mrs. M. Lodge, Auberry, California.

"Dear Mrs. Lodge: Supplementing our recent conversation, I wish to advise that a further report was submitted to the company and their letter replying was received today without much encouragement. However, they requested that I procure from you an itemized list of your claim, which indicates some little interest. Therefore, I will kindly request that you mail me the list showing the items of expense of all those involved in the accident. When this is received I will submit it and again attempt to ascertain what I can accomplish towards getting the matter cleared up. With kind personal regards, I am very truly yours, A. B. Brown, Adjuster.

"P. S. Attorney Harris called on the writer stating that any arrangements that you made would be satisfactory. A. B. B."

On November 19, 1927, Mrs. Lodge wrote Brown as follows:

"Auberry, California, November 19, 1927.

"Mr. A. B. Brown, Fresno, California.

"My dear Mr. Brown: Complying with your request, find enclosed list of our expenses and losses. The loss and the expenses on the old car were put upon us by the accident just as squarely as the other items of loss, damage and doctors. In the enclosed list I have not included my sickness, pain and suffering, from which I have not yet recovered, and which is greater than all the rest put together.

"Very truly yours, Mae C. Lodge."

On December 7, 1927, Brown wrote the following letter:

"Mrs. Mae C. Lodge, Auberry, California.

"Dear Mrs. Lodge: In reply to your communication of November 19, we wish to advise that we have not neglected answering your letter, but there has been some delay because of several exchanges of correspondence with the company, and today they wrote us stating that they did not desire to increase their original offer of \$350.

"In checking over your itemized list of loss, we note you have an item of \$57.50 for coat and hose, \$25.00 for serge dress and undergarments, cleaners and laundry, \$4.70, loss on old car \$100.00. License, taxes and purchase of used tire, \$28.65, which total \$215.85. These items all pertain to property damage and loss of use which are not covered under my company's policy.

"Since interviewing you, we have ascertained that Mr. Jensen did not have, at the

time of the accident, any insurance covering property damage and loss of use, consequently your claim for these items should be against Mr. Jensen.

"Your entire list totaled \$561.85, which amount, less the \$215.85, for which the company would not be liable, in any event, equals \$346.00 or four dollars less than the company offered you in settlement several months ago. We are advised that the sanatorium bill amounted to \$46.45, and the doctor's bill for treatment of injuries resulting from the accident, amounted to \$25.00. Undoubtedly you have had other medical and hotel expenses not chargeable to the accident, and it does not seem probable that you were obliged to make seven round trips to Fresno for treatment of injuries because of the accident, as it is probable some of these trips were in reference to getting your car repaired, trading it in, or other business affairs you may have had, consequently, according to your own statement of loss, it is evident that the company was very fair in making an offer to compromise the case for \$350.00.

"The writer has thoroughly thrashed all of these items out with the company, and they have given us their final conclusion, which we are transmitting to you. You will understand that in case the proposition is accepted it will be necessary for us to have releases from Mr. and Mrs. Cromer and from you, but the releases will be so worded that they will not affect any claim you may have against Mr. Jensen for property damage, loss of use, etc.

"Trusting you understand my attitude in this matter, and with kind personal regards, I am very truly yours,

"A. B. Brown, Adjuster."

On January 31, 1928, Mrs. Lodge replied as follows:

"Auberry, California, January 31, 1928.

"Mr. A. B. Brown, Fresno, California.

"My dear Mr. Brown: The list of expenses which I sent you is correct, and my doctor's bill as stated was due entirely to the accident. But if your company will not reimburse me without suit, I must accept the loss rather than go on with further worry. On payment to me of the \$350.00, as offered, I will sign a release.

"Very truly yours, Mae C. Lodge."

On February 23, 1928, Brown wrote to Mrs. Lodge as follows:

"Mrs. Mae C. Lodge, Auberry, California.

"Dear Mrs. Lodge: In reply to your letter of January 31st, which we promptly forwarded to the General Accident, at Pine and Sansome streets, San Francisco, we wish to advise that we received their letter today stating that inasmuch as the statute of limitations had run on your case, they would

not make any payment to you. Under the circumstances we will be obliged to close our file.

"Very truly yours,

"A. B. Brown, Adjuster."

Upon these letters the trial court found that there was a written contract whereby appellant agreed to pay respondent the sum of three hundred fifty dollars, and rendered judgment accordingly.

The sole question to be decided on this appeal is whether or not respondent's letter of January 31, 1928, was an acceptance of appellant's offer to pay her claim. Appellant maintains that its offer was conditioned upon its receiving releases signed by all three occupants of the Cromer car. It does not appear that Mr. or Mrs. Cromer suffered any injuries in the accident or made any claim against appellant. It will be noted that in the letters to respondent, appellant used the pronoun "your" in referring to the losses, and "you" in speaking of the payment, both seemingly being used in the singular. It seems clear from these letters that it was proposed to pay the money to respondent, and that it was not contemplated that any of it would be paid to either Mr. or Mrs. Cromer. In replying to these letters the respondent also made use of the personal pronoun, which is not surprising, as she was not an attorney nor was she learned in the technicalities and phraseology of the law. In the offer of appellant it was stated that in case it "is accepted, it will be necessary for us to have releases from you and Mr. and Mrs. Cromer." There is a clear inference that the releases to be signed were to be prepared by appellant and presented by it for signature at the time the money was paid. This was not done.

[2, 3] We believe that a fair construction of the correspondence shows that respondent intended to accept the offer of settlement as made by appellant. As respondent's letter was intended as an acceptance, it was incumbent upon appellant to promptly communicate to her any objection which it had to the form of the acceptance, or be subjected to the conclusion that it had waived such objection. Section 1501, Civ. Code; Lockhart v. J. H. McDougall Co., 190 Cal. 308, 212 P. 1; McClintick v. Leonards (Cal. App.) 285 P. 351. Appellant did not do this. It waited until the seventeenth day after the statute of limitations had run upon respondent's claim for damages, and then its agent wrote "that inasmuch as the statute of limitations had run on your case, they (the appellant) would not make any payment to you."

The offer was to pay money. The offeree agreed to accept money. The releases were not to be delivered at the time of the offer and acceptance. Their delivery was an incident to coincide in point of time with the payment and receipt of the money. Appel-

lant could not expect to demand and receive the releases before it tendered the money to respondent and was ready to deliver it to her. This it failed to do, repudiating all prior negotiations, not upon the ground of any defect in form of the acceptance, but on the ground that the statute of limitations had run against respondent's claim. Under the circumstances disclosed by the record, respondent having accepted the offer in compromise of her claim, appellant should not be heard to urge an objection to the form of her acceptance for the first time in a subsequent action where it had failed to make such objection promptly, or at all, but relied upon the statute of limitations having run against her demand for damages.

Judgment affirmed.

I concur: BARNARD, J.

105 Cal. App. 105

PEOPLE v. FINCH.

Cr. 1117.

District Court of Appeal, Third District, California.

April 7, 1930.

Criminal law §1130(4) — Failure to appear — Affirmance of conviction.

Failure to file brief or appear for oral argument authorizes affirmance of conviction (Pen. Code, § 1253).

Appeal from Superior Court, Sacramento County; J. R. Hughes, Judge.

Evans White Finch was convicted of robbery of the first degree, and he appeals.

Affirmed.

Evans White Finch, in pro. per., for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

PER CURIAM.

The defendant was convicted in the superior court of Sacramento county of a felony, to wit, robbery of the first degree.

The transcript on appeal was filed in this court February 20, 1930. No brief has been filed in behalf of appellant. The cause was regularly placed on the calendar for oral argument on April 7, 1930. No appearance was made for appellant at the time the case was called for hearing.

Pursuant to the provisions of section 1253 of the Penal Code, the judgment and the order are affirmed.

SCHUMANN v. CALIFORNIA COTTON CREDIT CORPORATION.

Civ. 273.

District Court of Appeal, Fourth District, California.

April 8, 1930.

1. Chattel mortgages §141 — Cotton crop — Picking advances — Ginning advances — "Wage."

"Picking advances" and "ginning advances," made deductible from proceeds of cotton before paying grower's creditor, included money advanced to pay wages of weigher, cost of sacks, renting sleeping tents for pickers, and transporting cotton; "wage."

The contract provided that the mortgagee of the cotton would pay to a creditor of the grower-mortgagor the sum of "\$1,000 out of the first money derived from the sale of the crops produced upon the above described premises after deducting therefrom any sums of money which may have been advanced * * * not exceeding however the sum of \$3,000 plus picking and ginning advances." Under well-known trade usage prevailing in these districts, the phrases "picking advances" and "ginning advances" include the cost to the grower of picking crop, wages of weigher, rent of sleeping tents for pickers, and cost of trucking cotton from field to gin and other such expenses. The term "wage" is defined as compensation for services rendered, which may take the form of money paid or other value given, such as board, lodging, or clothes.

[Ed. Note.—For other definitions of "Wage," see Words and Phrases.]

2. Customs and usages §13 — Trade usage — Contract.

Persons carrying on trade are deemed to have contracted in reference to known trade usage.

3. Customs and usages §15(1) — Contracts — Evidence — Admissibility.

Evidence of known trade usage is admissible to supply deficiency or interpret contract.

4. Chattel mortgages §141 — Advances — Contract — Modification — Written consent.

Where grower received additional advances from crop mortgagee under oral agreement of grower's creditor for modification of contract relative to disposition of proceeds, creditor could not claim modification was void for want of written consent.

The contract originally provided that \$1,000 should be paid to the grower's

creditor out of the proceeds of the cotton crop after deducting \$3,000 advances for raising crop, plus picking and ginning advances. However, more money became necessary to bring the crop to maturity, and additional amounts were advanced by the mortgagee on the promise of the grower's creditor to give written consent to the modification of the contract to protect the mortgagee to the extent of the additional advances.

Appeal from Superior Court, Fresno County; Denver S. Church, Judge.

Action by J. E. Schumann against the California Cotton Credit Corporation. From an adverse judgment, plaintiff appeals.

Affirmed.

Walter Sorensen, of Fresno, for appellant.
Irvine P. Aten, of Fresno, for respondent.

MARKS, Acting P. J.

Under date of July 13, 1927, the parties to this action entered into a written contract concerning a crop of cotton being raised in Madera county, Cal., by H. Neilan. At that time Neilan was indebted to appellant in the sum of \$2,200 on the purchase price of pumping plants and pumping equipment sold by appellant to him under conditional sales contracts which reserved the title to the personal property in appellant.

Respondent was a corporation organized and existing for the purpose, among other things, or loaning money to growers of cotton to enable them to finance their farming operations. It had loaned Neilan approximately \$3,900 with which to raise a crop of cotton upon the Madera county property and had taken a crop mortgage to secure its loan. Neilan required additional money from respondent to mature and harvest his crop, and, to enable this to be advanced, as well as to insure that the pumping plants and pumping equipment would remain upon the property during the cotton growing season, the parties entered into the written contract in question.

The contract provided, among other things, that respondent would advance "to the said H. Neilan a sum of money not to exceed \$3,000.00 to be used by said H. Neilan in farming said crop of cotton exclusive of picking and ginning advances," and that respondent would pay to appellant "the sum of \$1,000.00 out of the first money derived from the sale of the crops produced upon the above described premises after deducting therefrom any sums of money which may have been advanced by second party to said H. Neilan, not exceeding, however, the sum of \$3,000.00 plus picking and ginning advances, and second party by executing this agreement does hereby agree that it will pay over to first party the sum of \$1,000.00 out of the first proceeds

derived from the sale of the crops produced upon said above described premises after deducting any moneys advanced by it to the said H. Neilan, which advances are not to exceed the sum of \$3,000.00 for raising crop, plus picking and ginning advances. It is distinctly understood and agreed that the said second party shall not be entitled to deduct from the proceeds derived from the crops to be produced upon the hereinbefore described premises, any sums of money which have not been actually used in connection with the growing and harvesting of the crops upon said above described premises until after said first party has been paid the said sum of \$1,000.00."

In appellant's complaint it was alleged that respondent received from the sale of the cotton and cotton seed grown on the Madera county ranch the sum of \$6,206.62 after the cost of ginning the cotton had been deducted by the ginning company, and that respondent had expended the sum of \$1,582.25 for picking the cotton, together with the \$3,000 for farming operations, leaving a balance in its hands of the sum of \$1,624.37, out of which appellant was entitled to be paid the sum of \$1,000. Respondent's answer admitted the amount received by it for the cotton and cotton seed, but alleged it had expended the sum of \$2,638.48 for picking expenses in picking the cotton and delivering it to the gin, and further alleged that there was a modification of the contract whereby the parties had agreed it might advance to Neilan the sum of \$4,000 instead of \$3,000 for farming and maturing the crop of cotton. Under the allegations of the answer, the respondent pleaded an executed oral agreement modifying the contract of July 13, 1927, under which oral agreement it was authorized to advance Neilan \$4,000 in the place of \$3,000 for farming operations, as provided in the written contract, and alleged facts sufficient to put in issue the question of whether or not appellant had waived his right to demand his \$1,000 before respondent had received the \$4,000 advanced by it, together with the picking and ginning advances made by it, and also whether or not appellant was estopped from demanding his money until respondent had received its advances as last set forth.

Appellant presents two questions to be decided upon this appeal: First, he urges that under the language of the contract the respondent is only entitled to deduct and retain for itself the cost of the actual picking of the cotton, that is, the taking of the fibre from the boll and placing it in the sacks by the pickers; and, second, that it is only entitled to deduct and retain the sum of \$3,000 as cost of farming operations as specified in the written contract. We will consider these questions in the order stated.

[1-3] It is admitted that the actual cost of picking the cotton from the plant and placing

it in the sacks was the sum of \$1,481.19. The evidence disclosed, however, that an additional sum of \$1,157.29 was received from respondent by Neilan and used by him in other expenses connected with the harvesting of the cotton crop, such as the wages paid a weigher to weigh the cotton brought in from the fields by the pickers, upon which weights they were paid for their labor, in buying picking sacks for use by the pickers, in renting tents used as sleeping quarters by them, in paying the cost of trucking the cotton from the ranch to the gin, and other such expenses. Appellant maintains that these expenditures were not a proper deduction to be made under the terms of the written contract.

Appellant construes the phrase "plus picking and ginning advances" as though the words "as cost of actual picking, and cost of actual ginning" were used. We think this is too narrow a construction to be placed upon these phrases in view of the general terms of the contract, apparent intention of the parties, and common trade usage. The phrase "plus picking and ginning advances" is explained by a following phrase, under the terms of which it would appear to be the intention of the parties to include therein any sums of money which were "actually used in connection with the growing and harvesting of the crops."

It seems that the phrases "picking advances" and "ginning advances" are in common use in the districts raising cotton, and have a well-defined meaning there. Evidence was introduced to the effect that these phrases have a known usage in these districts. Under such usage they include the cost to the grower of the picking sacks used by the pickers, the wages of the weigher, the rent of tents or other living quarters for the pickers, the cost of trucking the cotton from the field to the gin, and other such expenses.

"It is the general rule that, when there is a known usage of the trade, persons carrying on that trade are deemed to have contracted in reference to the usage, unless the contrary appears; that the usage forms a part of the contract, and that evidence of usage is always admissible to supply a deficiency or as a means of interpretation where it does not alter or vary the terms of the contract." *Buckner v. Leon & Co.*, 204 Cal. 225, 267 P. 693.

It is not necessary, however, to rely upon the trade definition of these terms to conclude that at least part of these expenses should be allowed respondent. In this case the wages of the cotton pickers included, not only the actual money paid per pound for the cotton picked, but to this was added sleeping quarters for the pickers. Wage is compensation for services rendered, and this compensation may take the form of money paid or other value given, such as board, lodging, or clothes. 18 R. C. L. 530; 39 Cor. Jur.

160; *Hancock v. Yaden*, 121 Ind. 366, 23 N. E. 253, 6 L. R. A. 576, 16 Am. St. Rep. 396; *Moulin v. Columbet*, 22 Cal. 508. We are of the opinion that the phrases under consideration include money advanced by respondent to Neilan and used by him in paying the necessary expenses connected with the picking of the cotton, its transportation to the gin, and the ginning thereof, and that the finding of the trial court that the sum of \$2,638.48 so used for this purpose was supported by the evidence in this case.

[4] In connection with the second ground relied upon by appellant for reversal, it shows that on or about August 1, 1927, respondent had advanced to Neilan the sum of \$2,940.35, which had been used by him in paying his expenses in raising the crop of cotton. It was not matured on this date, and it was evident that Neilan would require more money to bring it into maturity. The representative of respondent took the matter up with, and explained the circumstances to, appellant, and the evidence shows that appellant agreed to permit respondent to advance Neilan an additional sum of \$750 for this purpose, and that this was to be repaid to respondent before appellant would receive his \$1,000. Respondent advanced this sum to Neilan with the knowledge of appellant. It later appeared that more money was needed by Neilan. There was a bill owing for power which was unpaid, and the power company threatened to turn off its electricity. The agent of respondent and Neilan visited appellant and explained the situation to him. Appellant thereupon agreed to a further advancement of \$250 to Neilan by respondent, and agreed that he (appellant) would not demand nor expect to receive his \$1,000 until respondent had been repaid the sum of \$4,000, together with the picking and ginning advances. Thereupon respondent's agent paid Neilan the sum of \$250 in the presence of appellant. Respondent advanced to Neilan for his farming operations the sum of \$4,090.47.

Respondent requested appellant to give his written consent to the modification of the contract in connection with the advancement of the \$4,000 instead of the \$3,000 to Neilan. Appellant promised to give such written consent, but never did so, and, because of his failure to do so, now maintains that the parol contract to amend the written contract was never executed. We cannot agree with appellant in this contention. If appellant had given his written consent to the modification of the contract of July 13, 1927, this contract would have been modified by another written contract and not by an oral agreement. We believe that the oral agreement was fully executed. They agreed orally to the two modifications we have mentioned, and, in accordance therewith, respondent paid Neilan more than the extra thousand dollars. There was nothing for any of the

parties to do to make this oral agreement executed. Appellant cannot now be heard to say that his failure to consent in writing to the modification of the original contract voided his oral consent to such modification. He knew that respondent had acted upon such oral agreement and paid Neilan the thousand dollars in question. He cannot be permitted to stand idly by and see the other party to the contract act upon it and pay out money upon his verbal agreement and consent and then claim that such agreement and consent was inoperative. *Pence v. Dennie*, 41 Cal. App. 428, 182 P. 980; 10 Cal. Jur. 612.

Judgment affirmed.

We concur: BARNARD, J.; BEAUMONT, Justice pro tem.

105 Cal. App. 132

GREGG v. PHILLIPS et al.
Civ. 7272.

District Court of Appeal, First District, Division 2, California.

April 8, 1930.

Usury §76 — Note — Usurious bonus and interest — Validity as to principal.

Note for amount, including usurious bonus and interest, is not void as to principal sum (Usury Law, § 2).

Usury Law, § 2 (St. 1919, p. lxxxiii), declares any agreement calling for greater return than that permitted by act null and void "as to any agreement or stipulation to pay interest."

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Action by Frances B. Gregg against Emma D. Phillips and others. Judgment for plaintiff, and defendants appeal.

Affirmed.

Guy S. Pratt, for appellants Simmonds.

Waldo, Hinds & Lawrence, of Pasadena (G. E. Waldo, of Pasadena, and Guy S. Pratt, of Los Angeles, of counsel), for appellant Emma D. Phillips.

Hill, Morgan & Bledsoe, of Los Angeles, and Roscoe R. Hess, of Pasadena, for respondent.

NOURSE, P. J.

Plaintiff sued to recover the sum of \$9,000 claimed due on a promissory note. She had judgment for \$5,000, without interest, from which defendants appeal upon typewritten transcripts.

The defense to the complaint was that the note was usurious. The evidence showed that but \$5,000 was actually loaned to defendants and that the sum of \$4,000 was a

bonus or interest for the loan. Plaintiff waived claim to the sum of \$4,000 and interest and asked for judgment for the principal sum alone.

The appeal is grounded on the assertion that because the transaction called for an usurious bonus and interest the entire note evidencing the debt for the principal sum was void and uncollectable. The point is without merit. The Usury Law enacted by the electors (St. 1919, p. lxxxiii) provides that any agreement calling for a greater return than that permitted by the act "shall be null and void as to any agreement or stipulation * * * to pay interest and no action at law to recover interest in any sum shall be maintained. * * *" Section 2.

As said in *Community L. Co. v. Chute* (Cal. App.) 284 P. 466, 469, "it will be noted that the act quoted above does not declare the note void, but only the portion of the agreement or contract as to the payment of interest shall be null and void." This is in harmony with all the decisions in this state on the subject. *Haines v. Commercial Mortgage Co.*, 200 Cal. 609, 622, 254 P. 956, 255 P. 805, 53 A. L. R. 725; *Davis v. Westphal* (Cal. App.) 282 P. 800, 801.

Judgment affirmed.

We concur: STURTEVANT, J.; BURROUGHS, Justice pro tem.

104 Cal. App. 349

Aaron MICHAELS et al., Plaintiffs and Respondents, v. PACIFIC SOFT WATER LAUNDRY et al., Defendants and Appellants.
Civ. 7255, 7256. ★

District Court of Appeal, First District, Division 2. California.

April 5, 1930.

Hearing Denied by Supreme Court May 5, 1930.

In the matter of the application of Aaron Michaels et al., stockholders of the Pacific Soft Water Laundry, a corporation, to test the validity of the election of W. C. Bull et al., as directors of said corporation.

See, also, 286 P. 165, 172.

PER CURIAM.

In their petition for a rehearing in cause No. 7255 respondents criticise the paragraph of the opinion reading: "And also that, because of the allegations relating to the pledge of this stock to the Marine Bank before this suit was commenced the bank is a necessary party to this litigation, and that, if these allegations are found to be true, then the corporation may no longer assert the invalidity of the stock under the settled rule of the cases cited."

Respondents now offer, in this case, to prove that the pledge of the stock of the Marine Bank was fully satisfied and that the loan was repaid. Whether this was done before the trial of the cause is not stated. However, the language referred to was not necessary to the opinion and is, therefore, stricken out.

Respondents also complain of the portion of the judgment limiting the issues on the retrial as to appellant Thompson, which withdraws from the retrial the issue of fraud as to this appellant. This was done because the parties have had their day in court on that issue. The respondents failed to prove anything but a suspicion of fraud, while the only competent evidence on the subject, including the presumptions and inferences which must be drawn, compelled us to find in favor of this appellant on that issue.

In a separate petition the respondents ask leave to present additional evidence under section 956a, Code of Civil Procedure. The proffered evidence relates to the matters of restoration and ratification. It does not include the issues which must be retried as to parties other than Thompson. As we pointed out in the original opinion, a judgment for these parties would require a judgment for Thompson, but a judgment adverse to them would not necessarily conclude the case as to this appellant.

The petition for a rehearing and the petition for leave to offer additional testimony are both denied.

105 Cal. App. 143

**MORTON v. SUPERIOR COURT IN AND
FOR LOS ANGELES COUNTY et al.**
Civ. 6784.

District Court of Appeal, Second District, Division 1, California.

April 9, 1930.

New trial §164 — Trial court — Duty.

Superior court having granted new trial, in action for false imprisonment, wherein verdict was against defendant employer alone and defendant employees were exonerated, held under duty to proceed with new trial.

Action for damages for malicious prosecution was brought against employer and several employees. Motion for new trial based upon grounds of excessive damages, insufficiency of evidence, and that verdict was against law was granted, and superior court refused to set cause down for trial, basing its refusal on ground that by reason of verdict exonerating employees, employer was discharged from liability.

Application by Robert A. Morton for a writ of mandate prayed to be directed to the Superior Court in and for Los Angeles County, and the Honorable John L. Fleming, Judge of Department 10 thereof, to compel respondent court to set cause for trial.

Peremptory writ issued.

Rohe & Freston, of Los Angeles, for petitioner.

Lawler & Degnan, of Los Angeles, for respondents.

YORK, J.

Petitioner commenced an action in the superior court of Los Angeles county against the Walter M. Murphy Motors Company and several of its employees, to recover damages for a false imprisonment, and for malicious prosecution occurring during a period of time thereafter, but arising out of the same set of circumstances upon which the false imprisonment was based. The action was tried upon the issue of false imprisonment only.

Upon conclusion of the trial of said cause, verdict was rendered by the jury in favor of plaintiff, petitioner here, as against the defendant Walter M. Murphy Motors Company only, for the sum of \$5,000, and said verdict also found in favor of the employees of defendant corporation, who were the only other defendants.

Thereafter, the corporation moved for a new trial. This motion was made upon the grounds of excessive damages, insufficiency of evidence, and that the verdict was against law. Said motion was granted on all of the grounds stated.

The trial court then refused to set said cause down for trial, basing its refusal on the ground that, by reason of the verdict exonerating the employees, the employer was discharged from liability. The question raised by said ruling is whether, when an employee or employees are sued with an employer for acts as alleged in this action, and a judgment is rendered against the employer, and the employees included in the verdict are all exonerated by such verdict, and when thereafter a new trial is granted on motion of the employer, may the court then refuse to try the case for the reason that necessarily the result of the trial must be favorable to the defendant? We think that it is the plain duty of the court to proceed in accordance with the order granting a new trial. It may not arbitrarily be assumed that the evidence to be produced at the second trial will be identical with the evidence received during the first trial.

Let the peremptory writ issue.

We concur: CONREY, P. J.; HOUSER, J.

105 Cal. App. 90

WOODS et al. v. BERRY et al.
Civ. 3843.District Court of Appeal, Third District,
California.
April 4, 1930.**1. Appeal and error ⇨916(2) — Transcript —
Filing of answer — Presumption.**

Court of Appeal must conclude that no answer was filed, where none appeared in transcript certified as full and correct copy of judgment roll.

**2. Venue ⇨37 — Place of trial — Convenience
of witnesses — Answer.**

Court cannot determine place of trial based on convenience of witnesses until answer is filed and issues joined.

3. Venue ⇨72 — Change of venue — Hearing.

Motion for change of venue is heard on affidavits and verified pleadings (Code Civ. Proc. § 396).

**4. Venue ⇨70 — Change of venue — Affidavits
— Evidence.**

Affidavits constitute evidence on which validity of order for change of venue depends, evidence not being part of judgment roll (Code Civ. Proc. § 670).

**5. Appeal and error ⇨612(3) — Proceedings —
Certification by clerk — Judgment roll.**

Clerk cannot certify to any part of proceedings and record except what is properly included in judgment roll, together with notice of appeal and demand for transcript.

**6. Appeal and error ⇨520(3) — Change of
venue — Appeal — Counter motion — Affi-
davits.**

Affidavits filed on counter motions to motions for change of venue held not properly before Court of Appeal on appeal from denial of motion to change venue.

**7. Appeal and error ⇨629 — Change of venue
— Record on appeal — Time.**

Defendants appealing from denial of motion for change of venue held entitled to time to institute proceedings to secure record on which appeal could be heard on merits (Code Civ. Proc. § 953a).

Affidavit by attorney for appellants disclosed that on giving notice of appeal from denial of motion to change venue and filing demand for clerk's transcript pursuant to Code Civ. Proc. § 953a, appellants relied on clerk to present record to judge for certificate as required by statute; that clerk neglected to perform duty; that appellants had no knowledge of omission un-

til motion to affirm order denying change of venue was served on them; and that appellants promptly presented to trial judge necessary certificate, which judge refused to sign on erroneous assumption that it was unnecessary (Code Civ. Proc. § 953a).

On Motion from Superior Court, Shasta County; Walter E. Herzinger, Judge.

Action by Alfred D. Woods and another against Harry Berry and others. On motion by plaintiffs to affirm an order of the superior court denying defendants' motion for change of venue.

Motion denied without prejudice.

Herbert Choyinski and Sidney Rhein, both of San Francisco, for appellants.

Carr & Kennedy, of Redding, for respondents.

R. L. THOMPSON, J.

This is a motion on the part of respondents to affirm an order denying defendants' application for a change of venue.

The complaint was brought against the principal and sureties on an indemnity bond for the value of labor performed and materials furnished by the plaintiffs pursuant to a contract for the repairing of a hotel building at Redding. The defendants filed a motion for change of venue based upon an asserted residence in San Francisco. The plaintiffs filed a counter motion to retain the action for trial in the county of Shasta. Affidavits and counter affidavits were filed by the respective parties on both motions. Upon the hearing of these motions the court denied defendants' application for a change of venue and granted plaintiffs' motion to retain the action for trial in Shasta county. A notice of appeal was filed in due time and a demand for a transcript was made pursuant to section 953a of the Code of Civil Procedure. The clerk prepared and personally certified to the proceedings, including therein the complaint, counter motions, demands and accompanying affidavits of the respective parties, the minute order of the court disposing of these motions, the notice of appeal, demand for a clerk's transcript, and the clerk's certificate of proceedings. It does not appear from this record that the defendants either demurred to the complaint or filed an answer thereto. No certificate of the trial judge to the accuracy of the proceedings or the affidavits appears. The transcript, certified to by the clerk alone, was filed in this court June 7, 1929. Appellants' opening brief on appeal was filed August 7, 1929. After extensions of time procured for the filing of respondents' brief, this motion was filed by it March 15, 1930, to affirm the orders of the trial court denying de-

fendants' application for a change of venue and granting plaintiffs' counter motion to retain the action for trial in Shasta county for the convenience of witnesses.

[1,2] Assuming that the record which is before this court "constitutes a full, true, and correct copy of the judgment roll," as the clerk has certified that it does, we must conclude that no answer was filed since none appears in the transcript. The issues of the cause were therefore not joined and it was impossible to determine what witnesses would be required to attend the trial in Shasta county. Until an answer is filed and the issues are joined a court may not lawfully determine the place of trial based upon the convenience of witnesses for the obvious reason there is no possibility of then ascertaining what witnesses may be required. *Dawson v. Dawson*, 83 Cal. App. 119, 256 P. 491; *Wong Fung Hing v. San Francisco Relief & Red Cross Funds*, 15 Cal. App. 537, 115 P. 331.

[3-6] It seems to have been contemplated by statute and the courts that a motion for change of venue shall be heard upon affidavits and the verified pleadings. At least this is the uniform practice in California. Section 396, Code Civ. Proc.; 5 Standard Ency. of Proc. p. 35; 40 Cyc. 156, § 3; *Schilling v. Buhne*, 139 Cal. 611, 73 P. 431; *Cook v. Pendergast*, 61 Cal. 72. The affidavits constitute the evidence upon which the validity of the order depends. The evidence is not a part of the judgment roll. Section 670, Code Civ. Proc. The clerk has no authority to certify to any part of the proceedings and record except what is properly included in the judgment roll together with the notice of appeal and demand for transcript. *Pierce v. Works*, 171 Cal. 684, 154 P. 852; *Martin v. Pac. Gas & Elec. Co.*, 195 Cal. 544, 234 P. 321. The affidavits which were filed upon these counter motions to determine the place of trial in the present action are therefore not properly before this court on appeal. On the merits of the appeal, under such circumstances, this court would be required to presume that the orders in question were amply supported by affidavits. This however, is not a hearing on the merits, but is a mere motion to affirm the orders for the lack of a certificate of the trial judge as to the accuracy of the affidavits which appear in the record.

[7] Upon this motion to affirm the orders of the trial court, the affidavit of Herbert Choyinski, one of the attorneys for appellants, was filed, from which it appears that upon giving the notice of appeal and filing a demand for a clerk's transcript pursuant to section 953a of the Code of Civil Procedure, the defendants relied upon the clerk to present the record to the judge of that court for his certificate as required by the third paragraph of the last-mentioned section; that the clerk

neglected to perform this duty and that the appellants had no knowledge of this omission until the present motion to affirm the said orders was served upon them on March 15, 1930; that the appellants thereupon promptly presented to the trial judge the necessary certificate, which he refused to sign on the erroneous assumption that it was unnecessary. It also appears that proceedings were pending at the time of this hearing to procure the necessary certificate of transcript, but that the appellants were unable to complete their application in the brief period of time which remained prior to this hearing.

We are therefore of the opinion that the appellants should be allowed time within which to institute appropriate proceedings to secure a record upon which this appeal may be heard on its merits.

The motion to affirm the order with relation to the proper place of trial is therefore denied without prejudice.

We concur: FINCH, P. J.; PLUMMER, J.

WEBER et al. v. NASSER et al. ★
Civ. 7201.

District Court of Appeal, First District, Division 1, California.

April 10, 1930.

Rehearing Denied May 9, 1930. Hearing Granted by Supreme Court June 9, 1930.

1. Appeal and error ⇨854(3) — Ruling on demurrer — Grounds — Court's reason.

Court's action in sustaining demurrer must be affirmed, regardless of reason given, if any ground of demurrer justifies ruling.

2. Specific performance ⇨62 — Collective bargaining contract.

Musicians' union held entitled to enforce collective bargaining contract calling for maintenance of minimum size orchestra in theaters (Civ. Code, § 3423; Code Civ. Proc. § 526).

The collective bargaining agreement covered a two-year period and provided for minimum sized orchestra in theaters in which sound devices were installed. Before the expiration of the period of the contract, certain theater owners installing talking devices proceeded to discharge their orchestras in violation of the terms of the contract, and thereupon the musicians' union brought suit to enforce the contract. The theater owners demurred to the complaint on the ground that the contract lacked mutuality and could not be enforced under Civ. Code, § 3423, and Code Civ. Proc. § 526. The union, on the

other hand, claimed that the contract was one of mutual collective bargaining whereby terms and conditions and prices of employment were contracted for by mutual covenant enforceable by both parties.

3. Trade unions Ⓒ6 — Contracts — Industrial relations.

Courts should give effect to contracts entered into for purpose of improving conditions between employers and employees.

4. Trade unions Ⓒ6 — Collective bargaining — Remedies — Mutuality.

Remedies applied in enforcement of collective bargaining agreement between labor union and employers should be mutual.

Appeal from Superior Court, City and County of San Francisco; J. J. Trabucco, Judge.

Suit by Walter A. Weber and others, as members of Musicians' Union of San Francisco, Local No. 6, and others, against William J. Nasser and others. From the judgment of dismissal, plaintiffs appeal.

Reversed.

Aaron Sapiro and Sapiro & Hayes, all of San Francisco, for appellants.

Nat Schmulowitz, George B. Harris, Gavin McNab, and Schmulowitz, Wyman, Aikins & Brune, all of San Francisco, for respondents.

TYLER, P. J.

This is a suit in equity to enforce the terms of a collective bargaining agreement with reference to labor and to prevent a breach thereof.

The pleadings show that plaintiffs are members of the Musicians' Union of San Francisco, an unincorporated association, composed of over a thousand members. The union has for its object the regulation of prices, business and working conditions of members of the musical profession, and it is authorized by the members thereof to fix the basic prices and the general terms and conditions under which musician services are to be rendered, and the members of the union agree to abide by any agreement established by it. Defendants are the owners and operators of certain theaters. The Allied Amusement Industries is authorized by certain of the theater owners to enter into and execute, for and in their behalf, contracts to cover and control the employment of members of the Musicians' Union and the members of their industry. In pursuance of his authority, the president of the union met with the employers through its trade organization to establish the terms, prices, and conditions under which the musicians would work. A

contract was entered into in 1926 between the parties relating to this subject, which was to continue for a period of two years. Prior to its expiration the same parties entered into negotiations for a new agreement to govern both organizations for an additional period of two years. During the negotiations leading up to the consummation of this contract, it was recognized that theaters were apt to install the use of talking devices. To provide for this contingency, the theaters were classified into groups, and a provision was inserted in the proposed contract which provided that in theaters where such devices were installed, the minimum size of orchestra provided for in the different classifications should be maintained. The parties then agreed upon other changes in working and basic price conditions. Upon the completion of these and other arrangements, the union announced to its members the proposed terms and conditions of the new agreement which was to exist for a further two-year period. The agreement was satisfactory, and it was signed by both contracting parties and was fully performed by them until March 1, 1929, at which time the owners of certain of the theaters installed talking devices and thereafter proceeded to discharge their orchestras in violation of the terms of their contract. The Musicians' Union, acting on behalf of its members, thereupon made demand on respondents that they perform their contract. Certain of the respondents refused to employ any orchestra at all and have continued to operate the talking devices without one. Thereupon this suit was commenced.

[1] At the time of the filing of the complaint an order to show cause was made why an injunction should not be issued against respondents. A demurrer and answer were filed to the complaint. When the order to show cause came on for hearing, the trial court heard the demurrer before considering the order. The demurrer was both general and special, and among other things it alleged that the facts as set forth in the complaint did not constitute a cause of action in equity or law against respondents; that the contract sued upon was unilateral and void for want of mutuality and consideration; and, further, that equity will never decree performance of a contract involving personal services, except where such services are of an unique and extraordinary nature. The trial court thereupon sustained the demurrer without leave to amend and dismissed the order to show cause. There is nothing in the minute order sustaining the demurrer, or in the judgment of dismissal, which in any manner indicates upon what ground the order of dismissal was based, except that it recites that it was sustained "upon the general grounds." The matter, however, is of no consequence.

Whatever the court's reasons may have been are not here controlling. If any of the grounds of demurrer presents sufficient justification for the ruling, regardless of the reasons given by the court, its action in sustaining the demurrer and dismissing the action must be affirmed. If the grounds present no justification, its action must be reversed.

[2] Respondents here urge the argument:

(1) That the agreement sued upon is a mere declaration of usage resulting from collective bargaining; (2) that it lacks mutuality of obligation as well as of remedy; (3) that the alleged breach thereof by the theater owners did not vest in the Musicians' Union, or its members, any right to injunctive relief, mandatory or prohibitory—for which reasons the judgment of the lower court should be affirmed. It is contended for by appellants that the contract is not of the character claimed by respondents, but, on the contrary, is one of mutual collective bargaining made between the union, a labor organization on the one hand, and the theater owners as employers on the other, whereby terms, conditions, and prices of employment are contracted for by mutual covenants, equally binding upon employers and employees alike and enforceable by both parties; it being mutual in obligation and remedy and supported by a valuable consideration. It is agreed by both parties in view of the well-established equitable principles which have found expression in our Codes (section 3423, Civ. Code; section 526, Code Civ. Proc.) that if the contract is to be construed as one calling for personal services, it will not be enforced in equity. It is conceded by both parties that the contract is not one of that character. In support of their claim that it is a mere *nudum pactum*, lacking mutuality of obligation and remedy, respondents argue that while they are bound by the contract to employ at their respective theaters an orchestra composed of a specific number of persons who are members of the union, there is no corresponding duty or promise on the part of members of the union to perform services, and, further, that even conceding that they so promised, their contract in this particular could not be enforced by reason of the provisions contained in section 3423 of the Civil Code. Notwithstanding that the parties concede that the contract is not one calling for personal services, it is apparent that the question is so entwined and intermingled with contracts of that character it necessitates a discussion of the nature of both such contracts. While the question presented is one of first impression in this state, the subject has received consideration in different jurisdictions. It is only of recent years that labor differences came to be settled in collective bargaining agreements. These contracts were designed to do away with strikes and lockouts and prevent acts of violence

through which employer, employee, and the public alike were all inconvenienced and suffered incalculable loss. The courts early recognized that these wasteful methods of settling disputes were archaic and they readily entertained, in the interest of public welfare, suits to enforce, where possible, contracts that had for their object industrial peace. Injunctions have frequently been issued on behalf of employers and against labor unions to prevent their officers and leaders from calling a strike or improperly persuading the members thereof to strike, by reason of the existence of contracts between the contending parties. Labor organizations have been slow to seek relief from the courts for breaches of collective bargaining contracts, but it would seem obvious that if a court, by injunction, has the power to prevent a contractual violation on the part of employees, it has equal power to prevent such violation on the part of the employer. If an injunction may issue in one case, it should issue in the other, as both cases should be measured by the same principle. Some of the earlier cases, following the reasoning of respondents, denied equitable relief to members of a union, holding that such contracts were for personal services and lacked mutuality or that an adequate remedy at law was provided for their breach. See *Chambers v. Davis*, 128 Miss. 613, 91 So. 346, 22 A. L. R. 114; *Stone Cleaning Union v. Russell*, 38 Misc. Rep. 513, 77 N. Y. S. 1049; *Hudson v. Cincinnati Ry. Co.*, 152 Ky. 711, 154 S. W. 47, 45 L. R. A. (N. S.) 184, Ann. Cas. 1915B, 98. Other and more recent cases, while recognizing fully the general rules under which injunction is denied to enforce a contract for personal services, or where the applicant has an adequate remedy at law, or where he will not suffer irreparable injury, hold that the law keeps pace with the requirements of justice, and have expressed the opinion that none of these principles are applicable to contracts of the character here involved, as the facts are so extraordinary as to require injunctive relief if a plaintiff is to have any protection whatever in his contract rights. Thus in *Schlesinger v. Quinto*, 201 App. Div. 487, 194 N. Y. S. 401, the court affirmed an order granting an injunction restraining an association of employers from violating the terms of their contract. The court, after referring to the doctrine that there must be a mutuality of remedy as well as of obligation, and recognizing the principle that an injunction will not issue to compel one man to work for another, although he may have agreed so to do, held that cases of the character here involved do not arise out of individual employment. It then points out that two organizations, one composed of employers and the other of employees, have entered into an agreement; that each had power through the consent of its members to enter

into a binding obligation in their behalf; that each had power through disciplinary methods to enforce compliance with the terms of the agreement; that the contract has mutual obligations binding on the parties thereto; that each party knows its obligation and the consequences of failure or refusal to perform those requirements; and that through the control of its members it can compel performance. Under such circumstances the court concluded that a decree of a court of equity could be enforced against either party and in favor of the other. The validity of such contracts and their enforceability is also recognized in *Goldman v. Cohen*, 222 App. Div. 631, 227 N. Y. S. 311. In discussing this question the court, in the course of its opinion, declared that the right to issue an injunction to prevent contractual violation of such contracts is well settled, and it held that where an employer is threatening to order a lockout of his employees, the right of a court of equity to prevent such contractual violation is measured by the same principle as the right of an employer to seek relief in equity to prevent a strike. It is there declared that if the union has not the right to invoke the aid of a court of equity to prevent the unlawful violation of such a contract, that it loses its force, and the right of collective bargaining is narrowed, and the economic benefits to the community arising therefrom is to a great extent lost. Again, the same principle was announced in *Grassi Contracting Co. v. Bennett*, 174 App. Div. 244, 160 N. Y. S. 279. There, plaintiff sought to enjoin the defendant from calling a strike which would have been in violation of a contract. It was held in substance that where a strike, or other action, is threatened by a labor union in violation of its contract, or of the contract of its members with their employers, the jurisdiction of a court of equity to issue an injunction is well recognized. See, also, *Blum & Co. v. Landau*, 23 Ohio App. 426, 155 N. E. 154; *Burgess v. Georgia, F. & A. Ry.*, 148 Ga. 415, 96 S. E. 864; *Gilchrist v. Metal Polishers Union* (N. J. Ch.) 113 A. 320; *Meltzer v. Kaminer*, 131 Misc. Rep. 813, 227 N. Y. S. 459; *Nederlandsch, etc., v. Stevedores' & Longshoremen's, etc., Soc. (D. C.)* 265 F. 397. In *Gregg v. Starks*, 188 Ky. 834, 224 S. W. 459, the court, in departing from its original position, holds that the contracts are of such extraordinary character as to require equitable relief if the parties are to have any relief at all. To the same effect is the very recent case of *Ribner v. Rosco Butter & Egg Co.* (December, 1929) 135 Misc. Rep. 616, 238 N. Y. S. 132, where the cases on the subject are collected and extensively reviewed. All of these cases recognize that such contracts do not lack mutuality, but are founded on adequate consideration, enforceable in equity by injunction, there being,

from their very nature, no adequate remedy at law for their breach, as they do not provide for the employment of any particular person. *Schlesinger v. Quinto*, supra; *Goldman v. Cohen*, supra.

[3, 4] In conclusion it may be stated that while some courts have granted equitable relief to employers and others have denied the same relief to labor unions, the better considered cases hold, as appellant contends for, that such contracts have mutual obligations binding upon both parties and enforceable in equity. Counsel for respondents has expressed the opinion that the later cases are based upon expediency rather than reason. We do not think so. Courts should, in the interest of public welfare, give recognition to the laudable efforts of groups to improve industrial conditions and prevent waste and violence, and where the parties have contracted with that end in view, their contracts should be enforced in a manner to give them effect if possible. In their enforcement the remedies applied should be, and they are, mutual. The law does not have one rule for the employer and another for the employee. In a court of justice they stand on an equal footing.

For the reasons given, the order of the court sustaining the general demurrer and the judgment dismissing the action are reversed.

We concur: CASHIN, J.; KNIGHT, J.

BLODGETT v. SUPERIOR COURT OF SANTA BARBARA COUNTY. ★

Civ. 7106.

District Court of Appeal, Second District, Division 1, California.

April 11, 1930.

Hearing Granted by Supreme Court May 15, 1930.

Contempt ☞2 — Proceeding — Answer — Letter insulting Judge — Challenge of qualification — New contempt.

Filing of answer, including letter insulting judge, as part of challenge to his qualification to hear contempt proceeding, held not new contempt.

Certiorari to Review an Order of the Superior Court, Santa Barbara County; Frank C. Collier, Judge.

On application for rehearing. Application denied.

For original opinion, see 286 P. 492.

D. T. Blodgett, in pro. per.

Schauer, Ryon & Goux, Heaney, Price & Postel and Atwell Westwick, all of Santa Barbara, for respondent.

CONREY, P. J.

On application for rehearing. In deciding this matter, we treated the order of respondent court as a single judgment, in which it was ordered that petitioner herein, Mr. Blodgett, be punished for the contempt referred to in the "order to show cause" issued in that court. In respondent's petition for rehearing, it is suggested that we failed to give sufficient consideration to the fact that the judgment, although entered as a single document, recites the commission of two separate acts of contempt and imposes a separate punishment for each one. The criticism is well founded, and calls for some addition to the opinion heretofore rendered.

The judgment is set forth in full in the return to the writ. From the recitals therein it appears that, in response to the order to show cause, Blodgett filed an answer in which he set forth his objection to the hearing by Judge Collier of the contempt proceeding, and stated that the alleged feeling of the judge against Blodgett was occasioned by the receipt of a letter from Blodgett, a copy of which letter was annexed as an exhibit to the answer. It may be conceded at once that said letter contained exceedingly offensive statements concerning the judge. The judgment further recites that Blodgett presented said answer to the court as his answer to the citation when the same came on for hearing, and that Blodgett in open court, and while the court was in session, stated that he desired said answer also to apply to the hearing of the demurrer in the then pending action in which Blodgett is plaintiff. Following said recitals it was adjudged that, by reason of the said acts and conduct of the said Blodgett while in court, Blodgett was and is guilty of contempt of court.

Petitioner Blodgett, in support of his claim that he had the right to use said letter as a part of his answer in the contempt proceeding, and in support of his challenge of the right of the judge to act in said matter, relies on the decision of the Supreme Court in *Works v. Superior Court*, 130 Cal. 304, 62 P. 507, 508. In that case it was held in substance that, in making objection to the hearing of a cause or proceeding by a judge upon grounds of bias or prejudice, the party so objecting cannot be held guilty of contempt of court in making the objection, or in supporting it by proof, "unless he goes out of his way to introduce something purposely and gratuitously offensive." It may be said in the case at bar, as was held in the cited case, that, since there is no finding or recital or charge that the affidavit was presented otherwise than respectfully and properly, except in so far as an improper motive or intention can be inferred from the supposed irrelevancy and immateriality of the statements, it is clear that the contempt, if any, consisted wholly in

the assertion in the affidavit of matter irrelevant and immaterial to the issue. We are of the opinion that (following the ruling announced in *Works v. Superior Court*, supra) we should hold that, notwithstanding that the letter in question contained matters which were reflections upon the judge and even insulting to him, nevertheless the mere filing and presentation of such answer, including said letter, as a part of Blodgett's challenge to the qualification of the judge to hear the original contempt proceeding, did not of itself constitute a new act of contempt committed in relation to the contempt proceeding instituted by the order to show cause. For further discussions based upon *Works v. Superior Court*, supra, see *Webb v. Superior Court*, 28 Cal. App. 391, 152 P. 957, and *In re Lake*, 65 Cal. App. 420, 224 P. 126.

The petition for rehearing is denied.

We concur: HOUSER, J.; YORK, J.

104 Cal. App. 770

NELSON v. PARKER et al.★
Civ. 6774.

District Court of Appeal, First District,
Division 1, California.
March 29, 1930.

Rehearing Denied April 28, 1930. Hearing Denied by Supreme Court May 26, 1930.

1. Appeal and error ⇨1002 — Review — Verdict — Conflicting evidence.

Verdict for plaintiff, based on conflicting evidence in malpractice action for negligent extraction of teeth, *held* binding on appellate court.

2. Appeal and error ⇨1001(1) — Review — Verdict — Slight evidence.

Verdict for plaintiff, in action for malpractice in extracting teeth, would not be disturbed, notwithstanding evidence of negligence was slight.

3. Physicians and surgeons ⇨18(9) — Extraction of tooth — Negligence — Question for jury.

Negligence of dentist in extracting tooth which dropped down patient's throat *held* for jury in malpractice action.

4. Trial ⇨243 — Instructions — Conflict — Malpractice action.

Instructions on negligence in extracting teeth and on negligence in failing to recover tooth from patient's throat *held* not conflicting.

The instruction on negligence in extracting teeth was to the effect that what was proper practice, in extracting teeth by

dentist, was a question for experts and could be established only by their testimony, while instruction on negligence in failing to recover tooth was to the effect that if act or omission of dentist was of such nature as to warrant jury in saying whether act or omission was negligence as matter of common knowledge, then jury could find such act or omission, if any, to be negligence without resorting to expert testimony.

5. Physicians and surgeons ⇨14(4) — Dentist — Representation — Reasonable degree of skill.

All that dentist represents in treating patient is that he possesses reasonable degree of skill possessed by others of his profession in same locality, and that he will use reasonable care in application thereof.

6. Appeal and error ⇨1050(1) — Harmless error — Admission of testimony — Expert opinion.

In action for malpractice, in extracting tooth which dropped down patient's throat, error in admitting doctor's opinion on cause of pneumonia held not prejudicial.

The opinion of the doctor was based on hearsay evidence, but there was testimony as to the position of the tooth in the patient's lungs given by several other witnesses.

7. Physicians and surgeons ⇨18(8) — Alter ego of corporation — Personal liability.

Evidence in malpractice action held to establish individual defendant was alter ego of corporate defendant, and hence liable individually.

The defendant dentist testified that he had corporation formed to protect his business and that he was general manager of corporation, and the evidence disclosed that with the dentist's knowledge and consent his pictures were placed on windows and doors of the dental offices and on the literature of the corporation, and that the dentist had charge of the personnel of the dental corporation.

Appeal from Superior Court, Alameda County; Homer R. Spence, Judge.

Action by Roy Nelson, a minor, by C. C. Nelson, his guardian ad litem, against Painless Parker, also known as E. R. Parker, and Painless Parker Dentist, also known as the E. R. Parker System. Judgment for plaintiff, and defendants appeal.

Affirmed.

J. Hampton Hoge, of San Francisco, for appellants.

E. C. Gridley, of San Bernardino, and Dunn, White & Aiken, Hamilton Wright, and W. M. Nold, all of Oakland, for respondent.

DEASY, Justice pro tem.

Plaintiff brought this action to recover damages from the defendants for alleged malpractice. On or about the 18th day of February, 1918, plaintiff, who at that time was between 6 and 7 years old, was taken by his mother to a dental office at Twelfth and Broadway streets, in the city of Oakland, to have a dentist examine him. He had suffered from a severe toothache for two nights before. The name Painless Parker Dentist appeared on the doors and windows of the office, and pictures of Dr. Painless Parker were similarly displayed. Upon examination of the boy's mouth, the dentist in charge, Dr. E. T. Mohney, stated that two teeth were in bad shape and should be removed. With the consent of the mother he proceeded to extract the two teeth. One of them he removed from the boy's mouth, but the other slipped out of the forceps and disappeared. Dr. Mohney searched for it, examined the boy's mouth and put his fingers down the boy's throat, but failed to find the missing tooth. Plaintiff immediately began choking or coughing, and the spell continued for some minutes, after which he seemed improved and was taken home. That night he had a chill and became quite sick. According to the record, he suffered from cough and loss of breath and had several attacks of pneumonia and was quite sick and ailing at intervals during a period of several years thereafter, and was attended by many doctors. Finally, in October, 1924, according to plaintiff's testimony, he had a very severe coughing spell one day on the street, and coughed up the tooth, after which his health improved, and he became more like a normal boy of his age than he had been prior to that time.

The case was tried before a jury, which brought in a verdict in plaintiff's favor against both defendants for the sum of \$12,500. From the judgment rendered on this verdict, defendants have appealed.

The record is very voluminous, a great deal of testimony having been introduced to show the condition of plaintiff before and after the extraction of the teeth. There is no need to review it in detail here, since, while there is a great deal of dispute between the parties on the question as to whether the lost tooth was ever in plaintiff's lung or bronchial tubes, there was a conflict in the evidence on the subject, which the jury has resolved in plaintiff's favor, and this court is bound by that finding. Furthermore, the questions raised by appellants do not involve the sufficiency of the evidence on that point.

[1, 2] Appellants do contend, however, that the evidence is insufficient to show negligence

on the part of defendants or their agent. The briefs contain quite an elaborate presentation of the conflicting views of the parties on this question, but it is quite apparent that there is testimony in the record which, if believed by the jury, was sufficient to justify the finding of negligence. Without attempting any analysis of the evidence, we think it will be sufficient merely to refer generally to the testimony of the boy's mother as to what Dr. Mohney did in extracting the teeth, and to Dr. Mohney's testimony as to how he held his fingers, and to the expert testimony of Dr. Parker and other dentists who were called by plaintiff, and who described to the jury in detail the manner in which the operating dentist should hold his fingers in order to guard against a tooth dropping down the throat of the patient. All of this created a conflict which when resolved by the jury became binding upon this court, and cannot be disturbed. In addition to the evidence contained in the transcript, it appears from the record that Dr. Mohney, Dr. Parker, and others, illustrated to the jury, by the use of their fingers and with a model, the correct way that the fingers should be held during the operation. There is no way in which we can visualize these illustrations, nor can we indulge in speculation or conjecture concerning them. In accordance with the fundamental principles governing us we must conclude that the illustrations, coupled with the oral testimony of the witnesses, furnished a proper basis for the action of the jury.

Appellants' next contention is that in an action of this kind expert evidence is necessary to establish the negligence, and that there being none, the judgment should be reversed. We will agree with the first part of this proposition partially only, for reasons which will later be more particularly referred to. But as has been said heretofore, there was some testimony of experts relative to what should have been done by the operating dentist, and it was for the jury to determine the facts. They saw and heard the witnesses and saw the gestures which illustrated the proper thing to be done, and were in a better position to resolve the conflict than is an appellate court. It is true that the evidence of negligence in the instant case was slight, and its probative value may not be great, but we may not interfere with the finding of the jury on that account. As has been said by the Supreme Court in a recent case, "Where the verdict of the jury and the judgment based thereon may be sustained on any reasonable theory, it will not be disturbed by an appellate court." *Rocha v. Garcia*, 203 Cal. 167, 263 P. 238, 240.

[3] Appellants also claim that their motion for a nonsuit should have been granted, and also that the court should have granted their motion for a directed verdict. Our views as

to the state of the evidence preclude us from any further consideration of these claims. If there were any evidence upon which the jury could find a verdict for plaintiff, the case should have been submitted to them. There was no error in the denial of the motions.

[4] Appellants next claim that it was error for the court to give instruction No. 28, which reads as follows: "You are hereby instructed that if you find from a preponderance of the evidence that any act or omission, or acts or omissions, if any, of the defendants, or either of the defendants, or any of their or either of their servants, agents or employees, acting within the scope of their employment, was of such a nature as would warrant you in saying whether or not it was negligence as a matter of common knowledge, then I charge you that you may find such act or omission, or acts or omissions, if any, to be negligence, without resorting to expert testimony as the basis of your finding, and I further instruct you that if you find from a preponderance of the evidence that such act or omission, or acts or omissions, if any, proximately caused the injury or injuries or any of them, herein complained of, that the plaintiff is entitled to recover against such defendant or defendants."

Two other instructions concerning the same general subject-matter were given by the court.

No. 27 is very similar to No. 28, and reads as follows: "You are instructed that unless you find from a preponderance of the evidence that any act or omission, or acts or omissions, if any you find, by defendants, or either of the defendants, or any of their or either of their servants, agents or employees, acting within the scope of their employment, was of such a nature as to warrant you in saying whether or not it was negligence as a matter of common knowledge, then you must make your findings as to whether or not the defendants, or either of the defendants, or any of their or either of their servants, agents or employees, acting within the scope of their employment, were negligent, from a consideration only of the testimony of competent witnesses, that is, a dentist or dentists, and that the testimony of other witnesses upon this point cannot be considered."

No. 40 is apparently the very antithesis of these two, and is as follows: "You are hereby instructed that what is or is not proper practice in the performance of an extraction by a dentist, or what is or is not the usual practice, is a question for experts, and can be established only by their testimony. In other words, in determining such issue, you must base your findings on the testimony of dentists who have been produced as experts in this action."

[5] There is no distinction between an action against a dentist for malpractice and a

similar one against a physician. Each is specially trained for his work in a highly technical calling. The rules of law applicable to the one are applicable to the other. It is well settled in this state that neither can be held to guarantee the results of his professional services, and that all that either undertakes or represents in treating a patient is that he possesses that reasonable degree of skill and learning possessed by others of his profession in the same locality, and that he will use reasonable and ordinary care and skill in the application of such knowledge to accomplish the purpose for which he was employed. *Houghton v. Dickson*, 29 Cal. App. 321, 155 P. 128; *Perkins v. Trueblood*, 180 Cal. 437, 181 P. 642.

The rule announced by the trial court in instruction No. 40 is a correct statement of the law as applied to the more technical matters of dentistry or surgery, but it has not an application which is universal. Many things may happen in the course of a dental operation to extract a tooth or teeth, which, to any person possessed of normal faculties, would appear to be negligent, just as the same situation would in the course of a surgical operation, where a sponge or a forceps or a surgical needle or a piece of a steel spring were left in the body of the patient after the operation had been concluded. And so it might well be that, if a dentist dropped a tooth into the throat of a patient, and did not use the methods which common knowledge would suggest to an ordinary person in an endeavor to recover it, the testimony of experts would not be necessary to establish negligence in such a case.

"Expert testimony is not required, however, where the results of the treatment are of such character as to warrant the inference of want of care from the testimony of laymen or in the light of the knowledge and experience of the jurors themselves. That some facts tending to establish plaintiff's case may have been shown by non-expert testimony is not objectionable." 48 Corpus Juris, 1151.

Where a surgeon in an operation loses a metallic spring in the wound and fails to remove it, it authorizes the jury to infer negligence without the aid of expert evidence. *Wharton v. Warner*, 75 Wash. 470, 135 P. 235.

In *Vergeldt v. Hartzell* (C. C. A.) 1 F.(2d) 633, it was held that where the question in issue in an action against a physician or surgeon is not one of skill in treatment or the performance of an operation, but of plain negligence and failure to use proper care, as to which a layman is as competent to judge as another physician or surgeon, it is not one which must be determined solely by the testimony of experts.

In this case, Mrs. Nelson, the mother of plaintiff, testified that as the forceps were applied it seemed but an instant until the

child started strangling and choking; that he turned black and fought until he was exhausted for breath; that the doctor and the nurse, after she came in, hunted for the teeth; that the dentist ran his finger down the patient's throat three times; that the dentist said that a tooth had gotten away; that the nurse went for the head nurse, and when she arrived the dentist was still working with the patient, that is, ran his finger down his throat; that the dentist turned to Mrs. Nelson and told her to give the patient a good laxative so that if the tooth had passed into his stomach it would pass on, and to watch him carefully; that the patient had perspired terribly from the choking; and that after he felt better the dentist and nurse looked for the teeth, looked on the floor, picked up the forceps, and again looked on the floor to see if the teeth could be found; that one of the nurses took part in trying to find the tooth in the boy's throat; that she ran her finger down his throat once; that there was nothing else done by either the dentist or the nurse with the patient relative to locating the tooth after the teeth were extracted, other than looking on the floor and running their fingers down his throat, and raising his head and wiping his face two or three times.

She further testified that she returned to the office of the dentist in April, 1920, to see about having some X-rays taken. She had X-rays taken in May, 1920, by a Dr. Peters, which showed a foreign body.

In the complaint several acts of negligence were charged. Negligence in the extraction was one of them. Instruction No. 40 was correctly given as applied to that matter. Negligence in looking for the tooth and in failing to recover it was also charged in the complaint, and some of the evidence tending to support that charge has been referred to. As to these matters, instructions Nos. 27 and 28 would apply. There is not such a contradiction between No. 40 and Nos. 27 and 28 as would leave the jury in doubt as to which rule to follow. The instructions taken as a whole were correct statements of the law, and no error appears that would justify a reversal.

[6] The objection to the question put to the witness, Dr. Alice Smith, concerning her opinion as to what caused the attack of pneumonia for which she treated plaintiff in 1924, should have been sustained. It is apparent from the deposition of the witness that the opinion she gave was based on hearsay. She relied on information given to her by the boy's mother as to the presence of the tooth in the boy's lung. She could have been and should have been asked a hypothetical question as a medical expert, and then her answer would be proper. But the error in admitting this answer was not prejudicial, since testimony as to the position of the tooth in the

boy's lung was given by several other witnesses.

[7] It is also claimed by appellants that there can be no recovery against Dr. Painless Parker as an individual, in any event. In support of this claim it is urged that the evidence shows that Dr. Parker was merely an employee of Painless Parker Dentist, a corporation, and, therefore, not liable for the acts of any other employee. If this were the true state of facts, we would agree, but it seems to us that under the evidence he was more than an employee. Dr. Parker was sworn as a witness in the case, and, among other things, testified that he had referred to himself for many years as "Painless" Parker, and that he was generally known by that name in a business way, and that he had his name changed from E. R. Parker to Painless Parker to protect his business, and also that he had a corporation formed for the same purpose. It is true that he also testified that he was not an officer or director of the corporation, but was its general manager. He claimed to be merely an employee, but it seems quite apparent from the evidence and from the reasonable inferences to be drawn therefrom, notwithstanding his protestations to the contrary, that to all intents and purposes he and the corporation were one and the same. It was his alter ego, and without his guiding hand could not function. He caused the corporation to be formed; he was one of the incorporators; he was its general manager; with his knowledge and consent, his picture was on the windows and doors of the dental offices, and on the literature of the corporation; he had charge of the personnel; he instructed the dentists employed as to the methods of the E. R. Parker system, he checked up at various times to see that they followed that system; he originated the system; and generally he had active supervision constantly over the affairs and the general business of the corporation. It would seem to require no further discussion on this point to determine that it is without merit, and that both the corporation, Painless Parker, and the individual, Painless Parker, are so related that they stand or fall together.

It is finally claimed that the court erred in giving certain instructions on the question of ostensible agency. The objection comes principally from the individual defendant, and in view of our conclusion as to the virtual identity of the parties, this objection is likewise without merit.

No prejudicial error appearing in the record, the judgment should be, and it is, hereby, affirmed.

We concur: KNIGHT, Acting P. J.; CASHIN, J.

**LYNN v. CITY COUNCIL OF CULVER
CITY et al. ★**

Civ. 7161.

District Court of Appeal, Second District,
Division 2, California.

April 11, 1930.

Rehearing Denied May 9, 1930. Hearing
Denied by Supreme Court June 9, 1930.

**Municipal corporations — 159(1) — Councilmen
— Recall — Petition — Signers.**

Petitions demanding recall of particular councilmen could not be considered in determining whether joint petition seeking removal of all had sufficient signers (St. Ex. Sess. 1911, p. 128).

Both joint and separate petitions were circulated and signed by electors, and all petitions were filed as a single petition with the city clerk. St. Ex. Sess. 1911, p. 128, provides that, in order to invoke recall of official of incorporated city or town, petition must be signed by qualified voters equal in number to 25 per cent. of entire vote cast for the office at the last preceding regular municipal election at which officer was voted for. At the last election 1,589 votes were cast for the office of councilman. Only 394 qualified electors signed the joint petition, whereas the number required for recall election was 398.

Original proceeding by Charles M. Lynn for writ of mandamus to be directed to the City Council of Culver City to require the calling of a special election.

Writ denied.

Frank J. Lavan, of Culver City, and Russell W. Kuhn, of Los Angeles, for petitioner.

John J. Dillon, City Atty., and Lawrence Scherb, both of Culver City, and Clarence B. Conlin, of Los Angeles, for respondents.

NORTON, Justice pro tem.

This is an original proceeding brought by petitioner, who is a qualified elector of Culver City, a city of the sixth class, to secure a writ of mandate directed to the city council of that city directing them to call a special election to determine whether the city councilmen thereof, Houck, Bobier, Clark, Coombs, and Kinkead, should be removed from office and their successors elected. The clerk filed his certificate that the petition is sufficient as to councilmen Houck and Bobier, but insufficient as to Clark, Coombs, and Kinkead. The clerk is made a party to the suit, and as to him it is alleged that he made a false and fraudulent estimate of the number of electors signing said petition, and wrongfully eliminated certain signatures

from the petition and failed to count them. The answer to the petition having raised issues of fact, a referee was appointed to try the issues and make findings, which, pursuant to the order appointing, have been returned to this court, together with a transcript of the testimony taken upon the hearing before him, and from which it appears that during the month of November, 1928, recall petitions identical in form in which all the trustees were named and their removal demanded were circulated among the electors of Culver City. The persons espousing the recall movement being advised that not more than one officer could be included in a petition for recall, they desisted in circulating these joint petitions. In the month of October, 1929, substantially nine months after they had abandoned obtaining signatures to the joint petition, five separate petitions, each naming one of the five councilmen, were circulated, and these were signed—some electors signing all five of the petitions, and others refusing to sign as against some of the councilmen who were sought to be recalled. It further appears that during the month of November, 1929, both forms of petitions were being circulated and signed by electors; that these joint and several petitions were filed as one petition with the city clerk on November 22, 1929, and, the clerk having certified that the petition was insufficient as to three of the councilmen, a supplemental petition naming all of the councilmen and in the same form as the first petition circulated in which they were all named was circulated and filed as a part of the original petition. The city clerk in making his estimate of the number of qualified electors signing the petition for the recall of the five councilmen did not include those who had signed the petitions in which the councilmen were proceeded against separately and in which each of the five petitions contained only the name of a single councilman. Unless these separate petitions are included therein, the joint petition is not signed in sufficient numbers to authorize the calling of the recall election demanded by it. The contention of defendants is that the petition filed as it was did not constitute one petition, and we think they are right in this claim. The petition consisted of seventy-seven pages, each page being a separate petition, that is, each page or sheet was a complete petition in itself stating the grounds of the recall and demanding recall of all the councilmen en bloc or demanding the recall of a particular councilman.

As far as they are duplicates, it is the rule supported by authority that they can be presented together and shall constitute one petition. The joint and separate petitions cannot be so regarded.

The petition demanding the recall of all of the councilmen cannot be said to be the same as a petition demanding the removal of only

one, nor can a petition requesting the recall of "A" be said to be the same as a petition to recall "B," so as to permit them all to be presented together as one petition.

As far as the joint petition for recall was concerned, the voter must have, when it was presented to him, signed to recall all five of the councilmen against whom it was directed or refrain from signing it at all. If he was in favor of recalling one of the councilmen only, he would have to sign another and different petition from the joint petition being circulated, to wit, a petition demanding the recall of that particular official alone, and he could not be made a party to the petition demanding the recall of the councilmen collectively by annexing his petition directed to a single councilman to the joint petition which asked for the recall of all the councilmen, a proceeding to which he was opposed and in which he did not concur. One group of electors may be strongly opposed to the recall of all the council en bloc, but would favor a recall of one or two thereof. Another group would favor the recall of all or none. Still another would favor the recall of only one of the council. Could separate petitions circulated by each of these groups be presented as one petition expressive of the demand or intent of one of these groups? We think not. It would result in unfairness to the electors, and the apparent and not real consent of an elector would be obtained to a petition in which he would not join and which he did not favor.

The statute provides that, in order to invoke the recall an official of an incorporated city or town, the petition therefor "shall be signed by qualified voters equal in number to at least twenty-five per cent of the entire vote cast * * * for the office which the incumbent sought to be removed occupies, at the last preceding regular municipal election at which such officer was voted for." Chapter 32, Stats., Extra Session, 1911. In construing this provision of the statute in the case of *Magoon v. Heath*, 79 Cal. App. at page 635, 250 P. 583, 584, it was held that the "intent of the Legislature in providing for 25 per cent. of the entire vote cast was to give some assurance that there was a substantial demand for the removal of an elective officer before the recall might be invoked, and in providing that it should be the last general municipal election we think it is apparent that they had in mind that in the rapidly growing incorporated cities and towns the vote cast at the last regular municipal election might be considerably larger than at previous regular municipal elections and that the phrase 'at which such officer was voted for,' in the act, is meant to designate the office and not the individual who may occupy that office." At the last regular municipal election held in the city of Culver City there were cast for the office of councilmen which defendants Houck, Bobier, Clark, Coombs, and Kinkad occupy

1,589 votes. The number of qualified electors necessary to sign a petition to recall said officers is 398. The referee found that the joint petition was signed by 394 qualified electors of Culver City, less than 25 per cent. of the vote cast for the office of councilman at the last municipal election. The separate petitions were signed by not to exceed in any instance 45 qualified electors. The joint and several petitions were therefore under the view we have taken insufficient to either demand the collective recall of the defendant councilmen or the recall of any single councilman. The finding of the referee as to the number of voters signing the petitions is not attacked, and, it appearing therefrom that the number of signers to the petitions are as above set forth, and by reason thereof and the view we have taken, we deem it unnecessary to discuss the question as to whether the city clerk of Culver City fraudulently estimated the number of qualified electors signing the petitions or fraudulently refused to count certain signers on the petitions for recall.

The issuance of a peremptory writ of mandamus is denied.

We concur: WORKS, P. J.; IRA F. THOMPSON, J.

105 Cal. App. 98

MAGNAVOX CO. v. JONES.
Civ. 6934.

District Court of Appeal, First District, Division 1, California.

April 5, 1930.

1. Corporations ⇨406(1) — Contract — Authority.

Contract is not binding on corporation, unless made on its behalf by some one with authority.

2. Corporations ⇨432(12) — Contract — Authorized execution — Evidence — Sufficiency.

Evidence held insufficient to establish authorized execution of exclusive sales contract on behalf of corporation.

3. Corporations ⇨426(10) — Contract — Benefits — Estoppel — Ratification.

Purchase of small amount of goods on assurance of director that exclusive sales contract was all right was not receipt of benefits by corporation working estoppel to avoid contract nor ratification of director's acts.

The purchaser, after failing to procure surety bond as required by original agreement, attempted to furnish other security,

and, without securing acceptance of contract by corporate action, purchased a few hundred dollars worth of goods, the amount being negligible compared with time contract was to run and amount of money involved.

4. Sales ⇨183 — Purchase in anticipation of exclusive contract — Purchase price — Liability.

Purchaser of goods of corporation in anticipation of exclusive sales contract was liable for purchase price, where contract was not executed.

Appeal from Superior Court, Alameda County; Leon E. Gray, Judge.

Suit by the Magnavox Company against H. D. Jones, wherein defendant filed a cross-complaint. Judgment for plaintiff and cross-defendant, and defendant and cross-complainant appeals.

Affirmed.

Kilpatrick & Goodman and Frank B. Graves, all of Oakland, for appellants.

Fitzgerald, Abbott & Beardsley, of Oakland, for respondent.

McKENZIE, Justice pro tem.

During the first week of September, 1926, a Mr. Osborne, who had done business with plaintiff, which is a corporation having seven directors, but was not a director or officer of plaintiff, called defendant's attention to the possibility of obtaining from plaintiff corporation an exclusive sales contract for Magnaray electric heaters, a product manufactured by plaintiff. In turn Mr. Osborne introduced defendant to Mr. Travers, who was a director and general sales manager for plaintiff. At this meeting the proposition of Mr. Jones' obtaining an exclusive sales contract was discussed in a general way, and a few days later, at Mr. Travers' request, Jones went to Mr. Travers' office, and then and there negotiations began in earnest regarding the exclusive sales contract. After the negotiations started, there were three representatives of plaintiff that discussed the proposition with Jones; namely, Mr. Travers, sales manager; Mr. Steers, president; and Mr. Sperry, treasurer. All three were directors of the corporation. There were four other directors, but Jones had no dealings or talk with the others. After the first meeting, the negotiations were mostly between Jones and Sperry. After several meetings, one at least of which was at the office of plaintiff's attorneys it was agreed that the sales contract should include Magnalux lamps as well as Magnaray heaters. The two articles were to constitute one contract, but the attorney preparing the contract directed

the attention of the parties to the difficulty of embodying the terms relating to the two articles in one document owing to the fact that the territory covered, the terms, discounts, etc., were so different. It was then agreed that the conditions and terms for the heaters would be set forth in one paper and the lamps in another. Whereupon the two forms of contract, Defendant's Exhibits A and B, were prepared. The entire controversy involved in this action centers around those exhibits and the actions of the parties concerning them.

Exhibits A and B on their face appear to contain all the terms and conditions of a very complicated exclusive sales agreement, and it would take pages to quote them. We deem it only necessary to specifically direct attention to two of the provisions. In the first place, the contracts (and by this term we mean only the documents) show that the plaintiff was making a departure from maintaining its own sales organization in eight of the Pacific Coast states and British Columbia, and in lieu thereof was to sell for ten years to none other than defendant, who agreed to purchase a minimum quantity of each article, amounting to approximately \$2,000,000 during the ten-year period. In the second place, the contract relating to Magnaray heaters provided: "17. Guaranty. Contemporaneously with the execution and delivery of this agreement, and as a part of the same transaction, distributor will furnish the manufacturer with a valid bond or other instrument of security satisfactory to manufacturer, guaranteeing and securing the performance by the distributor of his agreement to purchase the minimum quantities of heaters specified in paragraph 4 hereof and his agreement to pay for the same as herein provided. Said bond or instrument of security shall be satisfactory to manufacturer and in such form as the manufacturer shall prescribe and with such security, securities or guarantors as it may approve and shall be in the principal sum of fifteen thousand dollars (\$15,000.00). This sum shall be increased to twenty-two thousand five hundred dollars (\$22,500.00) on or before the expiration of the first year of said contract. * * *" The Magnalux contract contained a similar clause, except that the amount of the bond was \$8,750.

Those proposed contracts, Exhibits A and B, were handed Jones on September 18, and two days later he signed both, and left them with Mr. Travers at the office of the company to be signed by the corporation. Jones was told by Mr. Travers "that the contracts would have to be referred to their board meeting, which was held every Friday, and they would be approved by the board and signed at that time." On September 21, and after Jones had signed the contracts, Jones called at the company's office, and told

Mr. Sperry he could not get a surety company to go on his bond. From now on we will quote Jones' testimony only where there is a conflict. When Jones told Sperry he could not get a bond, the latter suggested he offer some other security. A contract of sale of real estate owned by Jones on which there was due \$16,000 was discussed. Jones brought the real estate contract to Sperry, who made a copy of it so that an assignment could be prepared for approval, and then Jones took the original away and never returned it. A form of assignment was never prepared nor were the terms or conditions of the assignment agreed upon or discussed. On September 28 Mr. Sperry told Jones the security was approved (how a security of this kind could be approved in the absence of an assignment containing terms and conditions is not explained), and for him to get his sales organization working as rapidly as possible. On the strength of Mr. Sperry's statement, Jones claims he commenced ordering Magnaray heaters and Magnalux lamps, and spent considerable money in preparing to start business without having the contract signed by the corporation or making investigation as to the action of the board of directors. The only action of the board is contained in the following resolution: "Minutes of the Directors' Meeting of the Magnavox Company held at the company's office on September 24, 1926, Present: President Frank M. Steers in the chair, Directors Folsom, O'Connor, Pridham, Sperry and Travers. Absent: Director Sullivan. Director Travers submitted to the Board drafts of two proposed contracts with Horace D. Jones who intends to form a company for distribution of High Duty Magnaray heaters and Magna-Lux lamps. The contracts for both heaters and lamps to be for ten years. The new company proposes to purchase the first year heaters to the amount of \$60,000.00 increasing by a graduated scale until reaching in the fifth year the sum of \$250,000.00 remaining at this amount during balance of term of contract. The new Company agrees to put up a bond in favor of The Magnavox Company equivalent to 25% of estimated purchases for the year. In regard to the lamps the new Company proposes to purchase a minimum of 35,000 lamps and put up a bond for 25% of their value. Territory to be covered in both cases includes California, Oregon, Washington, Idaho, Nevada, Arizona, Utah and a portion of Montana, and Province of British Columbia in the Dominion of Canada. Upon motion duly made, seconded, and carried unanimously, it was Resolved: That the President and Secretary be authorized to execute a contract with Horace D. Jones, covering High Duty heaters, also contract covering Magna-Lux lamps, these contracts substantially as now written. Seal of the Company.

Signed and certified by F. V. Moulin, Secretary, The Magnavox Company." On October 4, Jones not having furnished bonds or other security as provided for in the contracts, plaintiff withdrew its offer as embodied in the contracts.

In June, 1927, plaintiff brought suit to recover \$686.69, the value of the goods bought by Jones during the negotiations, and defendant sought by way of cross-complaint to recover from plaintiff damages in the sum of \$2,186.94 for expenses incurred in preparing to do business and \$60,000 for loss of prospective profits. At the commencement of the trial a rather indefinite stipulation was entered into concerning plaintiff's cause of action, which we interpret as follows: "It is stipulated that certain articles were bought from plaintiff by defendant; that they have not been paid for; that disregarding the aforesaid dealings between the parties, the regular price of said wares is \$686.69, and defendant owes plaintiff this amount unless the dealings between the parties effected a different price." When the evidence was concluded, the court, on motion of plaintiff, directed the jury to find for plaintiff in the sum of \$686.69, and to find for cross-defendant on defendant's cross-complaint. The jury followed the court's instructions. This appeal is predicated on the court's so instructing the jury.

Mr. Jones testified that at all times it was contemplated by him and plaintiff that any contract they might enter into should be reduced to writing and signed by both parties. The contracts were never signed by plaintiff.

[1-3] "To properly prove a contract claimed to be binding on a corporation, it should be shown that it was made on its behalf by someone who had authority to act for it. It must be shown that the officer was expressly authorized, or that the act was fairly within the implied powers incidental to his office, or that the corporation is estopped to deny his authority by reason of having accepted the benefit of the contract or otherwise. Where the corporate seal is used there is, of course, a presumption of authority, but where the seal is not used, the authority must otherwise affirmatively appear." Cal. Jur. vol. 6, p. 1095. The contemplated contract was not such as are made in the ordinary course of business; Jones knew that its terms had to be approved by the board of directors. He never complied with the terms of the proposed agreement, but negotiated with one of the directors to have different terms substituted in the contract. When he was negotiating with Sperry, he knew that he (Sperry) had no authority to change the terms of the proposed contract without the approval of the directors. The board of directors never approved or ratified any change. In fact, defendant's whole case is predicated

on the fact that Sperry misled him in regard to what the directors would do or had done. "Individual directors are not the corporation's agents, and it is well settled, that declarations and admissions of individual directors, when not acting as a board, are not binding on the corporation, nor admissible as evidence against it, unless they were acting at the time as its authorized agents, and within the scope of their authority." Fletcher, Cyc. Corp., vol. 3, § 2168. A single director having no authority to act for the corporation otherwise than as a member of the board of directors cannot bind it by ratification of an unauthorized contract; and knowledge and acquiescence of a minority of the board is not ratification. Fletcher, Cyc. Corp. vol. 4, § 2188.

The fact that Jones for four or five days bought goods of the value of a few hundred dollars from plaintiff on the strength of Sperry's assurance that everything was all right and to go ahead was not the receipt by plaintiff of such benefit as would work an estoppel nor was it a ratification of Sperry's acts. Compared with the time the contract was to run and the amount of money involved those transactions were negligible. The plaintiff promptly repudiated Sperry's unauthorized acts if any. We are not deciding in this opinion that Sperry did or said what defendant claims nor that what Sperry said if anything warranted defendant in incurring expense until the contract was signed. The recitals and conclusions herein have only reference to the action of the trial court in directing a verdict in favor of plaintiff on defendant's cross-complaint which we conclude it was justified in doing. There was but one proposed contract; notwithstanding it was to be evidenced by two documents this contract provided that two bonds or other security in the sum of \$15,000 and \$8,750 respectively, satisfactory to plaintiff, were to be furnished by Jones. According to Jones' own testimony, he could not furnish a surety bond, which evidently was what he had in mind when negotiations started; and the very most that Jones did or attempted to do was to try and get, through an unauthorized agent, plaintiff to accept not only different surety but in a less amount; and this he never succeeded in doing. On October 4th the plaintiff told defendant it would go no further with the negotiations concerning the proposed original contract, owing to his financial inability. When he was told this, he did not then or at any later time offer to furnish the security provided for in the contract or any security. It is true there is a conflict in the evidence concerning what statements were made by Sperry to Jones; but there is no conflict about Sperry's not having authority to act for the corporation or about Jones' knowledge of this fact.

It may be fairly inferred from the whole record that Jones abandoned the venture.

[4] Concerning the trial court's action in directing a verdict against defendant on plaintiff's complaint for wares bought by defendant from plaintiff pending negotiations prior to the execution of the exclusive sales agreement, the record shows that the first order was given on September 21st. This was before defendant claims Sperry told him the directors had agreed to terms different to those contained in the contract, and furthermore Jones placed orders after the 4th day of October, when he was told negotiations concerning the proposed contract were ended. From this it appears that defendant commenced to buy from plaintiff before any controversy arose about the security and continued to buy after this particular contract had been discarded. The goods were sold at the prices specified in the contract, which were lower than regular prices. It is apparent, when the parties began to buy and sell, they anticipated the contract would be executed. Because the contract was not executed, owing to the fault of defendant, is no reason why the defendant should not pay for the goods he bought during the interim. Having in mind the stipulation concerning plaintiff's demand, the court was justified in directing this verdict.

The judgment is affirmed.

We concur: TYLER, P. J.; CASHIN, J.

105 Cal. App. 122

PEOPLE v. GOODWIN. ★

Cr. 25.

District Court of Appeal, Fourth District,
California.

April 7, 1930.

Hearing Denied by Supreme Court May 5, 1930.

1. Witnesses ⇨379(1) — Testimony — Impeachment — Contradictory statement — Confession.

Contradictory statements in confession of witness to burglary could be used to impeach his testimony about accomplices (Code Civ. Proc. § 2052).

Witness in his confession of burglary said that accused aided him while at the trial of accused witness said accused was not present.

2. Criminal law ⇨1170½(1) — Witness — Impeachment — Former conviction.

Permitting impeachment of witness by testimony that he had been convicted of grand larceny and sentenced to Industrial School held not prejudicial, where evidence of guilt was conclusive (Code Civ. Proc. § 2051).

Appeal from Superior Court, San Bernardino County; Charles L. Allison, Judge.

Grant Goodwin was convicted of burglary in the second degree, and he appeals.

Affirmed.

H. Wenzlaff, of San Bernardino, for appellant.

U. S. Webb, Atty. Gen., and John D. Richer, Deputy Atty. Gen., for the People.

MARKS, Acting P. J.

On December 16, 1929, the district attorney of San Bernardino county filed an information in the superior court charging appellant and Julian Hacker with the crime of burglary. Hacker entered a plea of guilty and appellant went to trial upon his plea of not guilty. The jury found appellant guilty of burglary in the second degree.

On November 26, 1929, the office of the Shell Oil Company of California, situated in the town of Narod in San Bernardino county, Cal., was burglarized and a safe containing about \$130 in cash was removed therefrom. The safe was later found in a wash about two miles from the place of the burglary. It had been broken open and all the money except 25 cents removed therefrom. The office building containing the safe was entered through a window, the screen from which had been torn off and the window forced open. The front door had been broken open and the safe apparently rolled or carried out through it. Footprints were found outside of the window and also near the place where the safe was found. A detailed examination of them disclosed that there was a small triangle and the word "Revere" on both heels, and on that portion of the print made by the heel of the shoe worn on the left foot was an impression showing a defect in the rubber where it had either been worn or torn near one corner of this heel. At the time of his arrest appellant was wearing a pair of shoes that made tracks identical in shape and appearance with those found, even to the defect in the heel of the left shoe. Prints from these shoes were compared with the prints on the ground by having the appellant place his feet incased in these shoes in the dirt adjoining these tracks outside of the window of the office. After his arrest and subsequent to his making the second set of tracks outside of the window of the burglarized office, the police officers took the shoes from appellant, and it was then found that he had attempted to obliterate the name "Revere" and the triangle from the heels. Upon being asked why he attempted this, he replied, "Well, you had my prints out there at the job and I thought I had better get rid of them while I had a chance." An automobile was found which appellant admit-

ted he had been using for several days before the burglary with one Bob Herron, and in it was found a piece of steel the end of which fitted into an impression made on the safe where the door had been pried open. White powder was found on the end of the steel tool and also on the door of the safe.

[1] Hacker was called as a witness for appellant. He testified that he, Bob Herron, and a man named Blanke had committed the burglary and that appellant did not have any part in the crime. Shortly after his arrest and before the trial, Hacker confessed his guilt to officers of San Bernardino county, and the confession was taken down by a shorthand reporter. In it he stated that appellant, together with Robert Herron and the witness Hacker, went to the office of the Shell Oil Company of California together in the automobile we have mentioned; that Herron forced open the window and pushed the safe out the door of the office; and that the three of them loaded it into the automobile and took it to the place where it was found. It was then broken open and the money divided among Hacker, Herron, and appellant. Appellant complains of the use of this confession in impeaching Hacker. Hacker was produced as a witness for appellant, and respondent was entitled to impeach his testimony by the use of his contradictory statements. Section 2052, Code Civ. Proc. The statements made to the reporter and officers in the confession certainly tended to impeach Hacker's testimony that appellant was not present at the time of the burglary and did not participate in the commission of the crime. These statements were properly admitted in evidence.

[2] Appellant's defense consisted of an alibi. He claimed that he was at the home of his brother at the time the burglary was committed. This defense was supported by the testimony of the brother, Pat Goodwin. In cross-examination of this witness the district attorney sought to impeach him by asking if he had ever been convicted of a felony, to which question Pat Goodwin answered that he had not. The district attorney then asked the witness if it were not true that on or about the 18th day of September, 1923, in Los Angeles, Cal., he had been convicted of the crime of grand larceny and sentenced to serve a term of imprisonment at the Preston School of Industry at Ione, to which the witness replied that it was true. After the answer to the question had been given, counsel for appellant, without moving to strike it out for the purpose of objection, objected to the question as irrelevant, incompetent, and immaterial, for the reason that a sentence to Ione would not be a felony and therefore that the question was not proper for impeachment. The last ruling of the appellate court that we have been able to find upon the propriety

of a question of this nature is found in the case of *People v. Maloney*, 92 Cal. App. 371, 268 P. 472, in which the court held as follows: "The defendant was sworn as a witness, and on cross-examination was asked whether or not he had been convicted of a felony, to which he replied in the negative. Thereupon the court received in evidence what counsel for defendant terms 'a certified copy of action No. 29736, in which the defendant was sentenced to Ione.' The document was in fact a certified copy of the commitment of the defendant to the Preston School of Industry, in which it is recited that defendant had 'pleaded guilty in the superior court of the state of California, in and for the county of Los Angeles, of an offense of violating section 146, California Vehicle Act, a felony, as charged in the information.' Defendant now contends that the court erred in admitting this document in evidence. The Attorney General has filed a brief in which he concedes that error was committed, but asks this court to refuse a reversal on the ground that defendant was not prejudiced thereby. He insists that the evidence so conclusively established defendant's guilt that there has been no miscarriage of justice. In conceding error the Attorney General cites the cases of *People v. Hoffman*, 199 Cal. 155, 248 P. 504, and *People v. Adams*, 76 Cal. App. 178, 244 P. 106. The facts in those two cases were very different from the facts in the case at bar. In the Hoffman Case the record of the juvenile court was held to be erroneously admitted for the reason that the proceedings in that court are not penal in their character. In the Adams Case the error consisted in the admission of evidence showing that defendant had been committed to the Whittier Industrial School at the age of 13 years. In neither case could it be said that defendant had been convicted of a felony. The commitment which was admitted in evidence in the case now before us did not issue in a proceeding in the juvenile court. Defendant had pleaded guilty to a violation of section 146 of the Motor Vehicle Act. In this section certain acts are described followed by the statement that any one guilty thereof 'shall be deemed guilty of a felony.' In *People v. Ward*, 134 Cal. 301, 66 P. 372, a witness was asked upon cross-examination whether he had been convicted of a felony. It was shown that the witness had been found guilty by a verdict of the jury, but had not been sentenced. The court said: 'It is contended that at the time the witness testified he had not been "convicted of a felony"; that to sustain the ruling of the court, it must be assumed, as a matter of law, that the verdict of guilty constituted a "conviction." That such verdict does constitute a conviction within the ordinary as well as the technical meaning of the word, seems to be well settled.' *People v. Kepford*, 52 Cal. App. 508, 199 P. 64. Section 2051 of the Code

of Civil Procedure provides that a witness may be impeached by 'the record of the judgment, that he had been convicted of a felony.' In accordance with this section, the proper procedure would have been for the district attorney to present the judgment itself rather than the commitment wherein the plea of guilty is set forth. We think, however, that the criticism is only technical and that the defendant was not prejudiced by the admission in evidence of the commitment."

In view of this decision we hold that the question and answer was not prejudicial to the defendant. The rule announced in the foregoing case gains added force here, since it appears from the transcript that the evidence of appellant's guilt was conclusive and permitted no doubt of the correctness of the verdict.

Judgment affirmed.

We concur: BARNARD, J.; BEAUMONT, Justice pro tem.

105 Cal. App. 179

SECONDO v. SUPERIOR COURT IN AND FOR MONTEREY COUNTY et al.

Civ. 7205.

District Court of Appeal, First District,
Division 1, California.

April 11, 1930.

1. Partnership ⇨322 — Grantee of partner's interest — Necessary party to accounting.

If interlocutory divorce decree giving wife husband's interest in partnership realty had become final, wife would have been necessary party to accounting (Code Civ. Proc. § 389).

2. Judgment ⇨564(1) — Admissibility — Necessity of final judgment.

Judgment, to be admissible in evidence to prove facts therein recited, must be final judgment.

3. Judgment ⇨564(1) — Action still pending — Finality of judgment.

If action in which judgment has been rendered is still pending, judgment is not final.

4. Judgment ⇨580 — "Pending."

Action is "pending" until finally determined on appeal (Code Civ. Proc. § 1049).

[Ed. Note.—For other definitions of "Pending," see Words and Phrases.]

5. Judgment ⇨580 — "Final judgment."

Although judgment may be final and hence subject to appeal, it is not necessarily

final regarding property or rights affected, if subject to reversal; "final judgment."

[Ed. Note.—For other definitions of "Final Decree or Judgment," see Words and Phrases.]

6. Husband and wife ⇨270(5) — Actions involving community property — Necessary parties.

In actions involving community property to which husband is party, wife's interest is represented; hence she is not necessary party.

7. Mandamus ⇨3(3) — Partnership accounting against husband — Intervention by wife — Adequate remedy.

Wife awarded husband's interest in partnership realty by interlocutory divorce decree had adequate remedy by intervening in partners' action against husband for dissolution and accounting as regards right to writ of mandate to be made party to such action (Code Civ. Proc. §§ 389, 1086).

The wife had applied for writ of mandate directing the superior court to make her a party defendant in an action against the husband for partnership accounting, claiming to be entitled to husband's share of partnership realty by terms of interlocutory decree of divorce.

Application by Katherine Secondo for writ of mandate to the Superior Court, Hon. H. G. Jorgenson, Judge, to compel respondent judge to enter an order making petitioner a party defendant in a certain action.

Writ denied, and proceeding dismissed.

Anthony S. Devoto and Devoto & Richardson, all of San Francisco, for petitioner.

J. A. Bardin, of Salinas, and Wyckoff & Gardner, of Watsonville, for respondents.

PER CURIAM.

An application for a writ of mandate, requiring the superior court of Monterey county and the judge thereof to enter an order making petitioner a party defendant to an action pending therein numbered 11514 and entitled "Joseph Secondo and Pete Secondo, plaintiffs, versus Mitchell Secondo, defendant." An alternative writ having issued, the matter was submitted upon the demurrer and answer of the defendants.

The following are the facts: The parties to the above action are copartners engaged in the business of farming and fruit packing. The action was brought on September 17, 1929, for a dissolution of the partnership and an accounting. The partnership was formed on January 15, 1925, and, in addition to certain personal property, the assets of the

concern comprise three parcels of realty, the legal title to which appears in the name of one of the plaintiffs. Mitchell Secondo, the defendant, and Katherine Secondo, the petitioner herein, are husband and wife, and on September 4, 1929, in the superior court of Santa Cruz county, in an action for divorce instituted by petitioner, an interlocutory divorce was entered by which it was adjudged that all the right, title, and interest of Mitchell Secondo in the partnership real property be awarded and set aside to her. A motion for a new trial of the action was denied, and thereafter an appeal was taken from the judgment by Mitchell Secondo, and is now pending. On September 21, 1929, petitioner filed in the action between the partners a motion for an order that she be brought in and made a party thereto upon the ground that, the interest of her husband in the real property having been adjudged to be community property and awarded to her by the above decree, she had an interest in the subject-matter of the action, and was a necessary party thereto. The motion was denied, but the court by its order granted her leave to file therein a complaint in intervention.

[1-5] It has been held that a grantee of a partner's interest in partnership realty is a necessary party to an accounting (*Cuyamaca Granite Co. v. Pacific Paving Co.*, 95 Cal. 252, 30 P. 525; *Doudell v. Shoo*, 20 Cal. App. 424, 443, 129 P. 478); and, had the decree become final, an order that petitioner be made a party to the action would have been proper. This, however, was not the case; and the rule is well settled that a judgment, in order to be admissible in evidence for the purpose of proving facts therein recited, must be a final judgment in the cause; and, if the action in which the same is rendered is still pending, the judgment is not final (*In re Blythe*, 99 Cal. 472, 475, 34 P. 108; *Chambers v. Farnham*, 39 Cal. App. 17, 21, 179 P. 423); and an action is deemed to be pending until its final determination on appeal (*Code Civ. Proc.* § 1049). Furthermore, though a judgment may be final with reference to the court which pronounced it, and as such be the subject of appeal, yet it is not necessarily final with reference to the property or rights affected so long as it is subject to appeal and liable to be reversed. *Cook v. Ceas*, 143 Cal. 221, 227, 77 P. 65; *Hills v. Sherwood*, 33 Cal. 474.

In so far as petitioner's claim to an interest in the property depended upon the judgment, her motion was properly denied. She contends, however, that, having alleged in her affidavit filed in support of the motion that she had a community interest in the property, and the allegation not having been denied by the partners, and they in effect having admitted in their complaint that she had such interest, she was by reason thereof a necessary party to the action.

[6, 7] Such is not the rule. As to her community interest, the wife is in privity with her husband, who, in actions involving the property, fully represents both their interests, and she is not a necessary party thereto. *Cutting v. Bryan* [Cal. Sup.] 274 P. 326; 31 Cor. Jur., *Husband and Wife*, § 1270, p. 160. Under the facts presented, petitioner was not a necessary party to the action, and it was consequently not the duty of respondent court to grant the motion. Should the interlocutory decree be affirmed, an order that petitioner be made a party will no doubt be entered as required by statute (*Code Civ. Proc.* § 389; *Mitau v. Roddan*, 149 Cal. 1, 84 P. 145, 6 L. R. A. (N. S.) 275; *Solomon v. Redona*, 52 Cal. App. 300, 198 P. 643); but until then, so far as shown, intervention will furnish a plain, speedy, and adequate remedy (*Code Civ. Proc.* § 1086) for the protection of her community interest.

The petition is denied, and the proceeding dismissed.

104 Cal. App. 313

BUNNELL v. BAKER.★
Civ. 128.

District Court of Appeal, Fourth District,
California.

March 31, 1930.

Hearing Denied by Supreme Court April 28,
1930.

Appeal from Superior Court, Riverside
County; G. R. Freeman, Judge.

On rehearing.

For former opinion, see 285 P. 877.

Beecher S. Stowe, Ben S. Hunter, and L. E. Dadmun, all of Los Angeles, for appellant.
A. Heber Winder, of Riverside, and John J. Craig, of Los Angeles, for respondent.

PER CURIAM.

The last sentence of the opinion in this case, rendered by this court on March 4, 1930 (285 P. 877), as follows: "We would not disturb this portion of the judgment were the record free from the errors we have pointed out," is stricken out and the following is inserted in its place and stead: "We would not disturb this portion of the judgment were the record free from other errors." As hereby modified and amended, said opinion correctly states the conclusions of this court is adopted as such.

In his petition for rehearing the respondent offers, for the first time, to have the judgment for the value of the trucks reduced in the sum of \$3,200.42, and, upon such reduction being made, requests that the judgment be affirmed. In our opinion we did not find it necessary to

consider or comment upon the amount awarded by the jury as damages sustained by the defendant by being deprived of the possession of the personal property for three hundred days. The jury fixed the value of the property at \$10,000, and the damages for its detention at \$15,000. If this amount is not excessive, it is dangerously near being so. We do not think it necessary to decide this question, but we believe the case should be tried anew. There are other very questionable parts of the record that it is not necessary to pass upon here.

The petition for rehearing is denied.

105 Cal. App. 23

NEILSON v. WALKER et al.*
Civ. 6976.

District Court of Appeal, First District, Division 1, California.

April 1, 1930.

Rehearing Denied May 1, 1930. Hearing Denied by Supreme Court May 29, 1930.

1. Automobiles ⇨226(2) — Collision — Failure to light bicycle — Contributory negligence.

Noncompliance with statute in failing to equip bicycle with lights, if contributing proximately to collision between bicycle and automobile, was negligence preventing recovery (Motor Vehicle Act, §§ 99, 105).

Motor Vehicle Act (Deering's Gen. Laws 1923, Act 5128), §§ 99, 105, provide that all vehicles must be equipped with lights, and that all bicycles shall be equipped with lamps normally visible for at least 300 feet. The evidence showed, however, that collision occurred at brightly lighted intersection, and that bicycle, though without lamp, was visible for distance of almost 300 feet, and that driver of automobile, although he failed to see bicycle until only a few feet away, was not exercising due care.

2. Negligence ⇨136(26) — Contributory negligence — Jury question.

Contributory negligence is ordinarily question for jury.

3. Appeal and error ⇨999(3) — Contributory negligence — Conclusiveness of verdict.

Verdict adverse to defense of contributory negligence is conclusive, unless validity of defense showing negligence contributing proximately to injury follows necessarily from undisputed facts.

4. Automobiles ⇨245(78, 82) — Collision between bicycle and automobile — Contributory negligence — Jury question.

Absence of lamp, and speed of plaintiff's bicycle, which collided with defendant's au-

tomobile at brightly lighted intersection, on issue of contributory negligence, were jury questions.

5. Trial ⇨194(16) — Instructions — Charge on facts — Reckless conduct.

Instruction that driver's failure through carelessness to discover presence of another did not excuse reckless conduct *held* not charge on facts.

The instruction told jury that, if operator of vehicle should, in exercise of ordinary care, have become aware of another's presence in time to avoid collision, failure to discover the other is no excuse for conduct which would have amounted to recklessness, if he had known of presence of other person.

6. Trial ⇨250 — Irrelevant instruction — Absence of evidence — Error.

It is improper to give instruction which, although abstractly correct, is irrelevant or is unsupported by evidence.

7. Appeal and error ⇨1066 — Irrelevant instruction — Reversal.

Error in giving irrelevant or evidentially unjustified instruction does not warrant reversal, unless miscarriage of justice can reasonably be said to have resulted.

8. Infants ⇨115 — Appointment of guardian — Appeal on judgment roll — Necessity of record.

Proceedings relative to appointment of guardian ad litem, not being embodied in any record, could not be considered on appeal upon judgment roll (Code Civ. Proc. § 670).

9. Infants ⇨115 — Validity of proceedings and judgment — Presumption.

In appeal upon judgment roll in action against minor, it not appearing whether necessary guardian had been appointed, presumption was in favor of proceedings below (Code Civ. Proc. § 372).

Code Civ. Proc. § 372 requires that infant party must be represented either by general guardian or by guardian ad litem appointed by court in which action is pending.

10. Infants ⇨87 — Action against minor — Failure to appoint guardian — Disaffirmance.

If guardian were not appointed under statute for minor defendant, minor has right of disaffirmance after attaining majority until barred by laches (Code Civ. Proc. § 372).

Appeal from Superior Court, Alameda County; Leon E. Gray, Judge.

Action by Douglas Neilson, a minor, by Walter Neilson, his guardian ad litem.

against Jack Walker and another. From a judgment for plaintiff, defendants appeal.

Affirmed.

J. Hampton Hoge, of San Francisco (A. Dal Thomson, of San Francisco, of counsel), for appellants.

Clark & Heafey, of Oakland, for respondent.

PER CURIAM.

An action to recover damages for personal injuries to plaintiff, Douglas Neilson, a minor, which were alleged to have been caused by the negligence of defendant Jack Walker, who is also a minor. These parties will be hereinafter referred to as the plaintiff and defendant, respectively.

It was stipulated at the trial that P. J. Walker, who was joined as a defendant and is the father of Jack Walker, had prior to the accident signed the latter's application for an automobile operator's license.

The answer denied negligence on the part of defendant and pleaded the contributory negligence of the plaintiff.

A jury returned a verdict against both defendants, who have appealed from the judgment entered thereon.

As grounds for the appeal it is contended that plaintiff was guilty of contributory negligence as a matter of law, and that the court erred in denying a motion for a nonsuit and in instructing the jury.

The injuries occurred at about 8 o'clock p. m. on January 20, 1928, while the plaintiff, a newspaper carrier, was proceeding on his bicycle in an easterly direction along Arroyo avenue in the city of Piedmont. This avenue runs approximately east and west. Two other streets, namely, Upper Grand avenue, and further east, Lower Grand avenue, running from south to north and from the southeast to the northeast, respectively, end at Arroyo avenue. There is a 14 per cent. easterly slope on the latter avenue between the other streets mentioned. The defendant with two others was driving a Star roadster automobile west on Arroyo avenue, and, according to certain of the testimony, his course was to the left of the center line of the street. Instead of passing to the right of the intersection of the center lines of Arroyo and Lower Grand avenues, and thence along the latter avenue, the evidence shows that he turned into Lower Grand avenue, keeping to the left of its intersection, and continued his course on the left of the center line of the street. There was evidence showing that the plaintiff, who was coasting down the slope mentioned, had entered the intersection of Arroyo and Lower Grand avenue and was crossing the center line of the latter street when the defendant started to make the turn described. Seeing the danger of an accident, the plaintiff, in an attempt to avoid

it, swerved to his right, but a collision, which caused him to suffer serious injury, occurred at a point about 8 feet west of the easterly curb of Lower Grand avenue. The evidence also shows that plaintiff entered the intersection at a rate of speed of about 20 miles per hour, and, according to the testimony, the defendant was traveling at about the same rate. The night was dark, but clear, and the testimony indicates that due to the proximity of several electric lights the street and the scene of the accident were well lighted; and in this connection a witness, who was driving a car some distance behind the defendant, testified that when he reached the railroad which crosses Arroyo avenue nearly 300 feet east of the intersection mentioned he saw the plaintiff approaching. It is admitted that there was no light on the bicycle, and that its brake was not applied.

That the evidence supports the jury's implied finding of negligence on the part of the defendant is not disputed; but it is urged that the failure to equip the bicycle with a lighted lamp was a violation of sections 99 and 105 of the Motor Vehicle Act (Deering's Gen. Laws, 1923, part 1, pp. 1879, 1884, Act 5128) and proximately contributed to the accident.

[1-3] Plaintiff's failure to comply with the above sections of the Motor Vehicle Act, if it contributed proximately to the injury complained of, was negligence on his part which would prevent a recovery. *Stein v. United Railroads*, 159 Cal. 368, 113 P. 663; *Garns v. Halpern*, 193 Cal. 193, 223 P. 545; *Truitner v. Knight*, 83 Cal. App. 655, 257 P. 447. Ordinarily the question is one for the jury (*Smith v. Occidental, etc., S. S. Co.*, 99 Cal. 468, 34 P. 84), and their verdict thereon in favor of the plaintiff must be regarded as conclusive, unless, as was said in *Schneider v. Market Street Railway Co.*, 134 Cal. 482, 66 P. 734, 737, "the validity of the defense, both as to the existence of the negligence, and its effect as contributing proximately to the injury, follows necessarily from the undisputed facts." Here it sufficiently appears that the defendant was driving recklessly; and while he testified that he did not see the plaintiff until within a few feet of him, the evidence supports the conclusion that the conditions as to visibility were such that had he used ordinary care he would have seen the approaching bicycle soon enough to have avoided the collision.

[4] The facts of the present case are not unlike those in *La Count v. Pasarich* (Cal. Sup.) 270 P. 210, where it appeared that a collision between a truck and a bicycle occurred at a street crossing which was so flooded with light as to make the rider of a bicycle visible to the truck driver and the absence of a light on the bicycle probably inconsequential, and the question of contributory negligence was held to be one for the jury.

Here, also, the circumstances were such that this question with that of the effect of the speed of the bicycle (Truitner v. Knight, supra) were properly submitted to the jury, and we cannot say that their findings are unsupported.

[5] The court gave the following instruction to the jury: "If the operator of a vehicle should in the exercise of ordinary care have become aware of the presence of another in time to have avoided colliding with him, then the fact that he failed to become aware of the presence of the other is no excuse for conduct which would have amounted to recklessness if he had known of the presence of such person." The defendant claims that the instruction charged upon a matter of fact.

[6, 7] As held in the following cases the instruction correctly stated the law and was not an invasion of the province of the jury: Rush v. Lagomarsino, 196 Cal. 308, 237 P. 1066; Meyers v. Bradford, 54 Cal. App. 157, 201 P. 471. While it is improper to give an instruction which, though correct as an abstract statement of the law, has no bearing upon the issues of the case (Ensign v. Southern Pacific Co., 193 Cal. 311, 223 P. 953), or is unsupported by evidence (Risdon v. Yates, 145 Cal. 210, 78 P. 641), nevertheless, a reversal is justified only in case a miscarriage of justice can reasonably be said to have resulted therefrom (Dillon v. Prudential Ins. Co., 75 Cal. App. 266, 242 P. 736; Marston v. Pickwick Stages, Inc., 78 Cal. App. 526, 248 P. 930).

[8-10] The complaint alleged the nonage of defendant Jack Walker, and the question whether he was represented in the action by a guardian has been raised for the first time on appeal. The Code requires that when an infant is a party he must be represented either by his general guardian or by a guardian ad litem appointed by the court in which the action is pending (Code Civ. Proc. § 372); and so far as appears from the record in the present case he was not so represented. The appeal, however, is upon the judgment roll, of which proceedings relating to the appointment of a guardian ad litem do not form a part (Code Civ. Proc. § 670), and such matters in order to be considered on appeal must be embodied in some record (2 Cal. Jur., Appeal and Error, § 259, p. 520). The presumption in such a case is in favor of the action of the court below (Batchelder v. Baker, 79 Cal. 266, 21 P. 754); but should the fact be as claimed, the minor defendant has the right of disaffirmance in an appropriate proceeding at any time until barred by laches after attaining his majority (Gouanillou v. Ind. Acc. Com., 184 Cal. 418, 193 P. 937).

We are satisfied from an examination of the record that the verdict was fairly sustained by the evidence, and no error is shown

which warrants the conclusion that the same resulted in a miscarriage of justice.

The judgment is affirmed.

105 Cal. App. 51

JONES v. SUMMERS.
Civ. 5773.

District Court of Appeal, Second District,
Division 2, California.
April 2, 1930.

1. Judgment ⇨925 — Foreign judgment — Suit.

Creditor could sue judgment debtor upon judgment entered in another state and brought into state (Code Civ. Proc. §§ 456, 1908, 1913).

Code Civ. Proc. § 1908, section 1913, and section 456 relate to enforcement of foreign judgments.

2. Judgment ⇨934(1) — Action on foreign judgment — Finality of judgment.

Limitations to sue on foreign judgment not appealed from ran from time judgment became final and not from time judgment was rendered (Code Civ. Proc. § 336, subd. 1).

Code Civ. Proc. § 336, subd. 1, provides that an action upon a judgment or decree must be brought within five years as to actions other than for recovery of real property.

3. Constitutional law ⇨23 — Amendment — Appeal from superior court — Effect on prior appeals.

Constitutional amendment limiting appeals from superior court to proceedings wherein it has original jurisdiction held not to affect prior appeals (Const. art. 6, § 4b [see St. 1927, p. 2389]).

4. Constitutional law ⇨191 — Appeal — Right to limit — Foreclosing right of appeal — Retroactive legislation.

Legislature may discontinue right of appeal by retroactive legislation, destroying appeals already perfected.

5. Appeal and error ⇨2 — Statute — Terminating appellate jurisdiction — Retroactive effect.

Unless act terminating appellate court's jurisdiction so declares, or implication is definite that it is retroactive affecting pending appeals, act is not so construed.

Appeal from Superior Court, Los Angeles County; Hartley Shaw, Judge.

Action by Ralph A. Jones against William Summers. A judgment for the de-

defendant in the municipal court was reversed by the Superior Court, and the defendant appeals.

Affirmed.

John Barnes and E. L. Williams, both of Los Angeles, for appellant.

F. H. Whitfield, of Los Angeles, for respondent.

CRAIG, Acting P. J.

On November 17, 1926, an action was commenced in the municipal court of the city of Los Angeles upon a judgment for the sum of \$500, entered in the state of Nevada. Judgment was rendered in favor of the defendant, from which the plaintiff appealed to the superior court of Los Angeles county, wherein said judgment was reversed, and this is an appeal by the defendant therefrom.

It is contended that since the original judgment was rendered in a foreign state, the cause of action did not arise in Los Angeles county, nor in this state, and in any event that it was barred by the provisions of subdivision 1, section 336, of the Code of Civil Procedure.

[1] It is argued that since in the ordinary acceptance a *case* is a state of facts furnishing occasion for the exercise of jurisdiction, the cause of action did not arise in this state so as to confer jurisdiction upon the superior court, and is hence not a *case arising* in the city or county of Los Angeles, within the meaning of the statutes conferring concurrent jurisdiction upon the municipal court. The defendant appeared by demurrer in the courts below solely upon the grounds above mentioned, and at no time questioned the validity of the judgment upon which suit was instituted. The plaintiff alleged the rendition of judgment in Nevada, and that under the laws of that state the defendant had six months within which to appeal; that he had not appealed, and that said judgment was in full force and effect. Section 1908 of the Code of Civil Procedure provides that a judgment or final order in an action or proceeding before a court of this state is conclusive between the parties in respect to the matter directly adjudged. By section 1913 of the same Code, the Legislature has ordained that the effect of a judicial record of a sister state is the same in this state as in the state where it was made, except that it can only be enforced by an action or special proceeding. It is not necessary in pleading a judgment that the facts conferring jurisdiction be stated. Code Civ. Proc. § 456. It is too obvious to justify further discussion that a judgment of a sister state, brought into this state, gives rise to a cause of action if the judgment debtor be sued here.

[2] It is claimed that the judgment was rendered in Nevada on June 10, 1921, and that,

although the statutes in that state permit an appeal at any time within six months after entry thereof, the statute of limitations barred the present action on June 10, 1926, for the reason that the action in this state may be commenced within five years. Appellant's contention is that, having taken no appeal, the judgment in Nevada was not stayed, but he offers no authority which even remotely suggests that an appeal might not have been perfected within that time, or that the statute of limitations commences to run during the period allowed for appeal. It has repeatedly been held that a cause of action upon a judgment does not accrue until the judgment becomes final, and that the statute of limitations does not commence running in such cases until the expiration of the time for appeal. *Harrier v. Bassford*, 145 Cal. 529, 78 P. 1038; *Cook v. Ceas*, 143 Cal. 221, 77 P. 65; *Willard v. Dobbins*, 191 Cal. 287, 216 P. 1008.

Although the question as to jurisdiction of this court over appeals from the superior court, after an appeal from the municipal court, where the appeal was taken after November 6, 1928, has, in other cases, been denied and the appeals dismissed, we are not here concerned with that situation. The appeal in this case was taken on May 18, 1927, and prior to the date upon which the statute depriving this court of such jurisdiction became effective. The facts in this regard are the same as in *Harris v. Moore* (Cal. App.) 283 P. 76, where it was held that the constitutional provision (Const. art. 6, § 4b [St. 1927, c. 77, p. 2389]) here involved was not intended to apply retroactively, and hence would not take from the appellate court jurisdiction of appeals perfected at the time the amendment became effective.

[3-5] We think that this amendment to the Constitution is clearly distinguishable from the provision of the Code which was passed upon in *Pacific Gas Radiator Co. v. Superior Court*, 70 Cal. App. 200, 232 P. 995, because the latter expressly commanded the dismissal of appeals not taken in accordance with its requirements. There can be no doubt that a statute or constitutional provision may contain such a mandate, and when the legislative intention is clearly expressed, even though hardship may result, appeals will be dismissed, because under such circumstances an appellate court has no jurisdiction to act. But, in the instant case, no express purpose is discernible, and following our decision in *Harris v. Moore*, supra, we hold that the constitutional amendment here under consideration was not intended to apply to appeals perfected before the amendment became effective. The following fundamental propositions are determinative of the question here presented. First, it is within the jurisdiction of the law-making power to cut off the right of appeal by retroactive legislation so as to destroy ap-

peals perfected before the taking effect of such law. Second, to do this obviously works great hardship and apparent injustice upon those who may have waived other remedies allowed by law for the correction of possible errors. Third, therefore, unless the act itself clearly indicates an intention that it shall have a retroactive or retrospective effect, the rule of statutory construction that such statutes are not to be construed as intended to apply retroactively so as to affect pending appeals is fully recognized and well established by the decisions of this state. Fourth, it is well settled that, in order that such changes in the law as the termination of appellate jurisdiction may affect pending appeals, the amending law must either expressly so declare or an implication that such was the intention of the law-making power must be definite and clear.

That these principles are law in this state is declared in the following decisions: *Pignaz v. Burnett*, 119 Cal. 157, 51 P. 48, 49; *Vanderbilt v. All Persons*, 163 Cal. 507, 126 P. 158; *San Francisco, etc., Rys. v. Superior Court*, 172 Cal. 541, 157 P. 604, 606; *East Bay Mun. Utility Dist. v. Garrison*, 191 Cal. 680, 218 P. 43, 47; *Montecito County Water Dist. v. Doulton*, 193 Cal. 398, 224 P. 747, 749; *State Comm., etc., v. Welch*, 20 Cal. App. 624, 807, 129 P. 974, 977; *Harris v. Moore*, *supra*.

In *Montecito County Water Dist. v. Doulton*, *supra*, the opinion declares:

"The said amendment to the statute of 1913, adopted on May 11, 1923, does not purport, either by its express terms or by any reasonable implication, to be retroactive in its operation or effect, and it is a well-established principle of statutory construction that, while the Legislature has power to pass retroactive laws which do not impair the obligations of contracts or affect injuriously vested rights, it is equally true that statutes are not to be construed as intended to have a retroactive effect so as to affect pending proceedings, unless such intent is expressly declared or necessarily implied from the language of the enactment."

To the same effect is *East Bay Mun. Utility Dist. v. Garrison*, *supra*:

"There is nothing in the act itself to indicate that it was intended to have any such retroactive effect, and it is a well-settled principle of statutory construction that an act will not be construed to be retroactive in the absence of either an express declaration to that effect or a very clear implication that such was the intent of the Legislature."

In *Pignaz v. Burnett*, *supra*, the statute in question shortened the time for taking an appeal from one year to six months after entry of judgment in the trial court. After six months had elapsed, but before the expiration of one year subsequent to judgment, an ap-

peal was taken. In passing upon a motion to dismiss, the Supreme Court said:

"If the amendment operated retrospectively, it cut off the right of appeal immediately upon the taking effect of the act, affording no opportunity whatever thereafter for the exercise of this privilege, and depriving this court, so far as the legislature can, of its jurisdiction in the cases upon which it would so operate."

It was concluded that no such intention should be imputed to the Legislature. We think both the logic and the rule announced in *San Francisco, etc., Rys. v. Superior Court*, *supra*, are in point and controlling in passing upon the instant matter. Section 660 of the Code of Civil Procedure had been amended (St. 1915, p. 202) to provide that the power of the superior court to pass upon motions for new trials should expire within three months after verdict rendered. In the case giving rise to the application for mandate there being determined, verdict was rendered, and a motion for a new trial was made before the amendment became effective, but the date for hearing said motion was some time thereafter. The decision is so clearly in point that we quote from it at length:

"We are here dealing with a provision of law which deprives a court of power to pass on a motion for new trial unless such power is exercised within a specified time *after verdict or notice of decision*. The time is designated in clear and unequivocal terms, and, if the provision is applicable at all to proceedings pending at the time it became operative, its terms are such, in our opinion, as to preclude a construction to the effect that it did not absolutely take away from a trial court the power to pass on the motion for a new trial after the expiration of three months from the rendition of the verdict or service on the moving party of the notice of the decision of the court, regardless of all other circumstances.

"This being the construction that must be given to the provision, we have no doubt that it should not be construed as applicable to proceedings on motion for new trial pending at the time it became operative. *Pignaz v. Burnett*, 119 Cal. 157, 51 P. 48, is practically controlling as to this. We have already substantially stated the question decided in that case. There was involved the question of the application of a statute shortening the time within which an appeal might be taken from a judgment from one year to six months to judgments entered prior to the taking effect of the statute. The statute contained no saving clause as to judgments entered prior to such time. Holding that, if this statute were to be construed as applicable to such judgments, the effect would be to absolutely cut off at the very instant it went into effect the right of appeal from any judgment entered

six months or more previously, the court said: 'Unless it is absolutely necessary, we should not impute such an intention to the Legislature. In view of the construction which has almost invariably been given to statutes of this character, I feel sure that the Legislature intended that its operation should be limited to judgments thereafter entered.' In the case of the provision here involved, if the same be held applicable to proceedings on motion for new trial pending at the time it took effect, the result would be to absolutely cut off at that moment the right of the party to have the determination of the trial court on his motion regularly instituted and prosecuted in all cases where the verdict was rendered or notice of the decision given three months or more before the provision became a law. As said in *Pignaz v. Burnett*, 119 Cal. 157, 51 P. 48, 'no such intention should be imputed to the Legislature unless absolutely necessary.' Under the circumstances we are satisfied that it must be held that the operation of the provision in question was intended to be limited to proceedings on motion for new trial initiated after the change in the law. Especially is this true in view of the decision of *Pignaz v. Burnett*, 119 Cal. 157, 51 P. 48, which, it is only fair to assume, was in the minds of those enacting the provision, and to them declared the rule by which their enactment would be construed by the courts."

Here, it is equally true that those enacting the amendment terminating the appellate jurisdiction of the District Court of Appeal in such cases must be assumed to have had in mind both the decision in *Pignaz v. Burnett*, and *San Francisco, etc., Rys. v. Superior Court*, supra, as well as other decisions of our appellate courts declaring similar principles. It is also true that, in this instance, if the amendment be given a retroactive construction and made applicable to appeals pending at the time it became effective, the result would be to "cut off at that moment" the right of a party to have the determination of his appeal or the asserted errors of the trial court reviewed at all, in those cases wherein the time for appeal expired.

We have not overlooked the opinions rendered in *Berg v. Traeger* (Cal. App.) 285 P. 332, and *D. Q. Service Corp. v. Securities Loan & Discount Co.* (Cal. App.) 285 P. 335. Unlike these decisions, we hold that in this instance it is not only unnecessary and unfair to construe the amendment here in question as being retroactive, but that to do so would be inconsistent with the authorities to which we have referred and from which we have quoted. The California decisions referred to in the last-named cases do not, in our opinion, require the conclusion that this amendment should be interpreted retroactively. In

Johnston v. Wolf (Cal. Sup.) 274 P. 1028, the appeal was taken after November 6, 1928, the date upon which the amendment took effect. This fact alone is sufficient to distinguish it from the instant proceeding. In *People v. Bank of San Luis Obispo*, 159 Cal. 65, 112 P. 866, 872, 37 L. R. A. (N. S.) 934, Ann. Cas. 1912B, 1148, English authorities and those from other jurisdictions than California, in this country, are reviewed, which recognize it to be a general rule that the repeal of a statute operates upon pending proceedings and terminates them so that they at once abate upon the taking effect of the repealing statute. However, what is there said is obiter dictum. In that behalf, what is said in the same opinion is peculiarly applicable: "Here the wise admonition of Chief Justice Marshall in *Cohens v. Virginia*, 6 Wheat. 399, 5 L. Ed. 257, applies with peculiar force: 'It is a maxim not to be disregarded that general expressions in every opinion are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit, when the very point is presented for decision.' " And so the discussion upon the point here under consideration has no application to control the decision in the instant appeal, because that case went off on the proposition that there had been a judgment which had become final before the repealing statute became effective, and, although a motion for new trial was pending, and an appeal had been taken from an order denying it (as it could be under the law then in force), it was held that under those circumstances the repeal of the statute in question did not destroy the judgment nor necessitate a dismissal of the action. It is plain that what is said in the opinion as to the general effect of the repeal of a law, which has been the foundation for a cause of action, as determined by a judgment which has not become final, is beside the subject, and unnecessary to decision of the case. It is undoubted that there is respectable authority elsewhere holding the various "extremes of judicial determination" mentioned in the opinion, but the question here under consideration is one which appears to be beyond the doubtful stage in this state. Authorities in conflict with our own decisions are not persuasive, nor is the obiter dictum in *People v. Bank of San Luis Obispo* controlling, no matter how scholarly and extended it may be, when opposed to square and direct rulings in other and more recent decisions. We have heretofore distinguished *Pacific Gas Radiator Co. v. Superior Court*, supra.

The judgment is affirmed.

I concur: IRA F. THOMPSON, J.

105 Cal. App. 72

BACH et al. v. C. SWANSTON & SON et al.
Civ. 3939.

District Court of Appeal, Third District,
California.

April 3, 1930.

1. Death §104(1) — Instruction — Liability — Injuries to deceased.

Instruction *held* not erroneous as stating defendants would be liable for damages to plaintiff's wife dying from injuries sustained in automobile collision.

The instruction stated that violation of provision of law, intended for the guidance of and prescribing duties of persons in use of public highway, is of itself negligence, and if negligence proximately causes injury to another who is without fault, the one so guilty of negligence is liable to one injured for all damage proximately caused to injured party.

2. Automobiles §246(23) — Instructions — Recovery for death — Injury — Collision — Contributory negligence.

Instructions *held* not erroneous, as allowing recovery for death of wife and for injury husband sustained in automobile collision, irrespective of contributory negligence.

Instructions stated driver of automobile, colliding with plaintiff's car, was bound to use reasonable care to anticipate the presence on avenue of other persons having equal rights with himself to be there, and failure on his part to use reasonable care would be negligence, and that every person who suffers detriment from unlawful act or omission of another may recover compensation from the person in fault.

3. Trial §253(1) — Instructions — Ignoring defenses.

If instruction purports to state conditions necessary to verdict, it must state all conditions and not overlook pleaded defenses supported by substantial evidence.

4. Damages §216(6) — Instruction — Personal injuries — Permanency.

Instruction that jury may consider whether injuries to plaintiff, suing for injuries sustained in automobile collision, are permanent, *held* not erroneous under evidence.

5. Evidence §570 — Expert testimony — Conclusiveness.

Jury is not concluded by expert testimony.

6. Trial §260(1) — Instructions — Covered requests — Refusal.

Refusing instructions covered by instructions given *held* not error.

7. Trial §133(6) — Remarks of counsel — Insurance — Cure of error.

Remark by attorney for plaintiff, injured in automobile collision, in referring to person as insurance adjuster, did not require reversal where court instructed jury to disregard, evidence preponderated in plaintiff's favor and inference was not clear that purpose was to show jury defendants were insured.

8. Appeal and error §1004(3) — Review — Amount of recovery — Approval.

Decision of trial court and jury cannot be set aside because damages are excessive unless verdict suggests at first blush passion, prejudice, or corruption of jury.

9. Death §99(4) — Personal injuries — Excessiveness of verdict.

\$30,000 for death of forty-year old wife, and mother of four children under twelve years old, *held* not excessive.

10. Damages §132(6) — Personal injuries — Excessiveness of verdict.

\$6,000 for fracture of clavicle and hip bone of thirty-eight year old automobile mechanic, necessitating hospital treatment, *held* not excessive.

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action by Lester A. Bach and others, by John Bach, their guardian ad litem, and by John Bach, individually, against C. Swanston & Son, a corporation, and others. Judgment for plaintiffs, and the defendants appeal.

Affirmed.

Len H. Honey, of Stockton, and Butler, Van Dyke, Desmond & Harris, of Sacramento, for appellants.

V. L. Hatfield, W. H. Hatfield, and Martin I. Welsh, all of Sacramento, for respondents.

JAMISON, Justice pro tem.

This is an appeal from a judgment for damages in favor of respondents growing out of an automobile collision that resulted in the death of Mary Bach, the mother of respondent minors and wife of respondent John Bach, and that resulted in alleged injuries to the said John Bach.

The complaint contains two counts, the first of which is for damages for the death of the said Mary Bach, and the second being for damages for the alleged injuries sustained by the said John Bach. This case was tried with a jury which returned a verdict for damages for the death of Mary Bach in the sum of \$30,000, and a verdict in favor

of the said John Bach, for damages for the alleged injuries sustained by him, in the sum of \$6,000.

On the morning that the accident happened the said John Bach was driving his Chevrolet automobile north on Fourteenth avenue in the city of Sacramento. With him in said automobile was his wife, Mary Bach, who was sitting in the back seat, and a Mr. Benson, who was sitting in the front seat to the right of the said John Bach.

Respondents' evidence was to the effect that when John Bach reached the intersection of said Fourteenth avenue and Forty-Fourth street appellant Charles Swanston was about 100 feet east of said intersection proceeding west on said Forty-Fourth street, and was operating a two and a half ton Reo truck loaded with meat; that said John Bach proceeded to cross the said intersection in a northerly direction at a speed of not exceeding ten miles per hour; that he had almost passed out of this intersection when his automobile was struck by the truck driven by the said Charles Swanston, who was traveling at the time of the impact at a high rate of speed, somewhere in the neighborhood of forty to forty-five miles per hour. As a result of the collision Mary Bach and John Bach were hurled from their automobile. Mary Bach sustained injuries from which she shortly thereafter died, and John Bach received injuries that necessitated his treatment at a hospital.

Respondents allege in their complaint that the said collision and resultant death of Mary Bach and injury to John Bach were caused by the negligence of appellant Charles Swanston.

In their answer appellants deny the said negligence and allege that the said John Bach was guilty of contributory negligence that directly and proximately contributed to the said death and injury.

There is ample evidence to support the verdicts of the jury that the said collision and resultant death and injury were caused by the negligence of appellant Charles Swanston and that the said John Bach was not guilty of any negligence that contributed thereto, and this appellants concede.

It was stipulated by appellants that, at the time of said collision, appellant Charles Swanston was driving the said truck as an employee of appellant C. Swanston & Son Company and at that time was acting in the course of his employment as such; that he was a minor and that he had an operator's license, the application for it having been signed by appellants Robert Swanston and Florence Swanston.

[1] Appellants claim that the court erred in some of the instructions that were given to the jury; that it erroneously instructed the jury that appellants would be liable for the

injury or pecuniary damage to deceased. Appellants predicate the alleged error upon the language contained in the instruction which reads as follows: "A violation of a provision of law intended for the guidance of and prescribing the duties of persons in the use of a public highway, is of itself negligence, and if such negligence proximately causes injury to another who is himself without fault; the one so guilty of such negligence is liable to the one so injured for all of the damage proximately caused to such injured party."

Appellants argue that this instruction could be interpreted by the jury in but one way, that is to say, that the cause of action in favor of Mary Bach, as "one so injured" survived and was enforceable in this action. The construction placed upon this instruction by appellants is certainly a strained one. There is no cause of action here in favor of Mary Bach. So far as the death of Mary Bach is concerned, the injured persons are her husband and children. Then again the court very fully instructed the jury that respondents are not entitled to recover for any detriment sustained by the deceased prior to her death; that the jury was not to consider the question as to whether or not she suffered any pain prior to her death; that this action does not represent any right of action which she would have had had she survived her injuries; that respondents, if they can recover at all, can only recover for the pecuniary loss sustained by them, if any there be, on account of the death of deceased. There was no error committed in giving this instruction.

[2] Appellants next contend that the court erroneously instructed the jury that respondents were entitled to recover irrespective of the defense of contributory negligence. An examination of the court's instructions shows that there is no substantial foundation for this alleged error. The particular instructions to which appellants call attention as substantiating this alleged error are as follows:

"The defendant, Charles Swanston, was bound to use reasonable care to anticipate the presence on Fourteenth avenue of other persons having equal rights with himself to be there, and a failure on his part to use such reasonable care would be negligence."

"Every person who suffers detriment from the unlawful act or omission of another may recover from the person in fault a compensation therefor in money, which is called damages."

[3] Appellants claim that these last-quoted instructions ignored the question of contributory negligence and in effect direct a verdict for respondents in case the jury found that appellants were guilty of negligence. In support of this contention they cite *Beyerle v. Clift*, 59 Cal. App. 7, 209 P. 1015, and other

cases, to the effect that if an instruction by its terms purports to state the conditions necessary to a verdict, it must state all of the conditions and must not overlook pleaded defenses on which substantial evidence has been introduced. This undoubtedly is the law, but these cases are not in point as applied to the last-mentioned instructions, for the reason that these instructions did not purport to state the conditions necessary to a verdict, nor in any way direct a verdict.

In the case of *Douglas v. Southern Pacific Co.*, 203 Cal. 390, 264 P. 237, where the question of contributory negligence was an issue, the court instructed the jury that if it found that the injury and death were caused by the negligence of employees while operating defendant's engine, at the time of the accident, the verdict should be for plaintiffs, since an employer is bound by the acts of his employees within the scope of their employment, and their negligence is, in law, deemed to be the employer's negligence. In commenting upon this instruction, *Waste, C. J.*, delivering the opinion, said, in substance, that the authorities are legion that the so-called "formula" instruction must contain all the elements essential to a recovery, and the absence of any one of such elements may not be compensated for nor cured by a reference thereto in other instructions correctly and fully stating the law. However, this instruction did not purport to be a complete statement of the law upon which plaintiffs might recover, but served merely to inform the jury that responsibility attaches to a principal for the negligent acts of his servants committed within the scope of the latter's employment. The instruction constituted nothing more, in the opinion of the court, than an expression of the doctrine of respondeat superior, and, this being so, need not set forth all the elements essential to a recovery by plaintiffs. The court further said that these several elements were fully and properly expressed to the jury in the many other instructions given by the court. To the same effect is *Peak v. Key System Transit Co.*, 88 Cal. App. 354, 263 P. 578, 582, wherein the court, in passing upon an instruction similar to those quoted in the instant case, said: "The scope of the instruction embraced only the substantive law of primary liability without reference to any defenses."

Furthermore, in the case now before the court, the jury were very fully and clearly instructed upon the law of contributory negligence, together with the effect it would have upon the right of respondents to recover, and in that connection the court instructed the jury that if respondent John Bach was guilty of negligence in the slightest degree that contributed to the said death of Mary Bach and injury to John Bach, respondents could not recover.

[4] The next alleged error of the court complained of by appellants is that the trial court erroneously instructed the jury it could award damages to John Bach for alleged permanent injury suffered by him from said collision. The portion of the instruction of which appellants complain is as follows: "You may consider whether or not the injury to the plaintiff, John Bach, is permanent in character."

The date of the accident was August 14, 1928, and the date of the trial was June 25, 1929. At the trial John Bach testified that at the time of the accident his occupation was that of an automobile mechanic, and that he was strong and healthy and could do all kinds of heavy work; that his injuries consisted of a fractured hip and broken shoulder, in consequence of which he could no longer do any hard work or heavy lifting; that his hearing is affected and he is nervous and has dizzy spells; that he did not have the use of his shoulder; that two of his fingers are numb, and that he does not sleep well. The only expert who testified in the case was Doctor Von Geldern. Appellants maintain that the testimony of this witness conclusively established the fact that the effect of the said injuries received by respondent John Bach were not of a permanent character. Upon direct examination, after testifying that he found a fracture of the left clavicle and a fracture of the hip bone, he stated that he believed the injuries would clear up and not leave permanent disability. Upon cross-examination he testified that the clavicle and hip were entirely healed and that he could see no reason why there should be any disability in either. Further testifying regarding the hip fracture he was asked: "Q. So, at the time, after the time it required the fracture to heal, this man would be all right, is that it? A. Yes; that is just one point might be here, there, you can see on either side there is some depression (referring to X-ray plates). In other words, the joint from this muscle region is affected in some places, that is true. Now whether that change in position of the muscle will make any difference, I do not know—in the strength." But he further testified that in the course of a year or so, after healing it would then get in position and function in a fairly normal way and that there was no reason why it should create any weakness. On redirect examination he was asked the following question: "Q. Might there be a consequence attached to the changed muscles that you could not estimate?" To which he replied: "A. That is possible. But a fracture of this sort does not leave any permanent injury. That there may be, I would not say in any individual case there will not be some disturbance—on the other hand, the patient may have subjective symptoms that could not be brought out by examination."

We think there is evidence from which the jury might draw the inference that the effect of the injury was of a continuing and permanent nature. The expert does not positively state that disturbances growing out of the injuries sustained by respondent John Bach will not continue. On the contrary, he says that the changed muscle he found upon examination of respondent John Bach's hip may have subjective symptoms that could not be brought out by examination.

[5] The jury are not concluded by the testimony of the expert. *May v. Farrell*, 94 Cal. App. 703, 271 P. 789. Expert testimony is to be given the weight to which it appears to be entitled. The law makes no distinction between that kind of testimony and evidence of other character. *State Comp. Ins. Fund v. Industrial Acc. Comm.*, 195 Cal. 174, 231 P. 996.

[6] Appellants offered an instruction to the effect that passion, prejudice, and sympathy should not enter into the consideration of the case by the jury. The court refused to give this instruction on the ground that the matters contained therein were covered by other instructions that were given. We are of the opinion that these matters were sufficiently placed before the jury in other instructions given by the court.

[7] During the cross-examination of H. Moradian, a witness produced by respondents, who testified that he witnessed the said collision, he was asked, for the purpose of impeachment, if he had not made certain statements to Mr. Desmond, one of appellants' attorneys, and another man who was pointed out in the courtroom, but whose name was not given, contradictory to the facts testified to by witness while on the stand. At this stage of the proceedings, Mr. Welsh, who was one of respondents' attorneys, evidently with the view of establishing the identity of the man referred to and pointed out, remarked, "That was the insurance adjuster." Thereupon attorney for appellants assigned the remark as prejudicial misconduct upon the part of respondents' attorney, and moved for the discharge of the jury. The court denied the motion and admonished the jury to disregard the remarks of the attorney, with instruction to decide the case exclusively on the evidence and the instructions of the court. Later on, in presenting their evidence, appellants placed W. B. Winters, presumably the man pointed out, on the stand for the purpose of impeaching the said Moradian, and upon direct examination Winters testified that he was an adjuster, employed by the Union Automobile Insurance Company, and as such investigated the said accident, and interviewed the said Moradian in relation to same. Appellants claim that the said remarks of respondents' attorney were of such prejudicial nature as

to require a reversal of the judgment in this case.

There is abundant authority to the effect that efforts of plaintiff's counsel to get before the jury the facts that defendant is insured against loss is prejudicial and where the evidence is closely balanced, justifies a reversal. However, in this case we do not feel that such a drastic result should follow, first, because the inference is not clear that the purpose in making said remarks was to get before the jury the fact that appellants were insured or that the jury so interpreted the said remarks, next, because the court promptly instructed the jury to disregard them, and, lastly, because the evidence in this case, upon the issues involved, is by no means equally balanced, but, on the contrary, largely preponderates in favor of respondents.

Appellants vigorously maintain that each of the verdicts is excessive. At the date of the accident Mary Bach was forty years of age, with an expectancy of life of 28.18 years. She was in good health, did all of her housework, washing, ironing, mending, and sewing for her family, was an affectionate and loving wife and mother, was attentive to her children, devoting herself to their moral and educational training and made a harmonious home for them and her husband. Respondent John Bach was thirty-eight years of age at the date of the accident, and the ages of the four children ranged from five to twelve years. In the case of *Redfield v. Oakland C. S. Ry. Co.*, 110 Cal. 277, 42 P. 822, 823, 1063, which was tried in 1895, and which was an action for damages prosecuted by the husband and minor children for the death of the wife and mother, the court held that a verdict for \$14,000 was not excessive. In that case the court said: "It is true that in all such cases it is difficult to fix the definite money value of the services of such a wife and mother. Precise accuracy in that regard is not capable of being attained either by a court or jury."

In the case of *Valente v. Sierra Railway Co.*, 158 Cal. 412, 111 P. 95, 98, tried in 1910, and which was also an action by the husband and minor children for damages for the death of the wife and mother, the court held that a verdict of \$14,000 was not at all excessive, and in the course of the opinion delivered in that case said: "Manifestly there can be no fixed standard by which that loss can be determined. Necessarily the law had committed its ascertainment to the discretion and sound judgment of the jury, and it cannot be said that for the loss of a devoted wife and mother and deprivation by the husband and minor children of the advantages and benefits which, from the evidence in this case, the jury were warranted in finding she would continue to bestow on them had she lived, that the verdict rendered by the jury is at all excessive."

In the case of *Froeming v. Stockton Electric R. R. Co.*, 171 Cal. 401, 153 P. 712, Ann. Cas. 1918B, 408, tried in 1915, the court held that a verdict for \$18,000 in favor of the husband and children for the death of the wife and mother was not excessive. In the recent case of *O'Meara v. Haiden*, 204 Cal. 354, 268 P. 334, 60 A. L. R. 1381, in which the question of excessive damages was before the Supreme Court, Curtis, J., delivering the opinion of the court, said that the courts approved of verdicts today which would have been unhesitatingly set aside ten or fifteen years ago, and ascribes this change to the fact that, measured in money, the earning capacity of most men has increased, and that, measured by its purchasing power, the value of the dollar has decreased; that the courts of this state must, as the courts in other jurisdictions have done, in passing upon this question, take judicial notice of the fact that the value of the dollar has materially changed from what it was some ten or fifteen years ago; that a given sum when measured by its purchasing power is far less than it formerly was.

Regarding the injuries claimed to have been sustained by John Bach as a result of said accident it appears from the evidence that he was thrown from his automobile and rendered unconscious, and so remained for several hours; that he was taken to a hospital and was confined there by his injuries for a month; that prior to the accident he was a strong, robust man, was an automobile mechanic doing and capable of doing all kinds of heavy work; that as a result of the accident his left clavicle and his hip bone were fractured; that he suffered a good deal of pain from the injuries and up to the date of the trial, which occurred nearly a year after the accident, had not recovered from the injuries; that he cannot do any heavy lifting; that if attempted it makes his head weak, has dizzy spells, has affected his hearing; that his shoulder is not as good as it was before the accident, and two of his fingers are numb; that two months after the accident he returned to his work, but can perform only light work.

[8] In their motion for a new trial, appellants assigned, as one of their grounds for setting aside both verdicts, excessive damages, appearing to have been given under the influence of passion or prejudice, which motion was denied by the court.

It has been decided a number of times by the Supreme and Appellate Courts that upon appeal the decision of the trial court and jury cannot be set aside on the ground that the damages are excessive, unless the verdict is so outrageously excessive as to suggest at the first blush passion, prejudice, or corruption on the part of the jury. *Lahti v. McMenamin*, 204 Cal. 415, 268 P. 644; *Reneau v. Hirsch*, 88 Cal. App. 1, 262 P. 1100.

[9, 10] There is nothing in the record in this case indicating that the jury, in the rendition of the verdicts, was actuated or influenced by passion, prejudice, or corruption, or by anything other than its best judgment and the honest conviction of the individual jurors. Under these conditions we do not feel that the amounts of the verdicts are such as would justify this court in reversing the judgment or require that it should so do.

In addition to the other errors which appellants contend that trial court committed in the course of the trial, they claim that it instructed the jury on matters of fact. We deem it unnecessary to discuss this alleged error further than to say that it is without merit.

The judgment is affirmed.

We concur: FINCH, P. J.; R. L. THOMPSON, J.

105 Cal. App. 152

HONNOLD et al. v. PACIFIC FINANCE CORPORATION.★

Civ. 62.

District Court of Appeal, Fourth District.
California.

April 9, 1930.

Rehearing Denied April 29, 1930. Hearing Denied by Supreme Court June 5, 1930.

1. Automobiles ⇨19 — Conditional sales contract — Purchaser — Assignees — Claim and delivery — Actual or constructive possession — Registration.

Assignees of purchaser of automobile under conditional sales contract not having possession nor registration certificate cannot maintain claim and delivery action against seller's assignee taking possession after default (California Vehicle Act, § 45, as amended by St. 1925, p. 402, § 7).

California Vehicle Act (St. 1923, p. 524) § 45, as amended by St. 1925, p. 402, § 7, provides that until motor vehicle division has registered change of ownership and issued certificate of registration and certificate of ownership, delivery of vehicle shall be deemed not to have been made and title thereto not to have passed, and intended transfer shall be deemed to be incomplete and not to be valid or effective for any purpose.

2. Replevin ⇨69(2) — Immediate possession — Proof.

Plaintiffs, suing in claim and delivery for possession of automobile, must prove right to immediate possession (Civ. Code, § 3440).

STROTHER, Justice pro tem., dissenting.

★Rehearing denied. Hearing denied by Supreme Court.

Appeal from Superior Court, San Diego County; William D. Dehy, Judge.

Action of claim and delivery by A. R. Honnold and another against the Pacific Finance Corporation. Judgment for defendant, and plaintiffs appeal.

Affirmed.

Honnold & Hubbell, of Escondido, in pro. per.

Luce & Swing, of San Diego, for respondent.

MARKS, J.

On November 10, 1926, Walter L. Clapham, the legal owner of a Chrysler sedan, sold it to F. W. Stockdale under a conditional sales contract, which reserved the title in the seller, and provided, among other things, that should the buyer fail or neglect to comply with the terms of the contract, or fail to make the deferred payments according to the terms thereof, the seller might exercise his option of declaring the unpaid portion of the purchase price due and payable, and bring suit therefor, or might, without notice, declare the buyer's rights under the contract terminated and immediately repossess the car. The buyer defaulted in his payment falling due on February 10, 1927, and on all payments thereafter, leaving an unpaid balance of the purchase price due respondent in the sum of \$1,201.60, no part of which was paid by the buyer or his assignees. On November 24, 1926, Walter L. Clapham, for a valuable consideration, assigned the conditional sales contract to respondent, together with the legal title to the car. On March 3, 1927, Stockdale assigned his interest in the automobile to James Hollis. On May 2, 1927, both Stockdale and Hollis assigned their interests in the car to appellants, who were attorneys for Stockdale and who had notice of the conditional sales contract and the default in the payments. Hollis also had the same notice. On April 5, 1927, respondent took possession of the car and retained the same. Appellants did not have either actual or constructive possession of the car and did not receive the certificate of its registration. The other facts brought out at the trial are not necessary to a decision of this appeal.

[1] Title 3 of the California Vehicle Act, in effect at the time of the transaction under consideration (St. 1923, p. 517, as amended; St. 1925, p. 402), provides for the registration of motor vehicles and the transfer of title thereof. It is therein provided that until the motor vehicle division has registered a change of ownership and issued a certificate of registration and a certificate of ownership to the owner, or legal owner entitled thereto, the "delivery of such vehicle shall be deemed not to have been made and title thereto shall be deemed not to have passed and said intended transfer shall be deemed to be incom-

plete and not to be valid or effective for any purpose" (St. 1923, p. 524, § 45, as amended by St. 1925, p. 402, § 7).

The facts in the case of *Samuels v. Barnet*, 79 Cal. App. 529, 250 P. 405, are very similar to the one we are considering except that it arose under the Motor Vehicle Act of the state of California (St. 1919, p. 191). However, section 8 of the earlier act (St. 1915, p. 402), as amended by St. 1919, p. 199, § 7, contained provisions identical in substance to the California Vehicle Act controlling here. *General Motors Acceptance Corporation v. Dallas*, 198 Cal. 365, 245 P. 184. In the case of *Samuels v. Barnet*, supra, the following was said: "The purported sale of the automobile to the appellant was effected while he and Bohlen occupied the fiduciary relation of attorney and client. From appellant's testimony in this case, it appears that a judgment for over \$1,100 had just been rendered against his client, that the car was valued at \$2,073.65 and was taken by appellant for a debt of \$1,000 claimed to be owing him from Bohlen. It also appears that Bohlen was without any other assets with which to satisfy the judgment against him. The purported sale, not having been accompanied by an 'actual and continual change of possession,' was presumably fraudulent as to creditors of Bohlen (section 3440, Civ. Code), and the burden was on appellant to overcome this presumption. * * * The case is a simple one. The appellant bases his right of action on a purported transfer of a secondhand automobile, wherein he failed to meet the requirements of the statute. The section quoted provides that, unless these restrictions are followed, the 'intended transfer shall be deemed to be incomplete and not to be valid or effective for any purpose.' The Legislature could scarcely have used words which would have been more expressive of the intention to declare that such transfers should not be effective for any purpose. Such being the case, the transfer could not be effective for the purpose of conferring upon appellant the right of possession necessary for the maintenance of this action."

The cases of *Parke v. Franciscus*, 194 Cal. 284, 228 P. 435, and *General Motors Acceptance Corporation v. Dallas*, supra, are to the same effect.

[2] Appellants brought this action to recover possession of the Chrysler sedan or the value thereof in case possession could not be had. It was incumbent upon them to prove their right of immediate possession of the car. This they failed to do under the provisions of section 3440, Civil Code, and of the California Vehicle Act which we have cited. Therefore the judgment of the trial court in favor of respondent was correct and is hereby affirmed.

I concur: BARNARD, Acting P. J.

STROTHER, Justice pro tem.

I dissent. The defendant held the legal title to the car, which had been sold under a conditional contract giving the seller his option, in case of default in making installment payments, either to declare the whole balance due and bring an action for its recovery, or to repossess the car.

Stockdale, the original contract purchaser, transferred possession of the car to one Hollis and assigned to him his interest in the contract of purchase. Thereafter, default having been made in several installment payments, the defendant here exercised its option under the contract and brought an action for the full amount of the balance of purchase price. After the action was brought, defendant made demand upon Hollis for possession of the car and he, having no knowledge that action had been brought, and not being then advised of it, turned the car over to this defendant.

Afterward Stockdale and Hollis each transferred whatever interest either had in the car to the plaintiffs here, who made demand upon the defendant for the car, which was refused.

It is conceded that, under the decisions in this state, when the legal owner of personal property, which is the subject of conditional sale by contract containing the terms above set forth, elects to sue for the whole amount owing, he thereby confirms absolute title in the purchaser. It seems to me that it must follow as an inevitable conclusion that it was the duty of the seller to facilitate the transfer of title to the purchaser or his successor in interest. Instead, by what seems to me a fraudulent concealment of its election, it got possession of the car. That possession could not have been other than wrongful.

After demand made by these plaintiffs, the defendant caused a writ of attachment to be issued in its action above mentioned and turned the car over to the sheriff to be held by him under the writ.

I think the facts in this case are clearly distinguishable from those upon which the case of *Samuels v. Barnet*, 79 Cal. App. 529, 250 P. 405, was decided. In that case the legal owner, seller under the contract, never had possession of the car, nor did *Samuels*, the purchaser's assignee. The car was stored in a garage by the purchaser, who gave plaintiff an order for it. Plaintiff did not take physical possession of the car, or make any attempt to have the legal title in himself, as required by the provisions of the Motor Vehicle Act. In this state of affairs, the plaintiff in an action to recover the purchase price of the car caused an attachment to be levied upon it, and it was sold to the defendant *Barnet* under execution sale. The court held that the sale to the plaintiff *Samuels* was

constructively fraudulent under the provisions of section 3440 of the Civil Code, and, I think, rightly so held.

Here the defendant, holding evidence of legal title, by its own act divested itself of any rightful title, obtained possession of the car fraudulently and refuses the demand of plaintiffs who have succeeded to the equitable title and who can only obtain possession or record title by the act, voluntary or enforced, of the defendant. It seems to me that the position of defendant is wholly without merit either in law or good morals.

105 Cal. App. 156

HILL v. NEW AMSTERDAM CASUALTY CO.★

Civ. 86.

District Court of Appeal, Fourth District, California.

April 9, 1930.

Rehearing Denied April 29, 1930. Hearing Denied by Supreme Court June 5, 1930.

1. Sheriffs and constables ☞166 — Sheriff's action against deputy's surety — Suing in individual capacity.

Sheriff's action against surety, for undersheriff's defalcation which sheriff made good, was properly brought in sheriff's individual and not official capacity.

2. Parties ☞95(6) — Suing "as" sheriff — Change of title — Effect.

If sheriff's action against surety on undersheriff's bond had been brought "as" sheriff, change in title, omitting official designation, would have been change in cause of action.

In the title of the action as originally filed, plaintiff was named as "R. L. H., Sheriff," the official designation being omitted in amended complaints. It was contended that the change in title was in effect a change in the original cause of action.

3. Parties ☞95(6) — Describing plaintiff as "sheriff" — Surplusage.

Clause designating plaintiff as "sheriff," in action against surety on undersheriff's bond, was surplusage and hence irrelevant to his relation to cause of action alleged.

4. Sheriffs and constables ☞19 — Statutory bond — Mandatory.

Statute requiring execution of surety bond by undersheriff is mandatory (Pol. Code, §§ 954, 996).

Pol. Code, § 954, and related sections, require that principal execute bond with

surety, take oath of office within certain time, and file bond approved by judge of superior court, penalty for noncompliance being, by section 996, that office becomes vacant.

5. Sheriffs and constables §19 — Undersheriff's failure to sign bond — Surety's liability.

Surety on undersheriff's bond, not signed by principal nor approved by judge or recorded, was nevertheless liable to sheriff for undersheriff's defalcation (Pol. Code, §§ 954, 996).

6. Principal and surety §20 — Several obligation — Principal's failure to sign — Surety's liability.

Since several obligations bind each party, principal's failure to execute joint and several bond executed by surety did not exempt surety from liability.

Appeal from Superior Court, Tulare County; J. A. Allen, Judge.

Action by R. L. Hill against the New Amsterdam Casualty Company. From a judgment for plaintiff, defendant appeals.

Affirmed.

McKinstry, Haber & Firebaugh, of San Francisco (Peirce Coombes, of San Francisco, of counsel), for appellant.

J. A. Chase, of Visalia, for respondent.

STROTHER, Justice pro tem.

The plaintiff was sheriff of the county of Tulare, and in January, 1923, appointed Charles R. Hurst as a deputy acting as undersheriff, and required him to give a bond for the faithful performance of his duties. A bond reciting that, "We, Charles R. Hurst, as principal, and New Amsterdam Casualty Company," etc., "as surety, are held and firmly bound," in the sum of \$1,000, was executed by the defendant, and delivered by Hurst to the plaintiff without execution by him as principal. The bond was not approved by a judge of the superior court, or recorded.

Hurst misappropriated moneys coming into his hands as undersheriff, and this action was brought to enforce the obligation of defendant as his surety. Judgment was rendered in favor of plaintiff, from which the defendant appeals.

[1] In the title of the action as originally filed plaintiff was named as "R. L. Hill, Sheriff of Tulare County," the designation being dropped in the amended complaints. As the gravamen of the action stated in the original complaint, and all of the amended complaints, was a defalcation of the deputy which was made good by the plaintiff, the action was properly in plaintiff's individual, and not his official, capacity.

[2, 3] It is objected by appellant that the change in title of the action was, in effect, a change in the cause of action as set up in the original complaint. This would have been true if the action had been begun by plaintiff, "as Sheriff of Tulare County." It is, however, too well settled to admit of argument, by unvarying decision, that clauses such as appear in the title of the original complaint are mere descriptions of the person and surplusage, not pertinent to the relation of the party to the cause of action stated.

[4] The second objection made by appellant to the third amended complaint is that appellant's principal did not comply with the mandatory provision of section 954 of the Political Code that he should execute the bond. This contention is based upon two theories: One, that as the statute requires the principal to execute the bond, it is void for want of his executing it; the other, that having failed to comply with the statutory mandate, the office became by that fact vacant and no liability attached to the surety.

These positions are so nearly related that they will be considered together.

It is true that the statutory provision is mandatory as to the principal, as are the provisions of cognate sections cited by appellant, requiring the principal to take the oath of office within a certain time, that the bond shall be approved by a judge of the superior court, and be filed within a fixed period with a designated officer.

[5] All of these provisions are mandatory upon the principal and a very definite penalty for failure to comply with them, or any of them, is fixed by section 996 of the Political Code, i. e., that the "office becomes vacant." There is no provision, however, that the acts of the principal while serving in the official capacity are void, or that he or his sureties are not liable for any wrongful act of his done in the official capacity.

"If he assumed the office * * * he was an officer de facto, 'and held a vested right to act as such until his right was questioned by some one in a proper proceeding for that purpose.' *Hull v. Superior Court*, 63 Cal. 174, 177; *People v. Toal*, 85 Cal. 333, 338, 24 P. 603." *People v. Hammond*, 109 Cal. 384, 390, 42 P. 36, 37.

"Being an officer de facto, he and his sureties are estopped from denying that the bond was legally given; or rather that, so far as the officer and his sureties are concerned, he is to be held an officer de jure." *People v. Hammond*, supra, quoting from *State v. Rhoades*, 6 Nev. 352.

The cases cited by appellant to the effect that the office becomes vacant eo instante upon the failure of the officer to qualify as re-

quired by law have no application to the question before us. They are all directed, either to the question of the right of the officer to draw his salary, as in *Norton v. Lewis*, 34 Cal. App. 621, 168 P. 388, or the right of the appointing power to fill the vacancy or to some other matter wholly unrelated to the issue here.

[6] The decision in the case of *People v. Hartley*, 21 Cal. 585, 82 Am. Dec. 758, that the sureties on the bond under consideration in that case were not liable because the principal had not signed, was solely on the ground that the bond was joint in form, implying that the sureties agreed to become liable upon the condition that their principal should join with them in the obligation. The consideration was quite apart from any statutory requirement, and one applicable to all obligations, whether official or private. The bond sued on here is both joint and several. In a several obligation each party agrees to be bound whether any other joins with him in the obligation or not.

For the reasons stated, the judgment of the trial court is affirmed.

We concur: BARNARD, Acting P. J.; MARKS, J.

105 Cal. App. 116

**FIRST NAT. BANK IN FRESNO v.
CORCORAN. ★**

Civ. 279.

District Court of Appeal, Fourth District,
California.

April 7, 1930.

Rehearing Denied April 30, 1930. Hearing Denied by Supreme Court June 5, 1930.

**1. Bills and notes ⇨356 — Holder — Bank —
Check — Receipt for deposit.**

Bank in which payee deposited checks and which paid out proceeds on payee's order was holder in due course, though deposit slip reserved right to charge them back to depositor if not paid (Civ. Code, §§ 3082, 3133).

The checks were negotiable instruments under Civ. Code, § 3082, and were regular on their face, were not overdue, and had not been previously dishonored, and the bank had no notice of any infirmity or defect in payee's title, and therefore would, under section 3133, be a holder in due course unless deprived of that status by provisions of the deposit slip. While under these provisions the bank assumed no responsibility for failure of its collecting agents and reserved right to charge checks back to depositor if not paid, it did not elect to exercise that right. Payment of the check was refused by the drawee bank, and thereupon the holder bank attempted to collect from the drawer.

**2. Bills and notes ⇨431 — Liability on checks
— Acceptance of note.**

Bank's acceptance of payee's note in amount of dishonored checks deposited by payee did not alone extinguish drawer's liability to bank (Civ. Code, § 1531).

Under Civ. Code, § 1531, a new obligation is not substituted for an old one unless there is an existing intent in the minds of the parties to extinguish the old obligation. There was no evidence of any intent on the part of the bank to accept the note in discharge or satisfaction of the checks, but the bank retained the checks and persisted in its attempt to collect them from the drawer, and at the time of this suit on the checks, no part of the principal of the note had been paid.

3. Payment ⇨16(1) — Taking note.

Taking note does not constitute payment of debt, in absence of agreement (Civ. Code, § 1531).

Appeal from Superior Court, Fresno County; Denver S. Church, Judge.

Action by the First National Bank in Fresno against J. E. Corcoran. Judgment for defendant, and plaintiff appeals.

Reversed.

Cosgrave & Barstow, of Fresno, for appellant.

Theodore M. Stuart, of Fresno, for respondent.

MARKS, Acting P. J.

Appellant filed two actions in the court below to recover judgments on two checks. One was dated August 15, 1927, drawn by respondent, by O. C. Woodworth, his agent, upon the Franklin Trust & Savings Company of Pittsburgh, Pa., a banking corporation, to E. Y. Foley, in the sum of \$2,179.80. The other check was identical in form, except that it was dated August 16, 1927, and was drawn for the sum of \$1,500. The two cases were tried together, and, while there are two judgments from which appeals were taken, they are presented here upon a single record. As the facts, except as we have noted, are identical, we will consider the two cases together.

Appellant was a banking corporation with its principal place of business in the city of Fresno, Cal. Respondent was a resident of Pittsburgh, Pa., where he was engaged in the wholesale fruit and produce business. E. Y. Foley was a resident of Fresno, Cal., where he was engaged in the business of buying grapes and other fruits and shipping them to the Eastern market. During the summer and fall of 1927 Foley and respondent were engaged in the business of buying and shipping grapes to the Eastern market upon a "joint

account." Respondent furnished the money to carry on the operations, and the two were to divide the profits or losses between themselves. O. C. Woodworth was respondent's agent in Fresno, who drew the checks in question, as well as others, to furnish Foley the money with which to purchase grapes from the growers. Respondent testified that the checks so drawn by Woodworth had to be "O. K.'d" by respondent in Pittsburgh before the bank there would pay them. The checks had nothing on them to indicate this requisite, and respondent further testified that the bank in Pittsburgh was not informed of it, so we can give no weight to this statement.

The two checks in question were in the usual form of bank checks. On the face of each were letters and figures which were shown to refer to the numbers of refrigerator cars used by railroads in transporting fresh fruit to the market. Woodworth gave the checks to Foley on their respective dates, and on these dates he (Foley), after indorsing them, deposited them to his personal checking account in the appellant bank. Appellant credited the amounts of the checks to Foley's account, and he checked against this balance, reducing the amount of his deposit to about \$30 within three days. In the due course of business, appellant sent the checks to the Pittsburgh bank, where they were presented for payment, which was refused, payment having been stopped by respondent. They have not been paid. The slips used by Foley in depositing the checks in his account had printed upon them the following: "In receiving checks on deposit, this bank assumes no responsibility for the failure of any of its direct or indirect collecting agents, and shall only be held liable when proceeds in actual funds or solvent credits shall have come into its possession. Under these conditions items previously credited may be charged back to the depositor's account. In making this deposit the depositor hereby assents to the foregoing conditions." On September 1, 1927, appellant received notice that the checks had not been paid, and immediately notified Foley of this fact. It made numerous efforts to collect from respondent. These checks were never out of the possession of appellant, or its correspondent banks, or its attorneys.

In November, 1927, Foley changed his account in the appellant bank from E. Y. Foley to the Foley Packing Company. On November 22, 1927, Foley, with Ben H. Arkelian and R. George as comakers, gave appellant their promissory note in the exact amount of the principal sum of the two checks. While interest payments were made on this note, no part of the principal has been paid. On the date of the note, the checks were charged up to the account of the Foley Packing Company, and on the next day the Foley Packing Company was credited with the amount of

the note. The cashier of the bank testified that delay of a day in the entry of the credit of the principal of the note was due to the time necessary for the record of the deposit to pass through the regular machinery of the bank, and that the two entries resulted from the one transaction. He also testified that the debit and credit entries were made as a matter of bookkeeping for the convenience of the bank. Nowhere in the record before us is there any evidence that would raise the slightest intimation of an agreement between the makers of the note, or any of them, and appellant, or between respondent, or the makers of the note and the bank, or any of them, that the note was given in payment of the checks. On the other hand, appellant retained the checks, and was persistent in its attempts to collect them from respondent.

The trial court found that the appellant was not the holder of the checks in due course, and for value, and that it had merely accepted the checks for collection, basing this finding on the printed portion of the deposit slips before quoted. It also found that the promissory note given by Foley, Arkelian, and George was past due, and "that upon the delivery of said note to the plaintiff the plaintiff immediately entered the same as a deposit to the credit of the account of E. Y. Foley with plaintiff with the same force and effect as though Foley had deposited that amount of cash, and plaintiff thereupon charged against said account the amount of said check and said interest with the same force and effect as though plaintiff had cashed a check drawn by Foley against said account. That plaintiff by its own voluntary conduct in handling said transaction with Foley and his comakers on said note, substituted said note for said check as items in Foley's account and thereupon title to and right of possession of said check passed to Foley." Upon these findings the trial court gave judgment for respondent. Appellant maintains that the findings are not supported by the evidence and are contrary to the evidence.

[1] That the checks in question are negotiable instruments cannot be disputed. They were in writing, signed by the maker, contained an unconditional order to pay certain sums of money, were payable on demand, were payable to the order of Foley, and were drawn on the Pittsburgh bank, Section 3082, Civ. Code. Neither can it be questioned that appellant was the holder of the checks in due course. They were regular on their face, they were not overdue, and had not been previously dishonored. It had no notice of any infirmity in the instruments or defect in the title of Foley to them. It took them in good faith and for value. Section 3133, Civ. Code. The only ground urged by respondent to uphold the findings of the court that the checks were not taken by appellant in good faith and for value is the printed portion of the deposit

slip which we have quoted. On August 16 and 17, 1927, the dates of the deposits of the two checks in question, Foley deposited about \$22,000 with appellant. By August 19, 1927, he had checked out all of this money except about \$30. Appellant paid this money out upon Foley's written order, which is as effective, as far as consideration is concerned, as though the money were paid to him in cash. The printed portion of the deposit slip reserved the right to appellant to receive the checks for collection only, and to charge them back to the depositor in case they were not paid. This was a right which appellant might or might not exercise as it chose. In this case it did not choose to charge them back to Foley, but attempted to collect them from respondent as it had the right to do.

[2, 3] Respondent maintains, in effect, that, when Foley gave his note to the bank, the liability of respondent to appellant was satisfied and discharged. The situation in which the parties were placed by giving this note was similar to the one discussed in the case of *London & San Francisco Bank v. Parrott*, 125 Cal. 472, 58 P. 164, 73 Am. St. Rep. 64. It is well settled that a new obligation is not substituted for an old one unless there is an existing intent in the minds of the parties so to do. Section 1531, Civ. Code.

As we have observed before, there is not only no evidence, but not even an intimation of evidence in the record, tending to show any intent or agreement to substitute the obligation of the note for the checks. In the case of *Clark v. Berlin Realty Co.*, 33 Cal. App. 50, 164 P. 333, 335, the following was said:

"The main contention, however, and that which forms the substance of the defense interposed by the defendant, is that all of the indebtedness incurred by the Laundry Company to the bank and as evidenced by the several promissory notes was extinguished when the note for \$14,500 was given on March 5, 1913, which was after the defendant had ceased to be one of the stockholders in the Laundry Company. It appeared in evidence that, at the time the note for \$14,500 was made, the notes previously taken were delivered to the Laundry Company and marked

'paid.' The defendant urged and now insists that, under the facts shown by the evidence, when the last note was made a novation was effected, and under the agreement of the parties the new obligation extinguished the old debt. It has been held numerous times and by the decisions of this state that the taking of a promissory note from a debtor, or of a third party, will not extinguish the debt and create a new obligation, unless received by the creditor under an express agreement that it shall have that effect. It is further asserted in the authorities that there is not a presumption in favor of a note being received as payment under such circumstances; and, where a note was given to take up another note, it was said that because the original note was surrendered and marked paid on its face 'was not conclusive evidence of the extinguishment of the debt.' In the case of *Bonestell v. Bowie*, 128 Cal. 511, 61 P. 78, the text of the decision supports these statements, and a number of cases are therein collected and cited which are all to the same general point and effect. See, also, *Gnarini v. Swiss American Bank, etc.*, 162 Cal. 181, 121 P. 726. In *London & San Francisco Bank v. Parrott*, 125 Cal. 472, 73 Am. St. Rep. 64, 58 P. 164, the court said: 'In the absence of an agreement to that effect, or evidence that such was the intention of the parties, the taking of a note for an existing liability does not constitute a payment of the debt.'"

The cases of *Gnarini v. Banca Svizzera Americana*, 39 Cal. App. 200, 178 P. 532; *Sonoma County National Bank v. Skinner*, 42 Cal. App. 202, 183 P. 464; *Spellacy v. Young*, 44 Cal. App. 174, 186 P. 368, and *Seaboard National Bank v. Belden*, 47 Cal. App. 558, 190 P. 1045, support this doctrine. It is so well settled that further citation of authorities is unnecessary. The findings of fact which we have noted are not supported by the evidence.

Both judgments are reversed.

I concur: BEAUMONT, Justice pro tem.

BARNARD, J., being disqualified, does not participate herein.



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